WHITE BUFFALO VENTURES, LLC v. UNIVERSITY OF TEXAS AT AUSTIN: THE CAN-SPAM ACT & THE LIMITATIONS OF LEGISLATIVE SPAM CONTROLS

By Jameel Harb

Unsolicited commercial e-mail ("spam") has emerged as one of the most persistent annoyances of the twenty-first century, affecting individual e-mail users as well as multi-national corporations. Accordingly, both private and public entities have made efforts to combat spam. Various private filtering mechanisms employed by corporate entities, internet service providers, and individual end-users have played a significant role in the fight against spam. Numerous states have tried to curb spam by enacting various legislative schemes. The federal government has attempted to do its share by enacting federal legislation known as the Controlling the Assault of Non-Solicited Pornography and Marketings Act of 2003 (CAN-SPAM Act). The CAN-SPAM Act is meant to provide a single legal framework for dealing with spam, expressly preemption certain types of state spam laws.

White Buffalo Ventures, LLC v. University of Texas at Austin is the first Fifth Circuit case to consider any portion of the CAN-SPAM Act, and is the first case ever to directly address the preemption provision of the legislation. Specifically, the court analyzed the preemption clause of the CAN-SPAM Act in order to determine whether the federal legislation preempted the anti-spam regulation of a state university. Furthermore, the court examined whether anti-spam measures taken by the University of Texas, which blocked the commercial speech of White Buffalo Ventures'
e-mails, were constitutional under the First Amendment. In *White Buffalo*, the Fifth Circuit ultimately held that the CAN-SPAM Act did not preempt the particular state regulation in question, and that the action taken by the university was valid under the First Amendment. Given the enactment of the CAN-SPAM Act and the filing of lawsuits involving the legislation, an analysis of this recent noteworthy case involving the CAN-SPAM Act serves as a relevant backdrop to discuss the larger implications and inherent limitations of a legislative solution to spam.

Part I of this Note provides background on the spam problem, outlining various public and private efforts that have been taken to combat spam and surveying the federal CAN-SPAM Act. Part II briefly details the legal background of preemption analysis and the First Amendment standards of commercial speech. Part III describes in detail the *White Buffalo* case. Section IV.A evaluates the court's decision, examining both the strengths and weaknesses of its First Amendment analysis and its reasoning with respect to preemption. Finally, discussing non-legislative alternatives that may more effectively prevent the harms associated with spam, Section IV.B looks beyond *White Buffalo* and explores the deficiencies of the CAN-SPAM Act and the inherent limitations of any legislative solution to spam.

I. HISTORICAL BACKGROUND

A. The Spam Problem

It is estimated that over 13 billion spam messages are sent per day\(^4\)—more than two for every single human being on the planet.\(^5\) Others estimate the prevalence of spam to be significantly higher, claiming that spam accounts for up to eighty percent of the estimated fifty-seven billion e-mail messages that are sent every day.\(^6\) Spam of course would not be possible without e-mail, which traces its existence back to 1969 with the creation of ARPANET, a network of computer systems maintained by the military, defense contractors, and universities.\(^7\) Commercial spam was born in April 1994, when two lawyers discovered it was possible to send

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an electronic advertisement for immigration law services to approximately 6,000 online newsgroups.  

The presence of spam increased dramatically as the usage of e-mail became widespread during the mid-1990s, when the internet's popularity and usage skyrocketed. Spam has proliferated in large part because it is inexpensive; commercial advertising via spam is far cheaper than through conventional mail. As most anyone who has used e-mail is well aware, spam can be quite a significant annoyance. Yet beyond wasted time and frustration for personal e-mail users, in recent years spam has been estimated to cost $10 billion annually in worker productivity in the U.S. alone.

Given the scope of the spam problem, both private and public entities have made efforts to curb the ubiquitous nuisance. Private e-mail users and internet service providers (ISPs) use various forms of filtering technology in order to stop spam from reaching e-mail inboxes. Both state and federal legislators have attempted to address the issue—by 2003 thirty-six states had enacted anti-spam laws. Most of these state spam laws incorporate an opt-out system—allowing spammers to send spam to recipients that had no previous contact with the advertising company unless the recipients affirmatively opt out—and included a subject labeling requirement, which forced complying spammers to identify spam as an advertisement by including the label “ADV” in the subject field of the e-mail. On the federal level, numerous bills have been debated and rejected in recent years. Indeed, during the 106th and 107th Congress, from 1999 to 2002, nineteen bills dealing with spam were introduced, and all

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9. See Abbate, supra note 7, at 181.
11. Schwartz, supra note 4, at 34.
ultimately failed. During the 108th session, Congress finally passed the CAN-SPAM Act, which became effective on January 1, 2004.

B. The CAN-SPAM Act

The CAN-SPAM Act targets "email whose primary purpose is advertising or promoting a commercial product or service, including content on a Web site." The law's five major provisions are as follows: (1) a ban on false or misleading header ("From," "To," and routing information) information in e-mails; (2) a prohibition of deceptive subject lines; (3) a requirement that commercial e-mails give recipients an opt-out method to avoid receiving such e-mails in the future; (4) a requirement that commercial e-mail be identified as an advertisement (but not necessarily in the subject line of the e-mail); and (5) a requirement that the message include the sender's valid physical postal address. Violations of any of the above provisions can result in a fine of up to $11,000. Notably, the legislation does not provide for a private right of action. Only the U.S. Department of Justice, the Federal Trade Commission, state attorneys general, and ISPs have the ability to bring a cause of action under the CAN-SPAM Act.

The CAN-SPAM Act was created with the express purpose of providing a universal framework for national regulation of spam; thus the legislation is intended to preempt and override the varying state laws dealing with electronic mail. The CAN-SPAM Act's express preemption provision reads:

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

Therefore, although the CAN-SPAM Act is intended to preempt significant portions of state spam laws, the legislation is not intended to preempt

18. Id. at 2.
19. Id.
portions of state laws that relate to acts of fraud or computer crime, or other state laws that are not specific to electronic mail.\textsuperscript{22} In preempting numerous state laws that were actually more stringent than the CAN-SPAM Act itself, the legislation can be seen as creating a preemptive ceiling that has limited the more restrictive nature of state laws dealing with spam.

In addition to the preemption clause, the CAN-SPAM Act also has a specific carve out for entities that are exempt from any possible preemptive effect.\textsuperscript{23} The relevant portion of the legislation states that "[n]othing in this Act shall be construed to have any effect on the lawfulness or unlawfulness . . . of the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages."\textsuperscript{24}

In theory, federal spam legislation was expected to be a more effective and uniform tool in combating spam than the patchwork of numerous conflicting state laws.\textsuperscript{25} Yet the CAN-SPAM Act has been viewed as less restrictive, and ultimately less effective.\textsuperscript{26} In a sense, the CAN-SPAM Act can be perceived as outlining "rules of conduct" for those who send spam, rather than attempting to eliminate the existence of spam altogether.\textsuperscript{27} Some argue that the relatively lax nature of the legislation seems to be the result of multiple competing interests, including lobbying efforts by businesses and marketing groups concerned with limitations on advertising.\textsuperscript{28} As stands now, neither state nor federal attempts appear to have had any meaningful effect on reducing the aggregate level of spam.\textsuperscript{29}

In summary, the CAN-SPAM Act was intended to provide a more universal framework for addressing spam, although it does not yet appear that

\textsuperscript{22.} See id. § 7707(b)(2)(A)-(B).
\textsuperscript{23.} See id. § 7707(c).
\textsuperscript{24.} Id.
\textsuperscript{25.} Ford, supra note 13, at 358.
\textsuperscript{29.} Ford, supra note 13, at 356. Although it appears that the CAN-SPAM Act has had no significant effect on reducing the overall level of spam sent, it does seem that the legislation has reduced the relative amount of pornographic spam. Alepin, supra note 27, at 43. Pornographic spam, once 21.8% of overall spam in 2003, reduced dramatically to 4.8% in early 2004. Id. The degree to which this reduction is directly or indirectly related to the CAN-SPAM Act is debatable. See id.
the legislation has succeeded in that endeavor. In this pursuit of uniformity, the legislation was created with the express purpose to preempt state anti-spam laws, some of which are more stringent than the CAN-SPAM Act itself. Yet the CAN-SPAM Act explicitly states that internet service providers are not subject to the provisions of the legislation, and thus maintain the right to implement and enforce their own measures in dealing with spam. As will become evident, although an alternative interpretation would have ultimately led to the same result, the *White Buffalo* court’s interpretation of the CAN-SPAM Act’s preemption and exemption provisions undoubtedly played a role in determining the path that the court took in its preemption holding.

II. LEGAL BACKGROUND

A. Preemption Doctrine

Given the categorical preemption clause in the CAN-SPAM Act, questions arise as to whether the federal law actually supersedes or preempts a particular state law. The doctrine of preemption—when a federal law takes precedence over a conflicting state law—has its origins in the Supremacy Clause of the United States Constitution. The Supreme Court has elucidated two traditional scenarios where preemption occurs. The first scenario is when a federal law expressly preempts state or local law. The second scenario is where preemption is not expressly stated, but rather, implied as a result of a clear congressional intent to preempt state or local law. When, as with the CAN-SPAM Act, a law contains an express provision detailing its preemptive power over state laws, there is no need to infer any congressional intent as to preemption.

Yet although a federal law may contain an express preemption provision, the exact scope of what state or local laws are preempted is not necessarily clear. Since the power to supersede state law is “an extraordinary power in a federalist system,” a court must be able to ascertain not only that the federal legislation expressly permits preemption, but also the

30. U.S. Const. art. VI, cl. 2.
32. *Id.*
33. *Id.*
35. *See id.*
precise scope of the particular state law that is preempted.\(^{36}\) Given the sensitivity of this determination, the Supreme Court has adopted a principle creating a presumption against preemption of state law.\(^{37}\) As the Fifth Circuit noted in *White Buffalo*, "Supremacy Clause analysis is classic tie goes to the state jurisprudence, and the existence of an express preemption provision does not always plainly demarcate what the federal law expressly preempts."\(^{38}\)

The question of whether federal law preempts a particular state law is one of the questions directly raised in the *White Buffalo* case. Although Congress may have included an explicit preemption provision within the CAN-SPAM Act, the judicial tendency to maintain a presumption against federal preemption of state law in uncertain circumstances arises in the *White Buffalo* case.

**B. Commercial Speech Under the First Amendment**

Irrespective of preemption concerns about whether spam is regulated on the federal or state level, the issue of constitutionality is bound to arise in any scenario where speech (in the case of *White Buffalo*, commercial speech via spam) is being regulated or silenced. In the context of anti-spam legislation, First Amendment concerns are implicated because spam, although communicated through the medium of the internet and e-mail, is nonetheless commercial speech.

The determination of whether a regulation by a public entity violates First Amendment rights with respect to commercial speech requires application of the four-prong test set out by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.\(^{39}\) In *Central Hudson*, the Court held that in order to determine the legality of commercial speech regulation, it is necessary to consider: (1) whether the speech is unlawful or misleading; (2) whether the interest expressed by the government is substantial; (3) whether the state action directly promotes that interest; and (4) whether the state action is more extensive than necessary to promote that interest.\(^{40}\)

In applying the four-part test, the Supreme Court has held that with respect to the second prong, although a governmental entity may assert that a challenged statute serves multiple interests, only one of the interests


\(^{37}\) *White Buffalo*, 420 F.3d at 370.

\(^{38}\) *Id.* (internal quotations omitted) (emphasis omitted).

\(^{39}\) 447 U.S. 557 (1980).

\(^{40}\) *Id.* at 566.
must be substantial.\(^\text{41}\) Furthermore, as to the third prong, the Court has held that the burden to prove that a speech restriction directly and materially advances the asserted governmental interest

is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree . . . . We have observed that this requirement is critical; otherwise, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.\(^\text{42}\)

Yet, under the \textit{Central Hudson} analysis, no single factor is dispositive. The Court has stated that "all [factors] are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three."\(^\text{43}\) Thus a court must consider and weigh all four \textit{Central Hudson} factors when determining whether an asserted governmental interest is sufficient to justify a regulation on commercial speech.

### III. THE \textit{WHITE BUFFALO} CASE

As previously noted, \textit{White Buffalo Ventures, LLC v. University of Texas at Austin} is the first Fifth Circuit case to consider any portion of the CAN-SPAM Act, and is the first case to deal with the preemption provision of the legislation.\(^\text{44}\) The \textit{White Buffalo} court analyzed the preemption clause of the CAN-SPAM Act in order to determine whether the legislation preempted the University of Texas' anti-spam regulation.\(^\text{45}\) The court also examined whether such anti-spam measures, which blocked the commercial speech of White Buffalo Ventures' e-mails, were constitutionally permissible under the First Amendment.\(^\text{46}\) In \textit{White Buffalo} the Fifth Circuit ultimately held in favor of the university, finding that the CAN-SPAM Act did not preempt the particular state regulation in question and that the action taken by the university was valid under the First Amendment.

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\(^{43}\) \textit{Id.} at 183-84.

\(^{44}\) 420 F.3d at 371.

\(^{45}\) \textit{Id.} at 368-69.

\(^{46}\) \textit{Id.}
Amendment.\textsuperscript{47} The following two Sections detail the factual background of the case and describe the specific holding of the court, setting the stage for both an assessment of the court’s decision and a discussion regarding the limitations of any legislative solution to spam.

A. Factual Background

The University of Texas at Austin ("UT") provides free internet access and e-mail addresses to its faculty, staff, and students.\textsuperscript{48} UT engages in a policy of blocking various types of incoming spam, regardless of its source authenticity or commercial content.\textsuperscript{49} Under the rules promulgated by the Board of Regents of the University of Texas System ("the Regents"), UT’s technology department implements procedures to block incoming, unsolicited, commercial e-mails, and to stop the initial transmission of such e-mails.\textsuperscript{50}

White Buffalo Ventures operates multiple online dating services, including "longhornsingles.com," a website which targets UT students.\textsuperscript{51} In February 2003, White Buffalo, via a Public Information Act request, sought all "non-confidential, non-exempt email addresses" in possession of UT.\textsuperscript{52} UT responded by revealing all such e-mail addresses.\textsuperscript{53} Several months later, in April 2003, White Buffalo began sending commercial spam—which complied with the requirements of the CAN-SPAM Act—to selected members of the UT community.\textsuperscript{54} After receiving complaints regarding unsolicited e-mails from White Buffalo, "UT investigated and determined that White Buffalo had indeed sent unsolicited emails to tens of thousands of UT email account-holders."\textsuperscript{55} Soon thereafter, UT sent a cease and desist letter, with which White Buffalo refused to comply.\textsuperscript{56} Accordingly, UT blocked all incoming e-mail originating from White Buffalo’s IP address.\textsuperscript{57}

\textsuperscript{47} Id. at 369.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 369-70.
In the lower district court case, White Buffalo sought to enjoin UT from blocking its mass commercial e-mails. White Buffalo claimed that UT violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Additionally, White Buffalo claimed that UT's anti-spam policy was preempted by federal law—the CAN-SPAM Act. Ironically, using a federal anti-spam law as a defense, White Buffalo argued that the CAN-SPAM Act preempted UT's anti-spam regulation; thus, its spam could not be blocked since it was in compliance with the provisions of the CAN-SPAM Act.

Both parties moved for summary judgment, and the district court granted summary judgment in UT's favor. On appeal to the Fifth Circuit, White Buffalo challenged the district court's ruling on the grounds that the CAN-SPAM Act preempted UT's internal anti-spam policy and that the policy violated White Buffalo's First Amendment rights.

B. The Fifth Circuit Decision

The Fifth Circuit held "that the CAN-SPAM Act [did] not preempt UT's anti-spam policy." Furthermore, while reserving judgment on whether state university e-mail servers constitute a public or private forum, the court held that UT's "policy [was] permissible under [its] First Amendment commercial speech jurisprudence."

1. Preemption Under the CAN-SPAM Act

The court found that the CAN-SPAM Act's preemption provision "[was] in tension with plain text found elsewhere in the Act, and that [this] tension trigger[ed] the presumption against preemption." The court based its holding on the apparent ambiguity created by the interplay between the CAN-SPAM Act's preemption clause and the carve-out for entities exempt from any possible preemptive effect. The court reasoned that Congress, in drafting the CAN-SPAM Act, did not anticipate the scenario where the state entity is itself the provider of internet access—a conclusion

59. Id.
60. Id. at *5-*6.
61. See id.
62. Id. at *24.
63. White Buffalo, 420 F.3d at 368-69.
64. Id. at 369.
65. Id. (emphasis omitted).
66. Id. at 372.
67. See id.
that the court reached as a result of the supposedly competing and contradictory provisions in the statute, which, according to the court, both expressly preempted and expressly excepted the factual scenario presented in the case.  

Correspondingly, the court reiterated that "[s]uch tension, created by the text of the statute, [left it] unwilling to overrule the strong presumption against preemption." Therefore, the court found that the Regents' rules (UT's anti-spam policy) are "valid under the Supremacy Clause" of the Constitution, and are not preempted by the CAN-SPAM Act.

2. Commercial Speech Under the First Amendment

As previously noted, the four-part test defined by Central Hudson is used to determine whether or not a regulation by a public entity violates First Amendment commercial speech rights. The White Buffalo court easily determined that the first prong—whether the speech is unlawful or misleading—was not an issue, as both parties agreed that White Buffalo's commercial spam was legal and contained factually accurate information. Under the second prong—whether the interest expressed by the government is substantial—UT stated two primary interests for executing its spam policy: "(1) safeguarding the time and interests of those with UT email accounts ('user efficiency') and (2) protecting the efficiency of its networks and servers ('server efficiency')." In assessing the substantiality of these two interests, the court criticized the latter server efficiency argument as a "chronically over-used and under-substantiated" interest

68. See id. at 373-74. Given this apparent conflict, in a somewhat amusing yet undoubtedly instructive fashion, the court used a Venn diagram to illustrate the intersection that the court believed Congress did not envision—where a state actor is also the provider of internet service. Id.

69. Id. at 374.

70. Id. The court spent significant time dissecting the lower district court's decision. The Fifth Circuit court criticized various aspects of the district court's holding with respect to preemption, including the fact that the district court stated that "UT is certainly a provider of Internet access service to its students." Id. at 373. The court took issue with the district court's failure to reference the statutory definition of an internet service provider within the CAN-SPAM Act, which borrowed the definition from the Internet Tax Freedom Act. See id. Ultimately, while academically balancing the arguments on either side, the court nonetheless held that UT "falls within the ambit" of the CAN-SPAM Act's definition of an internet service provider. See id.


72. White Buffalo, 420 F.3d at 374.

73. Id.
asserted by parties.\(^74\) In contrast, the court accepted UT’s user efficiency argument, acknowledging “as substantial the government’s gate-keeping interest in protecting users of its email network from the hassle associated with unwanted spam.”\(^75\)

In assessing the third prong—whether the state (UT’s) action directly promotes that interest—the court promptly found that “there can be no serious dispute that UT’s anti-spam policy . . . directly advance[d] both interests.”\(^76\) Finally, under the fourth and traditionally most difficult inquiry—whether the state action is more extensive than necessary to promote the stated interest—the court accepted UT’s anti-spam policy as no more extensive than necessary in order to meet UT’s user efficiency interest.\(^77\) As to server efficiency, the court rejected the proposition that UT’s actions were no more extensive than necessary to secure its second substantial interest—the efficiency of its servers.\(^78\) Given that record testimony illustrates White Buffalo’s ability to send a restricted volume of e-mail at off-peak times, the court found that there was a “poor fit between UT’s restrictions and the substantial interest in server efficiency.”\(^79\)

However, because UT justified at least one of its substantial interests under the user efficiency rationale, the court held that UT’s anti-spam policy survived First Amendment scrutiny and was constitutionally permissible under \textit{Central Hudson}, irrespective of UT’s failure to support its server efficiency argument.\(^80\)

\(^{74}\) \textit{Id.} at 375.
\(^{75}\) \textit{Id.} at 374-75.
\(^{76}\) \textit{Id.} at 375.
\(^{77}\) \textit{Id.} at 376.
\(^{78}\) \textit{Id.}
\(^{79}\) \textit{Id.} at 377 (emphasis omitted).
\(^{80}\) \textit{Id.} at 378. As the court pointed out, in order to pass the muster of \textit{Central Hudson}, a “governmental entity may assert that a statute serves multiple interests, and only one of those need be substantial.” \textit{Id.} In light of its holding with respect to a public forum under \textit{Central Hudson}, and because the court reasoned that the First Amendment question would have been easily resolved if UT’s servers were considered a private forum, the court reserved judgment as to whether a public university e-mail network constitutes a public or private forum. \textit{See id.} In a brief footnote, the court pointed out that so long as the regulation is view-point neutral, regulation of a private forum is acceptable under First Amendment jurisprudence. \textit{See id.} at 374 n.15. Thus the court reasoned: “[i]f we determine that this particular regulation would satisfy either situation, we need not resolve the dicey but admittedly important question of the public versus private forum status of public university email servers.” \textit{Id.}
IV. DISCUSSION

A. Assessing the White Buffalo Decision

The White Buffalo court reached the proper result: UT Austin should have the right to regulate spam sent to its students via UT Austin’s servers. Yet, although the court’s reasoning was cogent and well elucidated with respect to the First Amendment analysis, the court’s preemption analysis was circuitous.

In analyzing preemption, the court relied unnecessarily on an apparent contradiction within the provisions of the legislation, and went a round-about way in achieving what should have been clear on the face of the CAN-SPAM Act itself—there is an exemption for ISPs, and UT Austin was functioning as an ISP. The fact that the CAN-SPAM Act explicitly preempts state law, but at the same time also explicitly exempts ISPs, needlessly occupied much of the court’s attention. The CAN-SPAM Act need not have specifically identified whether policies implemented by state-administered ISPs (as was the case with UT Austin) are preempted or not. In the end, although the court’s reasoning may have been indirect and unnecessarily exhaustive, the result is the same. ISPs have the authority and autonomy to regulate the spam that is sent over their servers.

In contrast, the court’s reasoning with respect to commercial free speech was cogently and adeptly applied. The court’s use of the Central Hudson test evinced a nuanced understanding of the relevant concerns with respect to e-mail technology. Specifically, the court’s distinction between user and server efficiency displayed a sophisticated understanding of the legitimate technological concerns surrounding spam. As the court noted, the server efficiency argument is one that may be intuitively appealing, but it is not always factually accurate. The court recognized as much when it noted that “[s]uffer the servers is among the most chronically over-used and under-substantiated interests asserted by parties . . . involved in Internet litigation.”

Rather than merely accepting at face value the argument that UT’s servers would be harmed by the transmission of White Buffalo’s spam, the court displayed an understanding of the technological realities of server efficiency, and demanded that there be some proof illustrating that the blocked spam posed a legitimate threat to server efficiency.

Similarly, the court was accurate in its recognition that user efficiency, in contrast to server efficiency, was in fact a valid and legitimate concern.

81. Id. at 375 (internal quotations omitted).

82. See id. at 377.
As most owners of e-mail accounts would agree, protecting users of an e-mail network from encountering the hassle of unwanted spam should be an acceptable and legitimate function of any responsible internet service provider.

Despite the court’s cogent treatment of legitimate regulatory interests, its failure to decide whether a state university e-mail server is public or private fora clearly leaves open future questions with respect to a state university’s ability to regulate speech. Courts tend to be conservative about answering unnecessary constitutional questions, and the court’s refrain in this decision is therefore understandable.

One significant question the court not only left open, but actually created by its own words, is the extent to which spam filtering and blocking must be content and viewpoint neutral in order to be valid under the First Amendment. More specifically, in a brief and seemingly innocuous parenthetical, the court left the door wide open to the potential for future conflict within Fifth Circuit case law. The opinion states that “UT may block otherwise lawful commercial spam (as long as the blocks are content- and viewpoint-neutral).” Given that the court made such a declaration, it should have elucidated the concept and defined the scope of such a principle.

The court could have been clearer as to its meaning; was it only referring to the blocking of an IP address, or was it also referring to filtering mechanisms that necessarily must focus on content? If the court was referring to filtering mechanisms, the practical implications of such a rule would be quite significant, essentially preventing any filtering scheme from screening out spam based on content. This oversight could leave open the potential for future First Amendment challenges in scenarios where e-mail regulation occurs by methods of content regulation (such as filtering pornographic spam or pharmaceutical marketing spam on the basis of particular words). It would seem that any reasonable filtering scheme by an ISP would include a system that filters and blocks spam on the basis of content. Put simply, filtering out the word “Viagra” would certainly allow a spam filter to function more effectively. Clearly, such a position—that spam blocking and filtering must be content and viewpoint neutral—could be problematic as a policy matter, resulting in greater dif-

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84. White Buffalo, 420 F.3d at 376.
ficulty in curbing spam. This oversight by the court will likely have to be addressed and clarified in a later case.

B. Beyond the CAN-SPAM Act and White Buffalo

On a broader level, White Buffalo serves as a reminder of the weaknesses of the CAN-SPAM Act itself and the need for more effective tools in combating spam. The fact that the CAN-SPAM Act is being used by spammers as a litigation tool speaks to the inadequacy of the legislation in effectively combating spam. Furthermore, it can be argued that the legislation was motivated by lobbyists re-couching the spam issue as one about dishonest and deceptive spam, rather than about the negative effects of huge amounts of mass commercial e-mail. It has also been said that the CAN-SPAM Act is more symbolic than it is substantive, serving as a token to which Congress can point to in order to claim they are dealing with spam.

In light of the numerous deficiencies of the CAN-SPAM Act, many commentators take the position that stricter legislation is needed to more effectively combat the problem of spam. For example, opt-in procedures, such as those that existed in California state law prior to the passage of the CAN-SPAM Act, could be a more effective way of preventing the transmission of spam. Opt-in procedures would require senders of spam to have received permission from potential recipients before the legal delivery of spam could take place. This policy would clearly have a devastating effect on the ability to advertise to new customers via spam. An opt-in system would also be more in line with the global community's approach towards dealing with spam. More effective legislation could also require that spam contain a label in the subject line of the message identifying the mail as spam, a feature which is found in many of the now-preempted state laws. The subject line label requirement was a feature of at least one of the proposed anti-spam bills in Congress, which ultimately failed to be incorporated into the initial enactment of the CAN-SPAM Act.

85. See Zhang, supra note 26, at 324.
88. See, e.g., id.
89. See id. at 285.
90. See id. at 284.
92. Id. at 316.
nally, incorporating a private right of action into federal legislation could also potentially create a more robust anti-spam legislation.\(^9\)

It should be noted that the First Amendment remains as an upward limit on all spam legislation. The more restrictive the spam legislation, the greater the concern is with respect to a violation of First Amendment principles. Legislation that would be most effective at eliminating spam altogether is legislation that makes all forms of unsolicited commercial e-mail per se illegal. Yet such a law would have a chilling effect on First Amendment rights and would undoubtedly be subject to countless constitutional challenges. Given this, the efficacy of anti-spam laws must always be balanced against the restrictions that are being placed on the freedom of speech.

A relevant question emerging from the debate surrounding the CAN-SPAM Act is whether legislation serves as the most effective means of combating spam. The most efficacious solution may lie outside the domain of state or federal legislatures. The technological progress that has served to facilitate the rapid growth of spam may also provide the answer as to how to address the pervasive nature of spam. Market-driven technological innovations may provide a more efficient and useful means of curbing spam. Stopping spam at its source—as legislation attempts to do—makes sense intuitively, but such a method is futile if senders of spam simply ignore the law. For example, even if revised spam legislation required an opt-in procedure, such strict requirements would be in vain if spammers simply played by the same rules, or lack thereof, that they do now.

Stopping spam at the point of reception, rather than inception, may be more effective. That is, a well-designed spam filter may be far more effective at diminishing the nuisance of spam than a legislator ever could be. It is clear that a significant cost associated with spam is the inefficiency that is created by e-mail inboxes filled with a greater amount of spam than legitimate e-mail.\(^9\) Properly designed spam filters may resolve these issues in a manner that the law cannot reach. Filters at the consumer level would not be subject to the First Amendment concerns noted above—an individual e-mail user could filter and effectively block all spam messages to their heart’s content. This is not to say that legislation has no role in this process, but merely that superior filtering technology may, as the CAN-

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\(^9\) See id.

\(^9\) See Hamel, supra note 6, at 968 (noting that the loss of productivity from sorting through unfiltered spam has an effect on a company’s bottom line).
SPAM Act itself recognizes,95 complement legislation and serve as an even more effective solution to the problems that are associated with spam.

Admittedly, the costs incurred from sent spam would still exist; even filtered spam consumes a portion of an ISPs bandwidth and uses recipients’ connection time and computer space.96 Yet this raises questions about the true nature of the spam problem: Is the cost of spam actually a function of front-end costs such as server efficiency and ISP connection time? Or is the harm more directly associated with the inefficiency and nuisance created by consumer and business users sifting through unfiltered e-mail inboxes? The latter seems to be a more apt characterization of the nature of the problem.97 Recall the White Buffalo court’s recognition of this point with respect to UT; the court agreed with UT’s user efficiency argument but dismissed the server efficiency argument as unsubstantiated.98 Furthermore, although many would argue that a significant problem of spam filtering is that it tends to be over- or under-inclusive, the creation of innovative and increasingly superior filtering technology should continue to address and minimize this problem.99

It appears that recent improvements in technology may already be filling the legislative gaps—a 2005 Pew Report on spam illustrated that recipients are “minding [spam] less” and that “the findings from almost one year ago might have represented a spike or a high point, rather than a growing negative trend of the impact of spam on the internet experience.”100 In light of the fact that aggregate levels of spam have only increased since the passage of CAN-SPAM, the fact that spam recipients are finding spam more manageable may signal that technological innovations are alleviating the spam nuisance where legislation has not.

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95. The CAN-SPAM Act itself notes the insufficiency of legislation as the sole means to combat spam. As the findings of the CAN-SPAM Act state, “The problems associated with the rapid growth and abuse of unsolicited commercial electronic mail cannot be solved by Federal legislation alone. The development and adoption of technological approaches . . . will be necessary as well.” 15 U.S.C. § 7701(a)(12) (2000).

96. See Zhang, supra note 26, at 305-06.

97. See supra note 94.

98. See supra notes 74-75.


Other innovative means of addressing spam also exist. Yahoo! created an authentication system whereby a system sending an e-mail message could embed a secure, private key in a message header. The receiving system would thus be able to verify the public key registered to the sending domain, and messages sent from unverified and unauthentic sources would correspondingly be blocked. Microsoft has proposed the Penny Black Project, where spam senders would pay a fee to recipients (of spam), thereby reducing the aggregate amount of spam by increasing its overall cost. Although the administrative difficulties of such a plan may be significant, the point is that other market-driven means of curbing spam exist as alternatives and complements to a singular legislative solution.

Finally, internet users must assess the costs on each side of this equation. What exactly is the tradeoff between technological solutions (such as under-inclusive or over-inclusive filters) and stronger legislation? Technological solutions may not provide an immediate or perfect answer, yet problems such as over-inclusive filters may be significantly less harmful than relying on strict and over-inclusive legislation. Notwithstanding the inherent enforcement difficulties that continually plague anti-spam legislation, highly restrictive legislation—even if perfectly effective—can have clear ramifications for the freedom of speech. While the imperfections of developing technology could lead to a few legitimate e-mails being lost or the occasional spam message reaching an inbox, highly restrictive legislation may nonetheless lack efficacy and will always have the pernicious potential to stifle free speech.

V. CONCLUSION

The decision in White Buffalo, although superfluous with respect to its holding on preemption, was ultimately the correct one. That is, internet service providers should have the freedom to adequately regulate the commercial spam that is sent over its servers. Furthermore, illustrating a heightened awareness of the relevant technological concerns, the Fifth Circuit adeptly addressed the issues surrounding commercial free speech. Yet the case also highlights more fundamental questions about how best to deal with the ubiquitous spam phenomenon. A legislative framework has a legitimate role as a partial solution in this dilemma. Although a legislative scheme that attempts to stop spam at the source seems to have an intuitive appeal, it is essential to address whether such a narrowly focused approach

101. Alepin, supra note 27, at 67-68.
102. Id. at 68.
103. See Hamel, supra note 6, at 1002.
provides a realistic remedy. The inherent limitations that accompany a legislative solution are paramount, particularly with respect to the upward limit that the First Amendment plays on any legislative scheme intending to stifle speech, commercial or otherwise. The genuine solution to spam may be found by looking beyond the content of legislation, pursuing alternatives just as creatively as the resourceful and innovative spammers who continue to cause the problem.