

January 1996

Destination Ventures, Ltd. v. F.C.C. and Moser v. F.C.C.: How Much Should the Telephone Consumer Protection Act Restrict Your Phone, Fax and Computer?

Michael D. McConathy

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>

 Part of the [Communications Law Commons](#)

Recommended Citation

Michael D. McConathy, *Destination Ventures, Ltd. v. F.C.C. and Moser v. F.C.C.: How Much Should the Telephone Consumer Protection Act Restrict Your Phone, Fax and Computer?*, 26 Golden Gate U. L. Rev. (1996).
<http://digitalcommons.law.ggu.edu/ggulrev/vol26/iss1/11>

This Comment is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

COMMENT

DESTINATION VENTURES, LTD. v. F.C.C. *AND MOSER v. F.C.C.*: HOW MUCH SHOULD THE TELEPHONE CONSUMER PROTECTION ACT RESTRICT YOUR PHONE, FAX AND COMPUTER?

I. INTRODUCTION

As new technology emerges, the appearance of related legal issues seems never to be far behind¹

The Ninth Circuit upheld the constitutionality of the Telephone Consumer Protection Act² (hereinafter "TCPA") in two February 1995 decisions: *Destination Ventures, Ltd. v. F.C.C.*³ and *Moser v. F.C.C.*⁴ *Destination Ventures* marked the first examination of the TCPA by any United States Court of Appeals.⁵ In that case, the Ninth Circuit held that the TCPA ban

1. Lutz Appellate Serv. v. Curry, 859 F. Supp. 180, 181 (E.D. Pa. 1994) (referring to fax machine use prohibitions of the Telephone Consumer Protection Act).

2. 47 U.S.C. § 227 (Supp. V 1993).

3. *Destination Ventures, Ltd. v. F.C.C.*, 46 F.3d 54 (9th Cir. 1995) (per Fletcher, J., joined by Nelson and Rymer, JJ.), *aff'g* 844 F. Supp. 632 (D. Or. 1994). Plaintiffs did not appeal to the U.S. Supreme Court due to the high costs of continued litigation and because the TCPA provision restricting unsolicited faxing was not aggressively enforced by the Federal Communications Commission. See Kit R. Roane, *Court Upholds Law Banning Unsolicited Fax Ads*, N.Y. TIMES, Mar. 24, 1995, at B6.

4. *Moser v. F.C.C.*, 46 F.3d 970 (9th Cir. 1995) (opinion by Fletcher, J., joined by Nelson and Rymer, JJ.), *rev'g* 811 F. Supp. 541 (D. Or. 1992) (granting preliminary injunction), *and rev'g* 826 F. Supp. 360 (D. Or. 1993) (granting summary judgment and declaring the TCPA subsection unconstitutional), *cert. denied*, 115 S. Ct. 2615 (1995).

5. Andrea Gerlin, *Business Tired of Faxed Ads Sue the Senders*, THE WALL

on unsolicited facsimile (hereinafter "fax") advertising was a constitutional regulation of commercial speech since the provision reasonably fit the government interest in preventing advertisement cost-shifting to the consumer.⁶ Five days later, in *Moser*, the same three-judge panel reversed a district court decision and upheld the TCPA's bar of prerecorded telephone sales messages.⁷ The Ninth Circuit held that automated telemarketing threatens residential privacy which justifies narrowly tailored statutory restrictions on such marketing methods.⁸

This comment examines and attempts to reconcile these two Ninth Circuit decisions with prior Supreme Court holdings involving constitutional challenges to commercial speech regulations.⁹ It concludes that both *Destination Ventures* and *Moser* are consistent with the Constitution and with the Congress' desire to avoid advertising cost-shifting.¹⁰ However, it suggests that the court exaggerated or overemphasized the harms caused by telemarketing and unsolicited fax advertising in upholding the corresponding regulations.¹¹ Finally, it recommends that the TCPA be expanded to encompass other types of unsolicited faxing and to restrict advertising on the Internet.¹²

STREET JOURNAL, May 9, 1995, at B1. See *Lysaght v. New Jersey*, 837 F. Supp. 646, 647 (D. N.J. 1993) (The Oregon district court in *Moser* was the first federal court to review the TCPA's constitutionality.).

6. *Destination Ventures*, 46 F.3d at 55-56.

7. *Moser*, 46 F.3d at 975.

8. *Id.*

9. See *infra* notes 84-142 and accompanying text.

10. See *infra* notes 143-46 and accompanying text.

11. See *infra* notes 147-73 and accompanying text.

12. See *infra* notes 174-220 and accompanying text. The Internet is an information clearinghouse connecting millions of users worldwide through phone lines, modems, and computers. Kit R. Roane, *Court Upholds Law Banning Unsolicited Fax Ads*, N.Y. TIMES, Mar. 24, 1995, at B6. One computer expert estimates that today nearly 50 million users worldwide access the Internet on a regular basis. Stephen McGookin, *FT Review of Business Books*, THE FINANCIAL TIMES, Sept. 27, 1995. Most users access the Internet through commercial servers who charge set-up and on-line fees in exchange for the use of host computers. See Aggi Raeder, *Internet World 95: An Eyewitness Report*, INFORMATION TODAY, May 1, 1995, at 57.

II. FACTS AND PROCEDURAL HISTORY

A. *DESTINATION VENTURES, LTD. V. F.C.C.*

Prior to the enactment of the TCPA, many travel agents, stockbrokers, and other small businesses promoted their enterprises through fax advertising.¹³ Before the TCPA ban took effect, Destination Ventures, an Oregon company, used fax advertising to promote its training programs for travel agents.¹⁴ Other small businesses, including a paralegal service (Lutz Paralegal Service), a fax number listing service (National Faxlist), an investment capital company (Porter Capital Corporation) and a travel agency (Lock Travel Service), also advertised in this manner.¹⁵ The TCPA prohibits any person from sending unsolicited advertising by fax.¹⁶ As a result, these five businesses, which desired to continue sending or receiving unsolicited faxes, challenged the constitutionality of the TCPA.¹⁷ Specifically, they sought to enjoin the Federal Communication Commission (hereinafter "F.C.C.") from enforcing the prohibition on using telephone facsimile machines to send unsolicited advertisements.¹⁸

In June 1993, plaintiffs filed suit in the Oregon federal district court claiming that the TCPA violated their "free speech and equal protection rights."¹⁹ The district court analyzed the constitutionality of the restriction to assure it reasonably fit a substantial government purpose.²⁰ The court found the provision constitutional because it was narrowly tailored to

13. See *Destination Ventures, Ltd. v. F.C.C.*, 46 F.3d 54, 55 (9th Cir. 1995).

14. *Id.*

15. See *Destination Ventures, Ltd. v. F.C.C.*, 844 F. Supp. 632, 634 (D. Or. 1994).

16. 47 U.S.C. § 227(b)(1)(C) (Supp. V 1993).

17. *Destination Ventures*, 844 F. Supp. at 634.

18. 47 U.S.C. § 227(b)(1)(C) (Supp. V 1993). This subsection states in relevant part: "It shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." *Id.*

"Unsolicited advertisement" includes material which "advertis[es] the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." *Id.* at § 227(a)(4).

19. *Destination Ventures*, 844 F. Supp. at 634.

20. *Id.* at 637-39.

prevent the unfair shifting of advertising costs to the fax owner.²¹ According to the court, cost-shifting to consumers was an economic harm the TCPA sought to avoid.²² Thus, the district court granted the F.C.C.'s motion to dismiss for failure to state a claim upon which relief could be granted.²³ Destination Ventures appealed the district court dismissal to the United States Court of Appeals for the Ninth Circuit.²⁴

B. *MOSER V. F.C.C.*

Unlike Destination Ventures, Kathryn Moser's telemarketing association utilized automated calling machines to solicit business.²⁵ Moser used artificial or prerecorded voice messages to deliver advertisements and other information to residential telephone customers.²⁶ Typically, these calls were conducted without the previous consent of the called party.²⁷

Moser and her telemarketing group challenged the constitutionality of TCPA subsection which prohibits placing automated calls to private residences without the called party's consent.²⁸ Plaintiffs claimed that this subsection restricted their First Amendment rights and sought to enjoin its enforcement by the F.C.C.²⁹

21. *Id.* at 640.

22. *Id.* at 636.

23. *Id.* at 640.

24. *Destination Ventures*, 46 F.3d at 54.

25. *Moser v. F.C.C.*, 46 F.3d 970, 972 n.1 (9th Cir. 1995), *cert. denied*, 115 S. Ct. 2615 (1995). Kathryn Moser served as president of a small trade group, the National Association of Telecomputer Operators (hereinafter "NATO"), which represented businesses using telecomputer marketing. *Id.* at 973. Both Moser and NATO were named plaintiffs in the appeal. *Id.* at 970.

26. *Id.* at 972. Some telemarketers use automatic dialer recorded message players or automated dialing and announcing devices to dial over 1,000 telephone numbers per day. S. REP. NO. 178, 102d Cong., 1st Sess. 2-3 (1991), *reprinted in* 1991 U.S.C.C.A.N. (105 Stat. 2395) 1968, 1970.

27. *See Moser v. F.C.C.*, 826 F. Supp. 360, 361 (D. Or. 1993).

28. *Id.* See 47 U.S.C. § 227(b)(1)(B) (Supp. V 1993). This subsection states, in part: "It shall be unlawful for any person within the United States . . . (B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party. . . ." *Id.*

29. *Moser v. F.C.C.*, 811 F. Supp. 541, 542 (D. Or. 1992). *See generally* U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech. . . .").

Plaintiffs filed suit in the United States District Court for the District of Oregon seeking injunctive relief and a declaratory judgment.³⁰ In December 1992, the court temporarily enjoined enforcement of the pertinent subsection until its constitutionality could be determined.³¹ In May 1993, the court ruled that the TCPA provision unconstitutionally restricted protected commercial speech.³² The district court determined that the ban did not sufficiently advance the government's substantial interest in protecting residential privacy since automated calls constitute only a small percentage of all telemarketing.³³ The court granted plaintiffs' motion for summary judgment and later declared the subsection unconstitutional.³⁴ The F.C.C. appealed the decision to the United States Court of Appeals for the Ninth Circuit.³⁵

III. BACKGROUND

A. DEFINING COMMERCIAL SPEECH

The United States Supreme Court has defined commercial speech as any expression relating "solely to the economic interests of the speaker and its audience."³⁶ Despite this ambiguous definition, the Court has consistently been able to recognize such speech.³⁷ The Court stated that there is really a

30. *Moser*, 811 F. Supp. at 542.

31. *Id.* The Oregon District Court granted plaintiffs' motion for a preliminary injunction on December 18, 1992 - just two days before the TCPA was to become effective. *Id.* at 546. See 47 U.S.C. § 227 (Supp. V 1993). The preliminary injunction enjoined the enforcement of the subsection until its constitutionality could be determined by the court. *Moser*, 811 F. Supp. at 545-46.

32. *Moser*, 826 F. Supp. at 367.

33. See *id.* at 366-67. Judge Redden cited congressional reports and a Roper Organization survey which found that automated calls make up "less than three percent of the telemarketing calls received by Americans." *Id.*

34. *Id.*

35. *Moser*, 46 F.3d at 970.

36. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980). See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (hereinafter "Virginia Pharmacy") (defining commercial speech as any communication which "proposes a commercial transaction").

37. See, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) (defining attorney advertising as commercial speech subject to State Bar regulation); *Central Hudson*, 447 U.S. at 562-63 (defining public utility advertising as commercial speech); *Virginia Pharmacy*, 425 U.S. at 762 (defining prescription drug

“common-sense” distinction between speech “proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.”³⁸ Courts have routinely held that commercial speech deserves some constitutional protection, but not to the levels warranted by political or non-commercial speech.³⁹ If a communication advertises a product or service for profit or for a business purpose, it constitutes commercial speech and is entitled to limited protection.⁴⁰

Fax advertising and automated telemarketing often disseminate commercial information for business purposes.⁴¹ Such sales methods typically promote products and encourage consumers to purchase goods or services.⁴² The First Amendment protects these types of commercial speech, subject to limited governmental regulation.⁴³

B. THE EVOLUTION OF COMMERCIAL SPEECH PROTECTION

1. The Traditional Approach

The First Amendment prohibits Congress from abridging an individual’s right to speak freely.⁴⁴ Until recently, however, commercial speech was excluded from constitutional protection.⁴⁵ The Supreme Court first articulated this traditional rule in *Valentine v. Chrestensen*,⁴⁶ where an entrepreneur challenged a state law prohibiting public dissemination of

advertising as commercial speech).

38. *Ohralik*, 436 U.S. at 455-56.

39. *Central Hudson*, 447 U.S. at 563. (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”). See, e.g., *Ohralik*, 436 U.S. at 456-57; Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469 (1989); *Virginia Pharmacy*, 425 U.S. 748.

40. See *Central Hudson*, 447 U.S. at 562-63.

41. See S. REP. NO. 178, 102d Cong., 1st Sess. 2-3 (1991), reprinted in 1991 U.S.C.C.A.N. (105 Stat. 2395) 1968, 1970. See also H.R. REP. NO. 317, 102d Cong., 1st Sess. at 13-14 (1991), available in 1991 WL 245201. A call must “encourage a commercial transaction” to be subject to the TCPA. *Id.*

42. *Id.* at 13.

43. See *Central Hudson*, 447 U.S. 563. See also 1991 U.S.C.C.A.N. at 1971.

44. See U.S. CONST. amend. I.

45. *Virginia Pharmacy*, 425 U.S. at 761-62.

46. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

advertising leaflets.⁴⁷ The Court held that, although the leaflets constituted “commercial speech,” their distribution was a privilege which the government could “appropriately regulate . . . in the public interest.”⁴⁸

This view changed, however, when the Supreme Court adopted a rule granting constitutional protection to commercial speech.⁴⁹ The Court held that “purely commercial speech,” such as prescription advertising, deserves some limited First Amendment protection.⁵⁰ The Court reasoned that the speech should be protected since consumers have a strong interest in the free flow of lawful and accurate commercial information.⁵¹

2. The *Central Hudson* Test

In the next decade, courts grappled with the limits of commercial speech protection.⁵² Then, in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*,⁵³ the Supreme Court articulated a four-part test to determine whether a commercial speech regulation violates the First Amendment.⁵⁴

In *Central Hudson*, a power company challenged a New York state statute banning all promotional advertising by

47. *Id.*

48. *Id.* at 54.

49. *See Virginia Pharmacy*, 425 U.S. 748. A pharmacy association challenged a state statute prohibiting the advertisement of prescription drug prices. *Id.* at 749-50. The state pharmacy board claimed that the statute protected professional standards of the pharmacy trade. *See id.* at 751-52. The Court declared the law unconstitutional, however, determining that “commercial advertising of the kind at issue” deserves some First Amendment protection. *Id.* at 779 (Stewart, J., concurring).

50. *Id.* at 771, n.24 (citing *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)). The Supreme Court asserted that a state may not completely “inhibit the dissemination of concededly truthful information about lawful activity.” *Virginia Pharmacy*, 425 U.S. at 771.

51. *See Virginia Pharmacy*, 425 U.S. at 771-72.

52. *See, e.g., Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85 (1977) (invalidating town restriction on residential “For Sale” signs); *Bates v. State Bar of Az.*, 433 U.S. 350 (1977) (overturning state restriction on legal advertising in newspapers); *Ohralik*, 436 U.S. 447 (1978) (upholding state restriction on commercial speech relating to illegal activity).

53. *Central Hudson*, 447 U.S. at 557.

54. *Id.* at 556.

public utilities.⁵⁵ To determine the constitutionality of the commercial speech restriction, the Supreme Court applied four criteria: 1) the speech must not be misleading or concern unlawful activity, 2) the restriction must serve a substantial government interest, 3) the restriction must directly advance that government interest, and 4) the regulation must not be more extensive than necessary to advance the government interest.⁵⁶

The Court determined that the utility advertisement in question was not misleading.⁵⁷ It also concluded that the regulation directly advanced a substantial government interest in conserving electricity.⁵⁸ However, since the regulation banned all electricity advertising, the Court found it was more extensive than necessary.⁵⁹ Accordingly, the Court struck it down since the law failed the final portion of the four-part *Central Hudson* test.⁶⁰

The Supreme Court has held that when a commercial speech restriction is constitutionally challenged, it must withstand this *Central Hudson* "intermediate" level of scrutiny to be upheld.⁶¹ Courts examine such restrictions using a higher presumption of invalidity than the rational basis review used to test regulations of unprotected or misleading speech.⁶² Calling this review mid-level scrutiny, courts apply a less stringent

55. *Id.* at 558-59.

56. *Id.* at 566.

57. *Id.* at 567-68.

58. *Central Hudson*, 447 U.S. at 568-69. Utility advertising encourages consumers to use electricity, directly opposing the substantial government interest to conserve power. *Id.*

59. *Id.* at 570-71.

60. *Id.*

61. See *Edenfield v. Fane*, 507 U.S. 761 (1993) (State ban on "direct, in-person, uninvited solicitation" by accountants is an unconstitutional restriction on commercial speech); See also *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995) (Court upheld state law prohibiting lawyer solicitation of accident victims until 30 days after accident.). Both cases applied the *Central Hudson* "intermediate" standard of review to test the corresponding commercial speech restrictions. *Id.* See *Edenfield*, 507 U.S. 761.

62. See *Florida Bar*, 115 S. Ct. at 2380. See also *Virginia Pharmacy*, 425 U.S. at 761-62 (Commercial speech is entitled to some protection since it serves the economic interests of the speaker and helps disseminate useful information.).

test than the strict scrutiny used to examine protected speech regulations.⁶³

3. The Modern Commercial Speech Doctrine

Since establishing the test for commercial speech in *Central Hudson*, the Supreme Court has relaxed the “no more extensive than necessary” requirement.⁶⁴ After closely examining the meaning of “necessary” in the test’s fourth prong,⁶⁵ the Court determined that this term actually demands “something short of a least-restrictive-means standard.”⁶⁶ Rather, the Court requires only a “reasonable fit,” or a “means narrowly tailored to achieve the desired objective.”⁶⁷ As a result, courts now tolerate some degree of flexibility between the government’s interest and the means chosen to accomplish that end.⁶⁸

More recently, in *City of Cincinnati v. Discovery Network, Inc.*, the Supreme Court further clarified the fourth element of the commercial speech test.⁶⁹ Applying a more lenient standard than the earlier “least-restrictive-means” requirement, the Court held that a commercial speech regulation need not be “absolutely the least severe [means] that will achieve the desired end.”⁷⁰ However, the Court added that the presence of “numerous and obvious less burdensome alternatives” was

63. *Central Hudson*, 447 U.S. at 562-63 (citing *Ohralik*, 436 U.S. at 456) (“The Constitution therefore accords lesser protection to commercial speech than to other constitutionally guaranteed expression.”).

64. *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 472, 480 (University policy prohibiting on-campus commercial solicitations, including “Tupperware parties,” need only be narrowly tailored to achieve a desired objective.).

65. See *Central Hudson*, 447 U.S. at 566.

66. *Fox*, 492 U.S. at 476-77. The Court cited to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which interpreted the term “necessary.” In *McCulloch*, the Marshall Court determined that “necessary” in the Necessary and Proper Clause (U.S. CONST. art. I, § 8) did not mean “absolutely necessary” or “indispensable.” See *id.* at 413. The Supreme Court in *Fox* agreed that the expression is sometimes used “loosely.” *Fox*, 492 U.S. at 477.

67. *Id.* at 480.

68. See *id.* at 476-77.

69. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416-17 nn.12-13 (1993).

70. *Id.*

relevant in analyzing the facts for a reasonable fit.⁷¹ Only one month after the *Discovery Network* decision, the Court interpreted the fourth prong further: a restriction “need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny.”⁷²

C. THE TELEPHONE CONSUMER PROTECTION ACT

Although interstate commercial speech regulation became less restrictive following *Virginia Pharmacy* and *Central Hudson*, states continued to regulate this speech.⁷³ By 1991, more than forty states and the District of Columbia had restricted or banned unsolicited automated calls and faxes within their boundaries.⁷⁴ However, because states are constitutionally prohibited from restricting interstate commerce, state legislatures have no authority to enact laws which could curb advertising originating out-of-state.⁷⁵ In response, states lobbied heavily for federal legislation to regulate these communications across state lines.⁷⁶

In 1991, Congress responded to the states by holding extensive hearings regarding interstate communication regulations.⁷⁷ Lawmakers determined that automated telemarketing calls constitute “an unwarranted intrusion upon privacy” and that unsolicited faxes unfairly shift advertising costs to the consumer.⁷⁸ Additionally, Congress concluded that “junk”

71. *Id.*

72. *Edenfield*, 507 U.S. at 767.

73. 1991 U.S.C.C.A.N. at 1970.

74. *Id.* Florida has attempted to regulate intrastate telemarketers by requiring them to maintain databases of individuals who wish to be excluded from telemarketing activities. See H.R. REP. NO. 317, 102d Cong., 1st Sess. at 9 (1991). Connecticut and Maryland have also enacted laws which prohibit the use of facsimile machines to disseminate unsolicited advertising within their state boundaries. In 1991, similar bills were pending in over half the states. *Id.* at 26.

75. 1991 U.S.C.C.A.N. at 1973. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951) (The mere existence of the federal commerce power restricts the states from discriminating against or unduly burdening interstate commerce.). See generally U.S. CONST. art. I, § 9.

76. 1991 U.S.C.C.A.N. at 1970.

77. See generally 1991 U.S.C.C.A.N. 1968.

78. *Hearing Before House Subcommittee on Telecommunications and Finance*, 102d Cong., 1st Sess. 3-4 (1991). See H.R. REP. NO. 317, 102d Cong., 1st Sess. 25-26 (1991).

faxes engage machines for hours and can “thwart the receipt of legitimate and important messages.”⁷⁹ In response, the House Subcommittee on Telecommunications and Finance determined that these communications pose a threat to privacy and should be curtailed by federal statute.⁸⁰

On December 20, 1991, Congress passed the Telephone Consumer Protection Act which amended Title II of the Communications Act of 1934.⁸¹ The TCPA, effective one year after its enactment, specifically prohibits sending unsolicited fax advertising or placing unauthorized automated calls.⁸² Congress assigned the implementation and enforcement of all TCPA provisions to the F.C.C.⁸³

IV. COURT'S ANALYSIS

A. *DESTINATION VENTURES, LTD. V. F.C.C.*

In *Destination Ventures*, the Ninth Circuit stated that constitutional issues are reviewed de novo.⁸⁴ Accordingly, the court reconsidered all evidence and arguments submitted by the parties.⁸⁵ The court applied the commercial speech test developed by the United States Supreme Court in *Central Hudson* and its progeny: “[R]egulation of commercial speech must directly advance a substantial government interest in a manner that forms a “reasonable fit” with the interest.”⁸⁶ The court stressed that the government has the burden to “demonstrate the reasonable fit” with more than “speculation or con-

79. *Id.* The term “junk fax” refers to any fax received without the party’s prior, expressed consent. *Id.*

80. *Id.*

81. 47 U.S.C. § 227 (Supp. V 1993).

82. *Id.* at § 227(b)(1). Subsections (b)(3) and (c)(5) also permit a private individual to sue the caller. Under these provisions, for each TCPA violation, a plaintiff is entitled to injunctive relief plus damages (actual monetary losses or \$500 per violation, whichever is greater). *Id.* at § 227(b)(3) and (c)(5). There is also a provision allowing for treble damages if the defendant is shown to have acted willfully or with knowledge of the prohibition. *Id.* at § 227(b)(3).

83. *Id.* at § 227(b)(2).

84. *Destination Ventures, Ltd. v. F.C.C.*, 46 F.3d 54, 55 (9th Cir. 1995).

85. *Id.*

86. *Id.* (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980); *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989)).

jecture.⁸⁷ In *Destination Ventures*, the court examined the governmental desire to prevent advertising cost-shifting in light of the First Amendment and upheld the TCPA as constitutional.⁸⁸

1. Substantial Government Interest

In its decision, the Oregon district court held that the government has a substantial interest in protecting consumers from bearing the expense and inconvenience of fax advertising.⁸⁹ The district court found that this interest stems from the general congressional objective to protect individuals from economic harm.⁹⁰

On appeal, *Destination Ventures* conceded that the government has a substantial interest in preventing advertising costs from being shifted to consumers.⁹¹ Instead, it argued that the costs associated with fax transmissions were too minimal to justify regulation.⁹² *Destination Ventures* claimed that Congress had unconstitutionally "singled out" fax advertising for regulation.⁹³ Further, it argued that the TCPA provision should be struck down since the F.C.C. had not sustained its burden of demonstrating a "reasonable fit" between the ban and a government goal.⁹⁴ However, the Ninth Circuit upheld the district court's decision that the costs shifted to consumers were substantial enough to warrant government regulation.⁹⁵

87. *Destination Ventures*, 46 F.3d at 55-56. The government must show that the harms it seeks to curb are real and that the restriction "will in fact alleviate them to a material degree." *Id.* at 56.

88. *Id.* at 54. The preliminary requirement of the *Central Hudson* and *Fox* commercial speech test is that the communication not be misleading or relate to unlawful activities. *Central Hudson*, 447 U.S. at 564. Although the Ninth Circuit did not seem to directly address this element in its analysis, it must have determined the faxes were not misleading since it proceeded with the other steps of the *Central Hudson* test. *See Destination Ventures*, 46 F.3d at 54.

89. *Destination Ventures, Ltd. v. F.C.C.*, 844 F. Supp. 632, 637 (D. Or. 1994).

90. *Id.*

91. *Destination Ventures*, 46 F.3d at 56.

92. *See id.* *Destination Ventures* argued that fax paper typically costs about 2.5¢ per page, countering the F.C.C.'s estimate of 35¢ to 40¢ per page. *Id.* Both parties agreed that a single sheet transmission occupies a fax machine for between 30 and 40 seconds. *Id.*

93. *Id.*

94. *Destination Ventures*, 46 F.3d at 56.

95. *See id.* The district court previously determined that "unsolicited and un-

2. Reasonable Fit

In defending a statute's constitutionality with regard to free speech, the government must demonstrate that the federal regulation is reasonably fitted to serve a substantial government interest.⁹⁶ This fit must be supported by more than "mere speculation and conjecture."⁹⁷ *Destination Ventures* argued that the government failed to meet its burden since it had not shown that unsolicited commercial faxes are more expensive than junk, prank, or political messages delivered by fax.⁹⁸ However, the Ninth Circuit held that the ban on fax advertising was reasonably fitted to advance the government goal of preventing cost-shifting because "unsolicited commercial fax solicitations are responsible for the bulk of advertising cost-shifting."⁹⁹

The court also determined that the ban even-handedly applies to commercial solicitations sent by any organization.¹⁰⁰ As a result, it did not engage in any statutory overbreadth or underinclusive analysis.¹⁰¹

While finding this "reasonable fit" between the TCPA provision and the government interest, the Ninth Circuit distinguished a similar case involving the distribution of commercial handbills on public property.¹⁰² In *City of Cincinnati v.*

wanted faxes can tie up a machine for hours and thwart the receipt of legitimate and important messages." *Destination Ventures*, 844 F. Supp. at 636.

96. *Fox*, 492 U.S. at 480.

97. *Destination Ventures*, 46 F.3d at 55.

98. *Id.* at 56.

99. *Id.* The Ninth Circuit implicitly affirmed that the TCPA subsection advances a significant government interest in a "direct and material" way as required by the *Central Hudson* test. See *Destination Ventures*, 46 F.3d at 55. See also *Destination Ventures*, 844 F. Supp. at 637. The court recognized that, in order to be constitutional, a restriction must "in fact alleviate [a harm] to a material degree." *Destination Ventures*, 46 F.3d at 55 (citing *Edenfield*, 507 U.S. at 767). It also analyzed the other *Central Hudson* elements and upheld the provision, suggesting that the "direct advancement" requirement had been satisfied. *Id.*

100. *Destination Ventures*, 46 F.3d at 56. The Ninth Circuit held that the TCPA provision pertained to all commercial fax advertisements, whether by "a multinational corporation or the Girl Scouts." *Id.*

101. *Id.*

102. *Id.* See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416-17 (1993) (The Supreme Court applied the *Central Hudson-Fox* four-part test to a city

Discovery Network, Inc., the Supreme Court struck down a city ordinance which banned handbill newsracks but preserved sidewalk newspaper stands.¹⁰³ Although the city claimed its law reduced littering and enhanced sidewalk safety, the Court failed to find a reasonable fit since the ordinance only regulated a small part of the harm.¹⁰⁴

Unlike handbill racks which plausibly increase littering, the fax advertising costs sought to be curbed in *Destination Ventures* accounted for a substantial percentage of all consumer cost-shifting.¹⁰⁵ The TCPA bans all unsolicited fax advertising and greatly reduces the majority of cost-shifting to consumers.¹⁰⁶ Accordingly, the Ninth Circuit held that Congress could enact the TCPA to reduce the volume of intrusive calls even though their regulation would not completely abolish cost-shifting.¹⁰⁷

The Ninth Circuit determined that a complete ban reasonably fit the government's interest.¹⁰⁸ This finding, coupled with the ban's evenhanded application, convinced the court that prohibiting unsolicited commercial faxes, regardless of their source, is a reasonable means of achieving the Congressional goal of protecting the public from cost-shifting.¹⁰⁹

ordinance restricting certain newspaper stands, but failed to find a "reasonable fit.").

103. *Id.* at 412; *Discovery Network*, 507 U.S. at 416-17.

104. *Id.* The Supreme Court found no "reasonable fit" between the government interest in promoting safety & aesthetics and the ordinance because the "benefit to be derived from the removal of 62 news racks while about 1,500-2,000 remain in place" was "minute . . . and paltry." *Id.*

105. See H.R. REP. NO. 317, 102d Cong., 1st Sess. 26 (1991), available in 1991 WL 245201.

106. *Destination Ventures*, 46 F.3d at 55. See 47 U.S.C. § 227(b)(1)(C) (Supp. V 1993).

107. See *Destination Ventures*, 46 F.3d at 56. See also *United States v. Edge Broadcasting*, 113 S. Ct. 2696 (1993).

108. *Destination Ventures*, 46 F.3d at 56.

109. *Id.*

3. Data on Cost-Shifting

Destination Ventures argued that the TCPA ban was excessive.¹¹⁰ It admitted that fax advertising shifts costs to the consumer, but claimed these costs had been significantly reduced by technology and were now *de minimis*.¹¹¹ Both parties used expert opinions and news articles to estimate the actual costs and burdens associated with fax transmissions.¹¹²

The court refused to consider statistics to establish these costs, asserting that the district court had already given due weight to the parties' arguments.¹¹³ The court held that Destination Ventures could have challenged these "material facts" on appeal, but had waived this ability by not providing the F.C.C. with "reasonable notice that the sufficiency of its claim [would] be in issue"¹¹⁴ The Ninth Circuit refused to hear new factual data from either party and relied on the district court holding that the fax advertising cost-shifting was sufficient to justify federal regulation.¹¹⁵ Thus, the court held that the TCPA provision banning unsolicited fax advertising did not violate the First Amendment.¹¹⁶

110. *Id.*

111. *Id.*

112. *Id.* at 55-56. The parties agreed that a typical fax "ties up" a machine for between 30 to 45 seconds, but disagreed as to the cost of each transmission. *Id.* at 56.

113. *Destination Ventures*, 46 F.3d at 56. See *Duggan v. International Ass'n of Machinists*, 510 F.2d 1086, 1087 (9th Cir. 1975), *cert. denied*, 421 U.S. 1012 (1975) (Flight engineer suing labor union was not entitled to extensive appellate review after the trial court had correctly dismissed the case on its merits.).

114. *Id.* See *Buckingham v. United States*, 998 F.2d 735, 742 (9th Cir. 1993) (defining reasonable notice as "adequate time to develop the facts on which the litigant will depend to oppose summary judgment").

115. *Destination Ventures*, 46 F.3d at 56.

116. *Id.* at 55-56.

B. *MOSEER V. F.C.C.*

1. Classifying the Provision's Content

In *Moser*,¹¹⁷ the district court determined that the TCPA provision restricting automated telemarketing calls involved the regulation of commercial speech.¹¹⁸ It then applied the *Central Hudson* and *Fox* tests to determine the constitutionality of the statute.¹¹⁹ The Ninth Circuit, however, determined that the TCPA subsection was actually a content-neutral regulation since the statute regulates both commercial and non-commercial telemarketing calls.¹²⁰ As a result, the Ninth Circuit applied a different test of constitutionality than the district court.¹²¹

2. The *Ward* Test as Applied to TCPA Subsection (b)(1)(B)

The Ninth Circuit explained that, under *Ward v. Rock Against Racism*,¹²² for a government restriction on the time, place, and manner of content-neutral speech to be constitutional, the regulation must be: (1) narrowly tailored to advance a significant government interest, (2) adequately justified without reference to the content of the speech, and (3) must leave open alternate channels for communication of the information.¹²³ The Ninth Circuit noted that the constitutional tests

117. *Moser v. F.C.C.*, 811 F. Supp 541 (D. Or. 1992) (granting preliminary injunction).

118. *Id.* at 543. The district court determined that 47 U.S.C. § 227(b)(1)(B) is a "content-based regulation" since it draws distinctions between recorded and live speech and distinguishes between commercial and non-commercial messages. *Moser v. F.C.C.*, 826 F. Supp. 360, 363. (D. Or. 1993). Citing *Discovery Network*, the district court determined the constitutionality of the provision should be examined using the *Central Hudson* and *Fox* commercial speech tests. *Id.* at 364.

119. *Id.* at 363-64.

120. *Moser v. F.C.C.*, 46 F.3d 970, 973 (9th Cir. 1995), *cert. denied*, 115 S. Ct. 2615 (1995). The Ninth Circuit found that "since nothing in the statute requires the Commission to distinguish between commercial and non-commercial speech . . . [it] should be analyzed as a content-neutral time, place, or manner restriction." *Id.*

121. *See id.* *See also* *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (outlining constitutional test for content-neutral speech).

122. *Id.*

123. *Moser*, 46 F.3d at 973. *See Ward*, 491 U.S. at 791. The Court upheld a New York City law requiring rock performers in public parks to use city provided sound equipment and technicians in an effort to reduce concert noise. *Id.* at 787.

for restrictions on content-neutral time, place, and manner speech and commercial speech are “essentially identical.”¹²⁴

a. *Narrowly Tailored to Serve a Significant Government Interest*

The Ninth Circuit agreed with Congress that protecting residential privacy from automated telemarketing calls is a substantial government interest.¹²⁵ The court referred to congressional findings that such calls constituted an “invasion of privacy” and that consumers favored their regulation.¹²⁶ The Ninth Circuit reversed the district court and determined that the TCPA restriction was “narrowly tailored” to serve this significant government interest.¹²⁷ In upholding the provision, the Ninth Circuit relied on recent Supreme Court decisions holding that proper commercial speech regulations must be narrowly tailored, but need not be the least restrictive means available.¹²⁸

b. *Adequately Justified Without Reference to Content*

The plaintiff in *Moser* argued that no justification for the TCPA ban on automated, commercial calls exists since such calls are no more intrusive than “live” or non-commercial ones.¹²⁹ However, the Ninth Circuit adopted the findings of

The Court sustained the law as a valid time, place, or manner restriction even though less-restrictive means existed to keep sounds low. *Id.* at 802-03.

124. *Moser*, 46 F.3d at 973 (citing *Fox*, 492 U.S. at 477).

125. *See id.* at 974. *See also Moser*, 826 F. Supp. at 362 (“[T]he government’s interest in promoting residential privacy . . . is substantial.”).

126. *Id.* *See* S. REP. NO. 178, 102d Cong., 1st Sess. 2-3 (1991), *reprinted in* 1991 U.S.C.C.A.N. (105 Stat. 2395) 1968, 1969, 1972-73.

127. *Moser*, 46 F.3d at 975. The district court previously determined that the ban was not “reasonably fitted” to advance the government interest given the ban’s slight benefit, the narrow distinction between automated calls and other types of telephonic solicitations, and the government’s disregard for less burdensome alternatives. *Moser*, 826 F. Supp. at 365. However, the Ninth Circuit disagreed. *See Moser*, 46 F.3d at 974.

128. *Id.* at 973-74. *See, e.g., Discovery Network*, 507 U.S. 410; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

129. *Moser*, 46 F.3d at 974. In the district court, *Moser* argued that the ban

congressional hearings which identified automated telemarketing as a residential privacy threat.¹³⁰ The court gave deference to the conclusions since Congress is "better equipped [than the court] to amass and evaluate the vast amounts of data bearing on such an issue."¹³¹ Accordingly, the court held that congressional and public concerns surrounding residential privacy justified the narrowly tailored TCPA ban on automated, commercial calls.¹³²

The Ninth Circuit court also determined that the regulation does not violate the constitution since it does not favor a particular viewpoint.¹³³ The court explained that such underinclusive speech regulation is acceptable so long as it does not give "one side of a debatable question an advantage in expressing its views to the people."¹³⁴ Consequently, it held that the ban on automated, prerecorded calls did not seek to "favor a particular viewpoint" and was within acceptable constitutional limits on free speech.¹³⁵

The court emphasized that the government is not required to "make progress on every front before it can make progress on any front."¹³⁶ Thus, the harm sought to be curtailed by the government need only be substantially reduced, not totally eliminated.¹³⁷ For example, the government could sufficiently reduce the harm of telemarketing by regulating only automat-

would not significantly advance the government interest since automated calls represent only a fraction of all telemarketing calls. *Moser*, 826 F. Supp. at 367. The district court agreed with Moser's position, relying on the ban's "slight" benefit to find no "reasonable fit." *Id.*

130. *Moser*, 46 F.3d at 974. The court referred to the findings of Senate Report No. 102-178. *Id.* See 1991 U.S.C.C.A.N. at 1970.

131. *Moser*, 46 F.3d at 974 (citing *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330-31 n.12 (1985)). The Ninth Circuit noted that reliance on the reports would not "foreclose the court's independent judgment." *Id.*

132. See *id.* at 974-75. The Ninth Circuit held the TCPA provision to be content-neutral since "nothing in the statute requires the Commission to distinguish between commercial and non-commercial speech." *Id.* at 973.

133. *Id.* at 974.

134. *Id.* (quoting *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2043 (1994) (an "underinclusive" speech regulation is only unconstitutional if it gives a particular group an advantage in expressing its views)).

135. *Moser*, 46 F.3d at 974.

136. See *id.* (quoting *Edge Broadcasting*, 113 S. Ct. at 2707).

137. *Id.*

ed telemarketing, without banning all phone solicitations.¹³⁸ Therefore, the TCPA can constitutionally restrict only automated calls while still exempting “live,” non-commercial, or operator introduced ones from regulation.¹³⁹

c. *Alternative Channels Available*

The Ninth Circuit determined that the TCPA properly excluded alternative channels of communication from regulation, including taped messages, operator introduced recorded calls, and direct “live” solicitations.¹⁴⁰ The court held that although automated solicitations are the least expensive and most efficient method of telemarketing, they could still be restricted by Congress.¹⁴¹

The Ninth Circuit held that the TCPA provision did not violate the First Amendment since Congress narrowly tailored the Act to promote residential privacy and preserved unregulated alternative methods of disseminating this information.¹⁴²

138. *Moser*, 46 F.3d at 975.

139. *See id.* at 974-75.

140. *See id.* The TCPA regulates calls placed by an automated dialing system, using an artificial or prerecorded voice, or unsolicited advertisements sent by fax or computer. 47 U.S.C. § 227(b)(1) (Supp. V 1993). *See also* 1991 U.S.C.C.A.N. 1968 (The primary focus of the TCPA is to “protect the public from automated telephone calls.”).

141. *Moser*, 46 F.3d at 975. *See Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949) (The Court upheld a city ban on sound trucks based on the municipal desire to protect “quiet and tranquility.” The Court reasoned that although “more people may be easily reached by sound trucks . . . [this] is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.”).

142. *Moser*, 46 F.3d at 975. On appeal, the F.C.C. also challenged the district court’s jurisdiction over the case, arguing that the Court of Appeals has exclusive jurisdiction over F.C.C. regulatory challenges. *Id.* at 973 (referring to 47 U.S.C. § 402(a) (Supp. V 1993)). The Ninth Circuit declined to grant exclusive jurisdiction. *Id.* The court reasoned that since the TCPA provision was part of the initial statute and not a subsequent F.C.C. regulation, the district court had initial federal question jurisdiction. *Id.*

V. CRITIQUE

In both *Destination Ventures*¹⁴³ and *Moser*,¹⁴⁴ the same unanimous three judge panel upheld TCPA provisions restricting automated telemarketing and unsolicited fax advertising. These decisions are consistent with the Constitution and with Congress' articulated desire to reform telemarketing and avoid advertising cost-shifting.¹⁴⁵ However, in deciding these cases, the Ninth Circuit failed to thoroughly address valid arguments offered by both plaintiffs.¹⁴⁶

A. NO "REASONABLE FIT" IN *DESTINATION VENTURES*

In *Destination Ventures*, the Ninth Circuit applied the *Central Hudson* test for constitutional commercial speech and held that the TCPA fax restriction "reasonably fit" the substantial government interest of preventing cost-shifting.¹⁴⁷ However, the opinion failed to fully analyze plaintiff's argument that a complete ban of all unsolicited faxes is more extensive than necessary.¹⁴⁸

The Supreme Court interpreted *Central Hudson* to require less than a perfect fit, but at least a reasonable fit "between the legislature's ends and the means chosen to accomplish those ends."¹⁴⁹ The Court also held that the existence of "numerous and obvious less-burdensome alternatives" is relevant in analyzing a commercial speech restriction.¹⁵⁰

Destination Ventures argued that many other less-burden-

143. *Destination Ventures, Ltd. v. F.C.C.*, 46 F.3d 54 (9th Cir. 1995).

144. *Moser v. F.C.C.*, 46 F.3d 970 (9th Cir. 1995), *cert. denied*, 115 S. Ct. 2615 (1995).

145. See S. REP. NO. 178, 102d Cong., 1st Sess. 2-3 (1991), *reprinted in* 1991 U.S.C.A.N. (105 Stat. 2395) 1968, 1969-70. See also H.R. REP. NO. 317, 102d Cong., 1st Sess. at 13-14 (1991), *available in* 1991 WL 245201.

146. See *Destination Ventures*, 46 F.3d 54; *Moser*, 46 F.3d at 970.

147. *Destination Ventures*, 46 F.3d at 55, 57.

148. See *id.*

149. *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989).

150. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993).

some alternatives to a total ban on unsolicited fax advertising exist, including: using “do-not-fax” lists, regulating the hours of fax advertising, and limiting the frequency of transmissions.¹⁵¹ The district court held that these alternatives failed to establish that Congress had improperly tailored the TCPA to prevent cost-shifting.¹⁵²

The Ninth Circuit opinion offered no discussion regarding other methods to reduce fax advertising costs.¹⁵³ Nevertheless, plaintiff’s proposed techniques, and others such as the use of a toll-free number to request reimbursement or a similar “hotline” to permit fax owners to be excluded from future transmissions, might have proved less restrictive.¹⁵⁴ Because less-burdensome alternatives would have been relevant, the court should have considered whether any means other than a complete ban would have advanced the governmental interest “in a manner less intrusive to [plaintiff’s] First Amendment rights.”¹⁵⁵

B. NO SIGNIFICANT HARM

In *Moser*, plaintiffs argued that the TCPA’s content-neutral ban on automated telemarketing calls was underinclusive since it excluded all other types of telemarketing from regulation.¹⁵⁶ However, the Ninth Circuit held that since “the ban on automated, prerecorded calls [was] not an attempt to favor a particular viewpoint,” it was constitutional.¹⁵⁷

Nearly 70 percent of the American public regard calls from

151. See *Destination Ventures, Ltd. v. F.C.C.*, 844 F. Supp. 632, 639 (D. Or. 1994). See also Daniel Brenner, *Federal Court Decision: a Roadblock to Advertising on the Information Highway?*, 5 WASHINGTON LEGAL FOUNDATION (LEGAL OPINION LETTER) NO. 12 (June 9, 1995) (hereinafter “BRENNER”).

152. *Destination Ventures*, 844 F. Supp. at 639.

153. *Destination Ventures*, 46 F.3d at 54.

154. See BRENNER, *supra* note 151 and accompanying text.

155. *Id.* See *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593-94 (1995). The court struck down a federal law prohibiting the display of alcohol content percentages on beer labels. In its analysis, the Court examined alternatives to the ban such as directly limiting alcohol content, prohibiting marketing efforts of high alcohol products, and limiting the ban to only certain types of beer. *Id.* at 1593.

156. See *Moser*, 46 F.3d at 974. See 47 U.S.C. § 227(b)(1)(B) (Supp. V 1993).

157. *Moser*, 46 F.3d at 974-75.

automated telemarketers as “annoying” and an intrusion into the home.¹⁵⁸ Yet, automated solicitations make up “less than three percent of all telemarketing calls received by Americans.”¹⁵⁹ As the Oregon district court determined, the TCPA ban on automated calls would eliminate only a very small percentage of the millions of sales calls made each day.¹⁶⁰

In *Discovery Network*, the Supreme Court held that the prohibition of only a small number of newsracks did not reasonably fit the advancement of the state’s interest in preventing littering.¹⁶¹ However, in *Moser*, the Ninth Circuit upheld the TCPA ban on automated sales calls, even though these calls made up only a small percentage of all telemarketing.¹⁶²

As the Supreme Court noted, “bright lines that clearly cabin commercial speech in a distinct category” are difficult to draw.¹⁶³ However, in this case, it appears that prohibiting automated calls, which constitute only part of the total harm caused by telemarketing, is underinclusive.¹⁶⁴ Under its test for content-neutral speech, the Ninth Circuit should have more closely examined whether automated telemarketing actually constitutes a significant harm which justifies regulation.¹⁶⁵

C. DIMINISHING FAX COSTS

In *Destination Ventures*, plaintiffs argued that the cost-shifting resulting from fax advertising had become very small due to modern technological advances.¹⁶⁶ However, the Ninth

158. *Moser*, 826 F. Supp. at 366 (referring to a Roper Organization survey). See 1991 U.S.C.C.A.N. at 1972 (“[A]rtificial or prerecorded voice messages are more of a nuisance and a greater invasion of privacy than calls placed by ‘live’ persons.”).

159. *Moser*, 826 F. Supp. at 366-67.

160. *Id.* at 367.

161. See *Discovery Network*, 507 U.S. at 425-26; *supra* notes 102-04 and accompanying text. The challenged regulation banned 62 racks, accounting for only about 3-4% of all racks in the city. *Id.* at 1510.

162. *Moser*, 46 F.3d at 974-75.

163. *Discovery Network*, 507 U.S. at 419.

164. See generally *Moser*, 46 F.3d at 973-75.

165. *Id.* See, e.g., *supra* note 122-23 and accompanying text (outlining three part constitutionality test for content-neutral commercial speech regulations).

166. See *Destination Ventures*, 46 F.3d at 56. On appeal, both *Destination Ventures* and the F.C.C. introduced declarations estimating the costs of a typical fax.

Circuit chose to examine the harm caused by unsolicited faxes “as it existed when Congress enacted the [TCPA], rather than speculate upon what solutions may turn up in the future.”¹⁶⁷ The court, relying on 1991 congressional findings, concluded that unwanted faxes cause cost-shifting and inconvenience sufficient to warrant their regulation.¹⁶⁸

Although courts often give deference to legislative conclusions, such findings do not foreclose the court’s independent judgment.¹⁶⁹ The Supreme Court held that “reliance on legislative history is hazardous at best.”¹⁷⁰ Accordingly, the Ninth Circuit may have given too much weight to the outdated findings of Congress regarding the TCPA.¹⁷¹

Since the Act’s enactment in December 1991, advances in technology have nearly eliminated the costs and inconvenience of unsolicited faxes.¹⁷² Although an advertiser may not impose its costs upon the consumer, it appears that inconvenience or *de minimis* cost shifting is acceptable under the Constitution.¹⁷³ The court should have considered this movement towards nominal cost faxing further before categorizing facsim-

Id.

167. *Id.* at 57. “[T]he possibility of future technological advances allowing simultaneous transmissions and eliminating the need for paper does not alter this conclusion.” *Id.*

168. *See id.*; *Destination Ventures*, 844 F. Supp. at 636-37. *See also* *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985) (Congress is “better equipped to amass and evaluate the vast amounts of data bearing on such issue[s].”); *Rostker v. Goldberg*, 453 U.S. 57, 72-73, 83 (1985) (Court upheld male-only military draft after deferring to prior Congressional findings.).

169. *See Sable Communications v. F.C.C.*, 492 U.S. 115, 129 (1989). *See also* *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) (“Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.”).

170. *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 242 (1990).

171. *See generally* *Destination Ventures*, 46 F.3d at 55. *See also* 1991 U.S.C.C.A.N. 1968 (findings were published in November, 1991).

172. *See infra* notes 187-90 and accompanying text.

173. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 72 (1983). The Court struck down a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives. The court held that a “short, though regular journey from the mailbox to the trashcan . . . is an acceptable burden, at least as far as the Constitution is concerned.” *Id.*

ile advertising cost-shifting as a substantial interest the government should avoid.¹⁷⁴

VI. RECOMMENDATIONS

Currently, the TCPA does not preclude the transmission of non-commercial faxes, such as political messages or prank faxes, to unconsenting recipients.¹⁷⁵ In addition, the TCPA does not regulate the transmission of commercial or non-commercial messages to unconsenting Internet users.¹⁷⁶ Like unsolicited fax advertising and automated telemarketing, these unregulated categories also shift transmission costs and inconvenience to the consumer.¹⁷⁷

Pursuant to the TCPA, the F.C.C. can initiate rulemaking proceedings and promulgate regulations to protect the privacy rights of telephone subscribers in an "efficient, effective, and economic manner."¹⁷⁸ However, since its regulatory power is limited by the language of the Act, the F.C.C. is powerless to restrict these unarticulated channels of communication.¹⁷⁹

In both *Destination Ventures* and *Moser*, the Ninth Circuit opted to follow outdated congressional findings and upheld portions of the TCPA.¹⁸⁰ If the courts are going to examine the TCPA's constitutionality based upon conditions existing at

174. See generally *Destination Ventures*, 46 F.3d at 57.

175. See generally *Destination Ventures, Ltd. v. F.C.C.*, 46 F.3d at 54, 55 (9th Cir. 1995). See also 47 U.S.C. § 227 (Supp. V 1993).

176. See 47 U.S.C. § 227(b)(1)(C) (Supp. V 1993). The statute only prohibits using a "computer, or other device" to send an unwanted commercial message to a fax machine. *Id.*

177. See generally *Destination Ventures*, 46 F.3d at 56. Plaintiffs argued that both commercial and non-commercial faxes tie up machines equally and require the recipient to pay ink and paper costs. *Id.*

178. See generally 47 U.S.C. § 227(c)(1-2) (Supp. V 1993). "The Commission shall . . . prescribe regulations to implement methods and procedures for protecting the privacy rights described . . . in an efficient, effective, and economic manner and without the imposition of any additional charges to telephone subscribers." *Id.*

179. See *id.*

180. See *Destination Ventures*, 46 F.3d at 57; *Moser v. F.C.C.*, 46 F.3d 970, 974-75 (9th Cir. 1995), *cert. denied*, 115 S. Ct. 2615 (1995).

its enactment, then Congress should regularly amend the TCPA to account for changing technology.¹⁸¹

A. THE TCPA SHOULD BAN ALL UNSOLICITED FAXING

Currently, the TCPA prohibits unsolicited advertisements sent from a facsimile machine or computer to another facsimile machine.¹⁸² Under this law, courts have assessed compensatory and punitive damages against defendants who illegally transmit advertising in such a fashion.¹⁸³

However, the TCPA only restricts messages advertising the commercial availability of products or services.¹⁸⁴ The statute is silent regarding unsolicited non-commercial messages such as political propaganda, fund-raising appeals from non-profit groups, prank faxes, vulgar cartoons, and other transmissions.¹⁸⁵ As the plaintiffs in *Destination Ventures* argued, faxes which contain advertising are no more costly to the unwilling recipient than faxes containing non-commercial messages.¹⁸⁶ Unfortunately, because Congress considered only faxes which solicit the sale of products or services during its 1991 TCPA hearings, the resulting statute regulates only commercial faxes.¹⁸⁷

Fax technology has steadily advanced since the TCPA's enactment.¹⁸⁸ Modern fax machines and modems "brand" each page of outgoing transmissions with the sender's name and telephone number.¹⁸⁹ Additionally, faxes now can be

181. See *Destination Ventures*, 46 F.3d at 57.

182. 47 U.S.C. § 227(b)(1)(C) (Supp. V 1993).

183. See Andrea Gerlin, *Business Tired of Faxed Ads Sue the Senders*, THE WALL STREET JOURNAL, May 9, 1995, at B1. A group of Texas businesses sued 35 companies alleging that unwanted ads tie up fax machines, use ink & paper, constitute a nuisance, and invade their privacy. In 1994 alone, the F.C.C. received over 300 official complaints from recipients of unwanted fax advertisements. *Id.*

184. See 47 U.S.C. § 227(b)(1)(C) and (a)(4).

185. *Id.*

186. See *Destination Ventures*, 46 F.3d at 56.

187. See H.R. REP. NO. 317, 102d Cong., 1st Sess. 10 (1991), available in 1991 WL 245201.

188. See *Destination Ventures*, 46 F.3d at 57.

189. *Telephony*, COMMUNICATIONS DAILY, Aug. 31, 1995, at 1. See 47 U.S.C. § 227(d)(2) (Supp. V 1993).

transmitted and received completely by computer, allowing users to preview and store messages prior to printout.¹⁹⁰ Some new machines even include an "anti-junk-mail feature" to block incoming transmissions which do not originate from a pre-entered list of phone numbers.¹⁹¹

Despite these technological advances, complaints involving unsolicited, non-commercial faxes continue to increase.¹⁹² Since both commercial and non-commercial transmissions harm an unwilling recipient equally, the TCPA should prohibit all unsolicited faxes regardless of their content.¹⁹³ Any argument that such a broad ban would chill speech could be circumvented by revising the Act's definition of unsolicited advertisement to require the consent of the receiving party.¹⁹⁴ To comply with the Act, the sender could show express consent in the form of direct authorization, or implied consent through prior dealings or an existing business relationship.¹⁹⁵

Such a modified provision would further reduce cost-shifting and would more easily withstand constitutional challenges under the less stringent *Ward* test.¹⁹⁶ Presently, all the other TCPA prohibitions are content-neutral.¹⁹⁷ Expanding the pro-

190. Andy Pargh, *Some Facts About Fax Machines*, THE STATE JOURNAL REGISTER (Springfield, Ill.), Aug. 4, 1995, at 4A. Such technology also permits a user to send and receive a fax simultaneously or to receive multiple incoming transmissions at once. *Id.*

191. *Id.*

192. See generally Andrea Gerlin, *Business Tired of Faxed Ads Sue the Senders*, THE WALL STREET JOURNAL, May 9, 1995, at B1.

193. Jim Doyle, *Court Upholds Junk-Fax Ban*, THE SAN FRANCISCO CHRONICLE, Feb. 2, 1995, at A17.

194. See 47 U.S.C. § 227(a)(4) (Supp. V 1993) (requiring the "prior express invitation or permission" of the recipient).

195. See generally *id.* (Routine faxes between businesses or individuals would still be protected since prior dealings could imply consent. Implied consent might also be shown through business or professional relationships, or through prior acts such as providing someone with the facsimile machine phone number.). See also Daniel Brenner, *Federal Court Decision: a Roadblock to Advertising on the Information Highway?*, 5 WASHINGTON LEGAL FOUNDATION (LEGAL OPINION LETTER) NO. 12 (June 9, 1995).

196. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

197. See 47 U.S.C. § 227(b)(1) (Supp. V 1993). The TCPA prohibits using an automatic dialing system to deliver a message, regardless of its content. The law similarly precludes sending unsolicited messages to residential phones or simultaneously engaging more than one phone line in a multi-line business system. *Id.*

vision to proscribe unsolicited faxes regardless of their content would give the courts an easier, more consistent test of constitutionality.

B. THE TCPA SHOULD RESTRICT UNSOLICITED ADVERTISING ON THE INTERNET

Recently, advertisers have begun to exploit the Internet¹⁹⁸ by soliciting their products and services in a practice commonly known as "spamming."¹⁹⁹ Some advertisers send unsolicited electronic mail (hereinafter "e-mail") to individuals or large groups of user mailboxes.²⁰⁰ More frequently, advertisers post sales messages in newsgroups, which are Internet "sites" containing articles, messages, and e-mails about a specific topic.²⁰¹ Spammers argue that these legitimate sales tactics are no different than telemarketing calls and mass mailings.²⁰² However, considering the cost of on-line time, information experts agree that the TCPA should be expanded to protect Internet users from receiving unsolicited information.²⁰³ As with faxes, Internet messages are inexpensive and easy to send.²⁰⁴ They are also difficult for the typical on-line user to avoid.²⁰⁵ Individuals encountering junk e-mail must sort through obscurely titled postings to ascertain the value of each message.²⁰⁶ Junk e-mail can be avoided through

198. See *supra* note 12.

199. See John Schwartz, *It's the Spam You Read That's Making Many Interneters Queasy*, THE WASHINGTON POST, Nov. 20, 1995, at F17 (hereinafter "SCHWARTZ"). See L. CANTER AND M. SIEGEL, *HOW TO MAKE A FORTUNE ON THE INFORMATION SUPERHIGHWAY: EVERYONE'S GUERRILLA GUIDE TO MARKETING ON THE INTERNET AND OTHER ON-LINE SERVICES* (HarperCollins 1994).

200. See SCHWARTZ. One advertiser sent an e-mail advertisement to 171,000 people and listed a false return address. Small circulations are uncommon since they are too difficult, expensive, and time consuming. *Id.*

201. *Understand the Culture*, THE MILWAUKEE JOURNAL, Aug. 14, 1994, at D3. Over 8,000 newsgroups exist on the Internet ranging from a bonsai aficionados group to a Somalia discussion group. *Id.*

202. See SCHWARTZ.

203. See Kit R. Roane, *Court Upholds Law Banning Unsolicited Fax Ads*, N.Y. TIMES, Mar. 24, 1995, at B6. See also Grant Parsons, *And Now For a Word From . . .*, THE NEWS & OBSERVER (Raleigh, N.C.), Mar. 30, 1995, at E1 (Unsolicited advertising on the Internet may soon be illegal because of cost-shifting to subscribers if recent court decisions prohibiting unsolicited faxes are any guide.).

204. *Id.*

205. *Id.*

206. See *id.* See also Daniel Ansk, *Postcard from Cyberspace*, L.A. TIMES, Nov.

prescreening or specialized software, but much like fax advertising and telemarketing, this shifts the cost and inconvenience onto the unwilling consumer.²⁰⁷ Although most servers do attempt to pre-screen commercial messages,²⁰⁸ advertisers are increasingly finding their way into user mailboxes and discussion areas. As a result, consumer awareness and unrest toward on-line advertising has grown considerably since 1994.²⁰⁹

In response to this widespread consumer discontent, TCPA subsection (b)(1)(C) should be expanded to restrict unsolicited Internet advertising.²¹⁰ Presently, this provision prohibits sending "unsolicited advertisements" by fax or computer, but only to other facsimile machines.²¹¹ As a result, on-line advertising remains unregulated.²¹² Congress should examine the

1, 1995, at 4 (Some users report receiving up to several hundred unsolicited ad postings each day.).

207. See *Junk Mail Threatens to Clog E-mail Boxes*, SALT LAKE TRIBUNE, Aug. 14, 1995, at C3. Commercial and even free e-mail "filter" programs are available to help users sift through unwanted mail. These programs automatically delete messages which contain names, profanities, or other selected words. *Id.* See also Tim Blangger, *A.M. Magazine Online*, ALLENTOWN MORNING CALL, Aug. 8, 1995, at D1.

208. See Bruce V. Bigelow, *Infuriated Client Sues Over Junk E-mail*, SAN DIEGO UNION-TRIBUNE, Feb. 19, 1995, at H1-2. CompuServe prohibits sending advertising solicitations to its subscribers. However, some Internet servers, like Prodigy Services, Co., permit on-line advertising in an effort to defray subscription costs. Users of these servers have already consented to such solicitations through prior registration and consent forms. *Id.*

Server and individual newsgroup operators attempt to intercept incoming unsolicited ads before they are delivered to the users. However, operators are not on guard 24 hours a day, and ads frequently slip through. See generally Daniel Akst, *Postcard From Cyberspace*, L.A. TIMES, Nov. 1, 1995, at 4.

209. See Tim Blangger, *A.M. Magazine Online*, ALLENTOWN MORNING CALL, Aug. 8, 1995, at D1. In April, 1994, a husband/wife law firm transmitted a message advertising their immigration legal services to thousands of Internet users worldwide. In response, so many recipients flooded their mail server with negative messages that it malfunctioned. Following this now infamous incident, server administrators began creating more structured rules to define acceptable solicitations. However, spamming is still viewed as an unacceptable Internet practice by most users. *Id.* See Stephen McGookin, *FT Review of Business Books*, THE FINANCIAL TIMES, Sept. 27, 1995. See also L. CANTER AND M. SIEGEL, *HOW TO MAKE A FORTUNE ON THE INFORMATION SUPERHIGHWAY: EVERYONE'S GUERRILLA GUIDE TO MARKETING ON THE INTERNET AND OTHER ON-LINE SERVICES* (HarperCollins 1994).

210. See 47 U.S.C. § 227(b)(1)(C) (Supp. V 1993).

211. *Id.*

212. See *id.* Recent attempts to curtail other Internet infractions has had only a limited effect. In November, 1995, the United States Department of Transportation fined Virgin Airways for placing a misleading advertisement on the Internet. See

prevalence and harms of unsolicited on-line messages, and modify current TCPA statutory language to restrict this practice.²¹³ The on-line costs to users caused by such messages are real and can only be curbed through federal intervention.²¹⁴

By no means, however, should all forms of advertising be banned from the Internet.²¹⁵ Only advertising which is unsolicited or “pushed onto the consumer” should be restricted.²¹⁶ Many individuals enjoy browsing through “Internet malls” or classified advertisement groups searching for possible purchases.²¹⁷ However, access to this sort of information is completely under the user’s control.²¹⁸ Like magazine advertisement or junk mail, users can skim messages or ignore them completely.²¹⁹ A slight modification in TCPA language would allow advertisement “links” or “sites” where information can be

also Rhonda Richards, *Virgin Airways Fined \$14,000 for ‘Net Ad*, USA TODAY, Nov. 22, 1995, at B2. Other government agencies continue to seek ways to curb on-line copyright, trademark and pornography infractions. *Id.*

213. See generally Moser v. F.C.C., 46 F.3d 970, 974-75 (9th Cir. 1995), cert. denied, 115 S. Ct. 2615 (1995). Only through Congressional analysis can the threat of unsolicited on-line messages be determined. If Congress finds that both commercial and non-commercial on-line messages equally injure the unwilling recipient, then the current content based language of TCPA subsection (b)(1)(C) should be amended. See *supra* notes 180-97 and related text.

214. See *Edenfield v. Fane*, 507 U.S. 761 (1993). Internet users frequently communicate interstate, suggesting that Congress has the authority to enact such legislation through its commerce power. See also 47 U.S.C. § 227(f)(2) (Supp. V 1993).

215. See Stephen McGookin, *FT Review of Business Books*, THE FINANCIAL TIMES, Sept. 27, 1995 (Some newsgroups are dedicated specifically for commercial advertising and usually include the word “biz” in the newsgroup’s name.). See also Tim Blangger, *A.M. Magazine Online*, ALLENTOWN MORNING CALL, Aug. 8, 1995, at D1.

216. *Id.*

217. *Id.* See Grant Parsons, *And Now For a Word From . . .*, THE NEWS & OBSERVER (Raleigh, N.C.), Mar. 30, 1995, at E1. Many companies maintain on-line “websites” where Internet users can access information about their products. Companies such as Pizza Hut and Federal Express currently operate such websites or homepages where users can purchase goods and services on-line. *Id.*

218. See *id.* (Frequently, this is accomplished by choosing certain options or “clicking” certain buttons on the computer screen to call up messages or other information.).

219. See *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 72 (1983) (The Court struck down a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives. The Court held that a “short, though regular, journey from the mailbox to the trashcan . . . is an acceptable burden, at least as far as the Constitution is concerned.”).

“pulled off,” but would restrict advertisers from using e-mail or newsgroups to push their wares without prior consent.²²⁰

New technological and communication advances emerge each year. As a result, Congress must survey and evaluate the communications field regularly to accommodate for new consumer threats. That way, the Internet and other communication avenues can continue to be regulated in an “efficient, effective, and economic manner” to protect user privacy and prevent advertising cost-shifting.²²¹

VII. CONCLUSION

Although the Ninth Circuit properly upheld the TCPA in both *Destination Ventures* and *Moser*, it failed to thoroughly analyze these provisions under their corresponding commercial speech tests.²²² The court was also unable to consider the challenged statutory subsections in light of current technologies.²²³ As a result, the court was forced to accept cost-shifting statistics and consumer opinion already four years out of date.²²⁴ Congress must amend and continually update the TCPA so that federal courts may address constitutional challenges using current information.

*Michael D. McConathy**

220. See 47 U.S.C. § 227(b)(1)(C) (Supp. V 1993).

221. *Id.* at § 227(c)(2) (Supp. V 1993) (describing how the F.C.C. should prescribe regulations and procedures under the TCPA).

222. See *Destination Ventures, Ltd. v. F.C.C.*, 46 F.3d 54 (9th Cir. 1995); *Moser v. F.C.C.*, 46 F.3d 970 (9th Cir. 1995), *cert. denied*, 115 S. Ct. 2615 (1995).

223. See *Destination Ventures*, 46 F.3d 57.

224. See *id.* See also *Moser*, 46 F.3d 970.

* Golden Gate University School of Law, Class of 1997. I would like to thank Caren Jenkins, Jennifer Wohlstadter, Marilyn Weinstein, and Prof. Michael DeVito for their advice and editorial suggestions. I also thank my family and Debbie Taquechel for their continued understanding and support.