

THE MARKETPLACE VS. THE IDEAS: THE FIRST
AMENDMENT CHALLENGES TO INTERNET COMMERCE

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Congress shall make no law . . . abridging the freedom of speech.
United States Constitution, Amendment I.

Congress shall have Power . . . [t]o regulate Commerce.
United States Constitution, Article I, Section 8.

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I. INTRODUCTION

In the United States, speech and commerce have always operated under conflicting paradigms. At least in theory, it is axiomatic that the government can and should regulate commerce, whereas the government cannot and should not regulate speech. The constitutional provisions addressing each activity say as much: “Congress shall make no law . . . abridging the freedom of speech”¹ while “Congress shall have Power . . . [t]o regulate Commerce.”²

Nonetheless, speech and commerce have a history of co-existence in the United States that includes very few conflicts.³ Indeed, at one time, speech with a commercial purpose was considered beyond the

1. U.S. CONST. amend. I.

2. U.S. CONST. art. I, § 8.

3. See THOMAS L. TEDFORD, *FREEDOM OF SPEECH IN THE UNITED STATES* 24–43 (2d ed. 1993) (tracing the history of U.S. speech regulation). One exception is the Federal Communications Commission’s traditional regulation of broadcast entities, which at times has included the right to regulate the content of broadcasts due to the scarcity of broadcast spectrum. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding the imposition of an equal access requirement on broadcasters). As explained below, this “scarcity” rationale for regulation of speech has been firmly rejected with regard to the Internet (and, for that matter, nearly all other communicative media), see *Reno v. ACLU*, 117 S. Ct. 2329, 2344 (1997), and even its application to broadcasting is being heavily questioned. See, e.g., Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 38–39 (1995) (discussing the increasing criticism of the “scarcity” rationale applied to broadcast communications).

scope of the First Amendment, thereby rejecting any notion that regulation of commerce could somehow violate free speech rights.⁴ While this belief has eroded over the years,⁵ it remains generally accepted that the First Amendment does not prevent the government from imposing or enforcing regulations deemed necessary to commerce.⁶ For example, the First Amendment cannot be employed as a defense to violations of FTC regulations against false or misleading advertising,⁷ copyright infringement,⁸ or antitrust law violations.⁹ Only where the attempt to regulate commercial speech unreasonably interferes with the ability of consumers to receive useful and accurate information regarding a legal commercial activity is the regulation overturned on First Amendment grounds.¹⁰ Otherwise, the First Amendment has had little effect on the U.S. government's ability to regulate commercial activity.

Commercial activity on the Internet creates a new and unprecedented potential for the First Amendment to impact commercial regulation. While the idea of making purchases over the Internet was a mere novelty a few years ago, e-commerce¹¹ transactions in the United

4. See *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (holding that speech with a commercial purpose could be regulated without violating the First Amendment).

5. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (affirming the First Amendment protection of commercial speech).

6. See *Glickman v. Wileman Bros.*, 117 S. Ct. 2130 (1997) (holding that economic regulation is presumed valid despite conflict with First Amendment).

7. See, e.g., *American Med. Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980) (prohibition of anti-competitive speech activities of professional association deemed consistent with the First Amendment), *aff'd per curiam by an equally divided Court*, 455 U.S. 676 (1982); *E.F. Drew & Co. v. FTC*, 235 F.2d 735, 740 (2d Cir. 1956) ("Congress can prohibit or control misleading advertising . . . without deprivation of First Amendment rights."). See also Interpretation of Rules and Guides for Electronic Media; Request for Comment, 63 Fed. Reg. 24,996 (May 6, 1998)[hereinafter FTC Notice] (proposing a policy statement on the application of the FTC regulations to commercial activity on the Internet).

8. See, e.g., *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1985) (holding that the enforcement of copyright law is entirely compatible with the First Amendment).

9. See, e.g., *Associated Press v. United States*, 326 U.S. 1 (1945) (holding that the First Amendment does not provide immunity from prosecution for antitrust violations).

10. See, e.g., *In re R.M.J.*, 455 U.S. 191 (1982) (restriction on the dissemination of truthful and accurate information regarding a lawful activity deemed unconstitutional); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748 (1976) (same).

11. For purposes of this Article, the terms Internet commerce and E-commerce are used interchangeably to refer to the range of electronic transactions encompassed in the use of the term "electronic commerce" by the U.S. federal government in discussing commercial regulation of the Internet. See U.S. DEP'T OF COMMERCE, THE EMERGING

States now total more than \$6 billion annually.¹² Just during the most recent holiday shopping season, e-commerce purchases totaled more \$2.3 billion, more than double the amount of holiday sales from the year before.¹³ This growth is expected to continue at an exponential rate, with total e-commerce sales expected to reach \$78 billion annually by the year 2003.¹⁴ As one court has recently concluded, “[t]here is no doubt that growth [of e-commerce] is explosive.”¹⁵

With this increased activity has come equally increased legislative and regulatory scrutiny. Indeed, the federal government is furiously grappling with how traditional commercial regulation should apply to the Internet,¹⁶ while at the same time formulating policies to maximize the commercial potential of the Internet.¹⁷ While initially these policy approaches have advocated a limited government role in commercial regulation of the Internet,¹⁸ a steady and increasing flow of legislative proposals for more detailed management of e-commerce is also emerging.¹⁹ In the last year, state and federal legislatures have enacted

DIGITAL ECONOMY (1998), available at <<http://www.ecommerce.gov/emerging.htm>> [hereinafter THE EMERGING DIGITAL ECONOMY].

12. See Association for Interactive Media, Research Update Service, Nov. 13, 1998, ¶ 1 (on file with the *Harvard Journal of Law & Technology*).

13. See *id.* at ¶ 4.

14. See *id.* at ¶ 1.

15. *ACLU v. Reno* (“*ACLU v. Reno II*”), 31 F. Supp. 2d 473, 486 (E.D. Pa. 1999) (citing expert testimony that total revenues from the Web will reach 1.4 to 3 trillion by 2003).

16. See, e.g., FEDERAL TRADE COMMISSION, PRIVACY ONLINE: A REPORT TO CONGRESS at iv (1998), available at <<http://www.ftc.gov/reports/privacy3/index.htm>> [hereinafter FTC PRIVACY REPORT] (“The development of the online marketplace is at a critical juncture.”); FTC Notice, *supra* note 7 (proposing a policy statement on the application of the FTC regulations to commercial activity on the Internet).

17. See, e.g., President William J. Clinton & Vice President Albert Gore, Jr., *A Framework for Global Electronic Commerce* (July 1, 1997) <<http://www.ecommerce.gov/framework.htm>> [hereinafter *E-commerce White Paper*] (outlining a proposal for government action aimed at facilitating commercial activity on the Internet); *Burns Hails Explosion of E-Commerce: Introducing Bills to Ensure Future of E-Commerce as Part of Marketplace* (Mar. 23, 1999) <<http://www.senate.gov/~burns/p990323a.htm>> (press release by Senator Conrad Burns outlining legislative proposals to foster the development of e-commerce).

18. See *E-commerce White Paper*, *supra* note 17, at “Principles” (proposing a “hands off” approach to Internet regulation, which simply oversees and encourages the self-regulatory efforts of private industry).

19. See, e.g., Senator Conrad Burns’ *Digital Dozen: An Agenda for 1999 and Beyond* (Jan. 29, 1999) <http://www.senate.gov/~burns/digital_dozen.htm> (proposing 12 pieces of legislation designed to address e-commerce development); Courtney Macavinta, *Virginia Proposes Net Policy Act*, CNETNEWS.COM (Dec. 2, 1998) <<http://news.cnet.com/news/0-1005-200-335925.html>>.

the first wave of legislation directly aimed at regulating commercial activity on the Internet. These include sweeping restrictions on commercial web site content,²⁰ standards for internet advertising practices,²¹ a prohibition on the taxation of e-commerce,²² and detailed measures designed to prevent the infringement of copyrighted material placed on the Internet.²³ However, these regulatory measures are minor in comparison to the legislative and regulatory proposals aimed at internet commerce that are currently being considered for enactment in the coming year.²⁴

However, the brief history of internet regulation demonstrates that any such regulatory efforts will be faced with uncommon resistance. While there will be many sources of resistance, past cases involving the Internet argue strongly that the primary source of resistance may be the First Amendment.²⁵ Due to the unique attributes of the Internet as a

20. See Child Online Protection Act, Pub. L. No. 105-277, §§ 1401–1406, 112 Stat. 2681 (1998) (to be codified at 47 U.S.C. §§ 230–231).

21. See *Virginia Lawmakers Ban Spam*, CNETNEWS.COM (Feb. 23, 1999) <<http://news.cnet.com/news/0-1005-200-339117.html>> (announcing passage of Virginia criminal law restricting unsolicited e-mail advertisements); Courtney Macavinta, *California Enacts Antispam Laws*, CNETNEWS.COM (Sept. 28, 1998) <<http://news.cnet.com/news/0-1005-200-333627.html>> (announcing passage of California penal and business code amendments imposing labeling and other requirements on e-mail advertisers).

22. See Internet Tax Freedom Act, Pub. L. No. 105-277 §§ 1100–1104, 112 Stat. 2681 (1998) (to be codified at 47 U.S.C. § 151).

23. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

24. See Association for Interactive Media, *Bills and Regulations Affecting the Interactive Industry* (visited May 2, 1999) <http://www.interactivehq.org/html/bills__regulations.htm> (detailing the over 40 bills introduced in Congress to address issues related to E-commerce); see also *Senator to Up SEC's Fraud-Fighting Muscle*, CNET NEWS.COM (Mar. 23, 1999) <<http://news.cnet.com/news/0-1005-200-340275.html>> (describing Senate plans to introduce legislation designed to strengthen SEC ability to regulate securities trading on the Internet); Courtney Macavinta, *Leading Senator to Revive Anti-Net Gambling Bill*, CNETNEWS.COM (Mar. 22, 1999) <<http://news.cnet.com/news/0-1005-200-340203.html>> (announcing plans of Sen. Jon Kyl to introduce legislation aimed at regulating commercial gaming over the Internet); Courtney Macavinta, *Gore Pushes New Net Privacy Laws*, CNETNEWS.COM (July 31, 1998) <<http://news.cnet.com/news/0-1005-200-331786.html>> (discussing ongoing efforts to pass legislation aimed at regulating the collection and use of consumer information over the Internet).

25. Other factors also contribute to the likelihood of conflict between the First Amendment and commercial regulation of the Internet. One is the nature of commercial activity on the World Wide Web. In most instances, commercial web sites, like broadcast stations, use noncommercial content to attract users to their site. Thus, the content on commercial web sites will include not just advertisements, but also informative material not necessarily aimed at selling a product. This practice blurs the

vehicle and venue for expression, the exchange of ideas and information over the Internet operates in a manner that rejects the tradition of allowing for the commercial regulation of speech activities.²⁶ This heightened sensitivity to First Amendment concerns affected by commercial regulation is a product of the Internet's defining structural, operational and cultural characteristics, characteristics that make any restriction on the flow of information unacceptable.

The Internet's resistance to controls on the free exchange of information has the potential to greatly impact government policy designed to facilitate internet commerce. To date, efforts to develop regulatory policy to address commercial activity on the Internet have relied on the traditional lack of conflict between commercial and free speech interests by rarely addressing First Amendment concerns.²⁷

"commercial speech" distinction courts have traditionally used to allow the regulation of commerce without interfering with core First Amendment rights. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980) (preserving the traditional practice of affording purely commercial speech lesser First Amendment protection). In addition, the entire practice of affording commercial speech less protection than other forms of speech has continued to erode, most notably in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). Thus, the impact of commercial regulation on speech may be less acceptable than it has been in the past. A final factor may be the recent resurgence of the "public forum" doctrine in First Amendment jurisprudence. *See, e.g., Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992). Under the "public forum" doctrine, private actors may be held liable for First Amendment violations to the same extent as the government. *See Marsh v. Alabama*, 326 U.S. 501 (1946). It appears that the Internet may be a medium to which the "public forum" doctrine applies. *See, e.g., David J. Goldstone, A Funny Thing Happened on the Way to the Cyber Forum: Public vs. Private in Cyberspace Speech*, 69 U. COLO. L. REV. 1 (1998) (arguing that the public forum doctrine has particularly relevant application to the Internet). This would appear especially true with regard to national and international Internet governance bodies whose actions could easily be seen as usurping the role of government. *See Marsh, supra*; *see also* Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475 (1997) (reviewing the various private entities attempting to regulate the use of cyberspace). Indeed, the U.S. government has advocated such private self-regulatory bodies taking an extremely active role in determining technical and regulatory standards for e-commerce. *See E-commerce White Paper, supra* note 17. Through application of the public forum doctrine, the regulatory activities of these bodies would have to be in compliance with the First Amendment.

26. *See Reno v. ACLU*, 117 S. Ct. 2329, 2344 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].").

27. *See E-commerce White Paper, supra* note 17, at "Issues" (making only one passing reference to the First Amendment in respect to the regulation of consumer privacy and not listing the First Amendment among the "legal issues" affecting

Indeed, federal policy regarding the development of the Internet has been criticized for its "complete absence of the First Amendment."²⁸ This failure to properly consider free speech ramifications when forming internet policy is reflected by the numerous instances in which internet legislation, addressing both commercial and social issues, has been later ruled invalid by the courts on First Amendment grounds.²⁹ As a result, a consistent government policy to address the regulatory issues presented by internet commerce has yet to develop.

This paper argues that if future e-commerce policy is to be successful, such policy should, and perhaps must, be bound and guided by the internet's First Amendment parameters. Part II examines the First Amendment theory being followed with respect to the Internet. Part III discusses why this theory is a product of the Internet's defining characteristics, making the theory particularly useful in understanding and evaluating the effect of different attempts to regulate internet activity. Part IV demonstrates how recent court cases involving the Internet can be best explained through an understanding of this First Amendment theory. Part V highlights potential conflicts between the operation of this First Amendment theory and the identified areas of regulatory concern for e-commerce. Finally, Part VI attempts to show how an understanding of the First Amendment theory being followed

e-commerce); The National Information Infrastructure: Agenda For Action, 58 Fed. Reg. 49,025 (1993) (outlining basic goals for information infrastructure policy without making any reference to the First Amendment); FTC Notice, *supra* note 7 (requesting comment on issues surrounding the application of FTC regulations to e-commerce without addressing potential First Amendment concerns).

28. Cate, *supra* note 3, at 9.

29. See *Reno v. ACLU*, 117 S. Ct. 2329 (1997) (overturning law criminalizing the knowing transmission of indecent content over the Internet); see also *ACLU v. Reno II*, 31 F. Supp. 2d 473 (1999) (granting preliminary injunction against enforcement of Child Online Protection Act); *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998) (overturning law requiring the filtering of Internet content in public libraries); *ACLU v. Johnson*, 4 F. Supp. 2d 1029 (D.N.M. 1998) (granting preliminary injunction against enforcement of state law banning communication of indecent materials to minors); *ACLU v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997) (granting preliminary injunction against state law prohibiting Internet transmissions which falsely identify sender); *Bernstein v. United States Dep't of State*, 974 F. Supp. 1288 (N.D. Cal. 1997) (finding licensing requirement for export of encryption software unconstitutional). This struggle is played out in other nations as well, as proposals to regulate the Internet consistently meet resistance due to free speech and other concerns. See generally Amy Knoll, Comment, *Any Which Way But Loose: Nations Regulate the Internet*, 4 TUL. J. INT'L & COMP. L. 275 (1996) (reviewing various proposals to regulate the flow of information over the Internet both in the United States and abroad).

with respect to the Internet can help policymakers predict and resolve issues raised by e-commerce in a more effective manner.

II. INTERNET AND THE FIRST AMENDMENT: THE MARKETPLACE OF IDEAS

In 1997, the United States Supreme Court decided *Reno v. ACLU*,³⁰ the landmark decision that established that speech over the Internet was entitled to full protection under the First Amendment.³¹ The lingering question for all interested in the future of the Internet was to what extent could the government restrict or regulate the exchange of information over the Internet. In many people's eyes, *Reno v. ACLU* answered this question by affording the Internet the level of protection traditionally given to newspapers;³² thus, *Reno v. ACLU* settled the controversy over how the Internet would be treated from a First Amendment standpoint.³³

In reality, *Reno v. ACLU* was a relatively narrow decision and did little to establish the First Amendment parameters of the Internet. That the statute challenged in *Reno v. ACLU*, the Communications Decency Act ("CDA"), was a normally impermissible content-based regulation of protected speech activities was hardly addressed. The only decisive question presented in *Reno v. ACLU* was whether the Internet was one of those few mediums of communication to which the First Amendment does not apply with full force.³⁴ Once it was determined that the Internet was not one of these extraordinary exceptions to the normal application of the First Amendment, the Supreme Court's finding the CDA unconstitutional was a relatively simple matter.³⁵ Indeed, the CDA was drafted so broadly that it is highly unlikely it could have survived even the low level of First Amendment scrutiny applied to other, less protected media.³⁶

30. 117 S. Ct. 2329 (1997).

31. See *id.* at 2344 ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].").

32. See, e.g., Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact On the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1, 49 (1998).

33. See, e.g., *Supreme Court Rules: Cyberspace Will Be Free* (June 26, 1997) <<http://www.aclu.org/news/n062697a.html>> (ACLU press release describing the conclusory reactions of certain plaintiffs to the *Reno v. ACLU* decision).

34. See *Reno v. ACLU*, 117 S. Ct. at 2344.

35. See *id.* at 2348.

36. See *id.* at 2347 ("The breadth of the CDA's coverage is wholly unprecedented.").

Obscured by *Reno v. ACLU*, however, have been the significant lower court decisions that have served to establish the First Amendment principles applicable to the Internet in much greater detail. These cases have dealt with First Amendment challenges to less obviously intrusive measures and have therefore more fully analyzed the First Amendment characteristics of the Internet. A review of these cases reveals that the First Amendment is operating on the Internet in a far more complex manner than that indicated by *Reno v. ACLU*. Specifically, courts considering the First Amendment characteristics of the Internet have adhered to a “marketplace of ideas” theory of First Amendment jurisprudence, a theory which has a much broader reach than that applied to any other media.

A. The Marketplace of Ideas Doctrine

[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market³⁷

With this quote in *Abrams v. United States*, Justice Holmes established what has now come to be known as the “marketplace of ideas” theory of First Amendment jurisprudence (the “Marketplace Theory”). As Justice Holmes’ language indicates, the foundation of the Marketplace Theory is that the importance of protecting freedom of speech is to foster the “marketplace of ideas.” Analogous to a competitive commercial market, the “marketplace of ideas” envisions an unrestricted and robust exchange of views and opinions whereby such views and opinions may be available for each person to either accept or reject on their merits. In this manner, all views and opinions can be fairly tested and faulty or ill-conceived notions will be challenged and exposed, while truth and wisdom is revealed. Thus, the Marketplace Theory argues that, by allowing the free exchange of all ideas, even those the majority of persons are inclined to despise, the welfare of society as a whole is advanced. In the context of constitutional jurisprudence, advocates of the Marketplace Theory have therefore asserted (though, as explained below, with limited success) that the primary purpose of the First Amendment is and should be to establish

37. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

and preserve the marketplace of ideas. Thus, at a minimum, the Marketplace Theory dictates that “the judiciary must act to prevent the government from interfering with the growth of the marketplace of ideas”³⁸ by protecting and even advancing the free and open exchange of information.

It is this focus on the “exchange” of ideas and information that distinguishes the Marketplace Theory in the realm of First Amendment doctrine. Other more widely accepted First Amendment theories base the level of First Amendment protection on either 1) the category of speech in question (i.e., certain speech, such as political speech of strictly verbal nature, is fully protected, while other categories of speech, such as obscenity or “fighting words,” may be restricted or prohibited) or 2) the degree and character of countervailing interests (i.e., nearly all speech can be justifiably limited if the interest in limiting speech is sufficiently compelling).³⁹ However, the Marketplace Theory has a constant and overarching goal that is entirely separate from the content or character of the speech involved: that of facilitating and maximizing participation in the public and private dialogue. As such, the Marketplace Theory resists restrictions on speech in a distinct and uncommonly sensitive manner by essentially concluding that *any* restriction that results in less speech, or, more importantly, a less active *exchange* of speech, must be disfavored. This sensitivity to speech restrictions is further heightened by the fact that the Marketplace Theory can justify virtual “speech anarchy” as serving a greater good because the Marketplace Theory assumes “that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems.”⁴⁰ The Marketplace Theory therefore resists all forms of speech restrictions to an extent beyond that of any other First Amendment doctrine.

For these reasons, the Marketplace Theory has long been viewed as an idealistic vision of the First Amendment, reflecting the core

38. Stephen Jacques, *Reno v. ACLU: Insulating the Internet, The First Amendment, and The Marketplace of Ideas*, 46 AM. U.L. REV. 1945, 1951 (1997) (discussing the theoretical underpinnings of the First Amendment). See also *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (“At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas . . .”).

39. See, e.g., Jerome A. Barron, *The Electronic Media and the Flight From First Amendment Doctrine: Justice Breyer’s New Balancing Approach*, 31 U. MICH. J.L. REFORM 817 (1998) (discussing the various models which have dominated First Amendment jurisprudence and noting the limited influence of the Marketplace Theory).

40. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (1984).

democratic virtues that the First Amendment was designed to serve.⁴¹ As the Supreme Court has stated: “[T]he First Amendment was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes.”⁴² John Locke and John Stuart Mill similarly believed that an open exchange of ideas was critical to a free society, not only because freedom of thought, discussion, and inquiry were goods in their own right, but also because the public dialogue encouraged thereby would reap the greatest benefits for society.⁴³ Thus, governments should refrain from restricting the exchange of ideas and instead facilitate the widest dialogue possible in order to allow truth to be revealed. Perhaps the best articulation of this tenet is one of its first, by the poet John Milton in the following passage from *Areopagitica* in 1644:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worst, in a free and open encounter?⁴⁴

However, like many visions of how the world should operate, the idealistic vision of the Marketplace Theory has rarely manifested itself in the more practical world of First Amendment jurisprudence. Some rare exceptions have been the few instances in which courts have exhibited an adherence to the Marketplace Theory by invalidating government action that, while not directly affecting protected speech, nonetheless affects the exchange of information.⁴⁵ Even more rare have been the few cases in which courts have *upheld* government actions designed to promote the overall marketplace of ideas, even though the

41. *See id.* at 2–4 (noting that the marketplace doctrine is ideally suited to the goals of a free society).

42. *Roth v. United States*, 354 U.S. 476, 484 (1957).

43. *See* T. BARRON CARTER ET AL., *THE FIRST AMENDMENT AND THE FOURTH ESTATE* 35–37 (6th Ed. 1994).

44. John Milton, *Areopagitica — A Speech for the Liberty of Unlicensed Printing* (1644).

45. *See, e.g., Smith v. California*, 361 U.S. 147 (1959) (striking down a law which made bookstore owners absolutely liable for keeping obscene materials in their bookstore; while obscene speech was not protected by the First Amendment, the restriction was nonetheless unconstitutional due to its deleterious effect on the exchange of ideas).

speech interests of others may be sacrificed in the process.⁴⁶ However, despite these examples of the Marketplace Theory's influence on First Amendment doctrine, the Supreme Court has never taken the position that it must maximize the free exchange of information.⁴⁷ Rather, the modern Supreme Court cases dealing with First Amendment issues have consistently recognized that restrictions on the free flow of speech may be justified by countervailing concerns.⁴⁸ Under this approach, speech interests invariably are compromised in favor of other public interests, such as national security, child welfare,⁴⁹ and the flow of commerce.⁵⁰ The increasingly frequent reliance on this "balancing approach" in evaluating nearly all speech restrictions⁵¹ runs counter to the priority placed on the flow of information under the Marketplace Theory and exemplifies the limited influence the Marketplace Theory has had in recent years.

The court's failure to adhere to the Marketplace Theory with any consistency also reflects another, more permanent, problem: market failure. In the real world, the resources that enable participation in the marketplace of ideas are not distributed equally. Certain people are able to speak more than others; certain people are able to speak more effectively than others; certain people are able to reach more people than others; and certain people are prevented from speaking at all. Such market failures have been particularly common within modern

46. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (holding that cable must-carry rules were consistent with the First Amendment, in part, because they foster greater participation in the marketplace of ideas by broadcasting interests); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding a requirement that broadcast stations assure fair coverage of each side on a policy issue and provide free reply time in response to personal attacks and political editorials); *Associated Press v. United States*, 326 U.S. 1 (1945) (upholding government antitrust action against a press organization; even though speech interests of the organization were impacted, the action was consistent with the First Amendment in that it promoted a greater diversity of voices in the marketplace).

47. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749, 758 (1985) (noting that the Court has long recognized that "not all speech is of equal First Amendment importance"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 249 (1974) (specifically rejecting the notion that a greater exchange of ideas is mandated by the First Amendment).

48. See, e.g., Barron, *supra* note 39; Bruce J. Ennis, Jr., *The Internet, Cable and The First Amendment Implications of Reno v. ACLU/ALA and Turner v. FCC*, 498 PLI/Pat. 991 (1997).

49. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (recognizing the protection of children as outweighing the interest in broadcasting indecent language during daytime hours).

50. See, e.g., *Glickman v. Wileman Bros.*, 117 S. Ct. 2130 (1997).

51. See, e.g., Barron, *supra* note 39; Ennis, *supra* note 48.

communications technologies, where the Supreme Court has recognized a variety of inequities among speakers.⁵² As the Supreme Court has stated:

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.⁵³

In such an atmosphere, adopting the Marketplace Theory, whereby we depend solely on the free exchange of ideas to elucidate truth, would probably be ill advised.⁵⁴ Thus, no medium — not even print — has been afforded the strict protection from regulation that the Marketplace Theory provides.

B. The Internet and the Rise of Marketplace Theory Rhetoric

The Internet has brought about a renaissance for the Marketplace Theory in recent years. Noting that the marketplace inequities that prevent adherence to the Marketplace Theory in other contexts are not present on the Internet, courts have demonstrated an almost uncontrolled attraction to the ideals the Marketplace Theory embodies.

This trend began with, and remains best exemplified by, District Judge Dalzell's lower court opinion in *ACLU v. Reno* ("*ACLU v. Reno I*").⁵⁵ As one of the first judges asked to directly assess the First Amendment status of the Internet, Judge Dalzell made the groundbreaking determination that the Marketplace Theory was the appropriate framework for analyzing the First Amendment status of the Internet.⁵⁶ Adhering to the "medium-specific" approach to analyzing the

52. See, e.g., *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (acknowledging inequities in access to mass media); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (recognizing market failure due to broadcast scarcity).

53. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 249 (1974).

54. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (adopting a balancing approach based upon perceived inequities among speakers operating in cable television systems).

55. 929 F. Supp. 824 (E.D. Pa. 1996).

56. Indeed, to this author's knowledge, Judge Dalzell's opinion represents the first time a court has advocated strict adherence to the Marketplace Theory with respect to a particular medium.

First Amendment status of communications technology,⁵⁷ Judge Dalzell determined that internet communication removed the communicative inequities that traditionally preclude adherence to the Marketplace Theory. Focusing on these democratizing characteristics of internet communication, Judge Dalzell declared that the Internet achieved the Marketplace Theory's goal of creating an unfettered marketplace of ideas, stating that "[i]t is no exaggeration that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country — and indeed the world — has yet seen."⁵⁸ Therefore, any "decrease in the number of speakers, speech fora, and permissible topics will diminish the worldwide dialogue that is the strength and signal achievement of this medium."⁵⁹ On the Internet, such a reduction in the "free trade of ideas" would be a "constitutionally intolerable result."⁶⁰ As a result, the Internet as a medium of communications demanded the First Amendment protection provided by the Marketplace Theory.⁶¹

More recently, a second *ACLU v. Reno*⁶² opinion, this time by Judge Reed considering the constitutionality of the Child On-line Protection Act ("COPA"), again relied heavily on the Marketplace Theory to frame the constitutional analysis of a restriction on speech over the Internet. In doing so, Judge Reed seemingly (and, as explained above, questionably)⁶³ advocates the Marketplace Theory as the historically favored approach to First Amendment analysis. As Judge Reed states:

Although there is no complete consensus on the issue, most courts and commentators theorize that the importance of protecting freedom of speech is to foster the marketplace of ideas. If speech, even unconventional speech that some find lacking in substance or offensive, is allowed to compete unrestricted in the marketplace of ideas, truth will be discovered.⁶⁴

Like Judge Dalzell before him, Judge Reed then goes on to conclude

57. See 929 F. Supp. at 873.

58. *Id.* at 881.

59. *Id.* at 879.

60. *Id.* at 881.

61. See *id.*

62. 31 F. Supp. 2d 473 (E.D. Pa. 1999).

63. See *supra* text accompanying notes 45–54 (discussing the highly limited adherence to the Marketplace Theory exhibited by past First Amendment jurisprudence).

64. *ACLU v. Reno II*, 31 F. Supp. 2d at 476.

that the Internet is a medium wherein the vision of the Marketplace Theory is particularly realized:

In the medium of cyberspace . . . anyone can build a soap box out of web pages and speak her mind in the virtual village green to an audience larger and more diverse than any the Framers could have imagined. In many respects, unconventional messages compete equally with the speech of mainstream speakers in the marketplace of ideas that is the Internet, certainly more than in most other media.⁶⁵

While essentially dicta,⁶⁶ both Judge Dalzell's and Judge Reed's statements regarding the Marketplace Theory's special applicability to internet speech restrictions are nonetheless groundbreaking in that never before in the history of First Amendment jurisprudence has adherence to Marketplace Theory been advocated to such an extent. For the first time, it is proposed that an entire medium, the Internet, may warrant the unique and unprecedented protection of open and free dialogue dictated by Marketplace Theory. As explained in the next section, Judge Dalzell's and Judge Reed's opinions are well founded.

III. THE INTERNET AS A MANIFESTATION OF THE MARKETPLACE THEORY

A critical aspect of both Judge Dalzell's and Judge Reed's reliance on Marketplace Theory with respect to the Internet is that neither judge did so out of an idealistic desire to re-inject the democratic virtues of Marketplace Theory into modern First Amendment analysis. Indeed, Judge Reed openly disdained the fact that he felt compelled to permit the unfettered exchange of ideas demanded by the Marketplace Theory.⁶⁷

65. *Id.*

66. In neither *ACLU v. Reno I* nor *ACLU v. Reno II* did the result depend upon the heightened protection of information exchange that the Marketplace Theory provides. See *ACLU v. Reno I*, 929 F. Supp. at 857, 865 (Judges Sloviter and Buckwalter overturning the CDA pursuant to the more traditional analysis of "balancing" (Sloviter) and "vagueness" (Buckwalter)); *ACLU v. Reno II* at 492-97 (employing a traditional balancing test to determine the constitutionality of the COPA). Indeed, although citing Judge Dalzell's analysis favorably, the Supreme Court affirmed the *ACLU v. Reno I* decision through the application of traditional overbreadth analysis. See *Reno v. ACLU*, 117 S. Ct. 2329, 2347-48 (1997).

67. See *ACLU v. Reno II*, 31 F. Supp. 2d at 498 (expressing distaste for the result of his decision to enjoin enforcement of the COPA).

Rather, as Judge Dalzell revealed, reliance on Marketplace Theory was a necessary outgrowth of an assessment of the characteristics of the Internet as a medium.⁶⁸ As Judge Dalzell concluded, the particular attributes of speech over the Internet commanded the heightened level of First Amendment protection the Marketplace Theory affords.⁶⁹

What Judge Dalzell's analysis reflects is that the Internet, both as a medium of expression and as a vehicle for the exchange of information, is fundamentally bound to the Marketplace Theory. Specifically, as explained by both Judge Dalzell and Judge Reed, the Internet manifests a marketplace of ideas in the manner by which the Internet allows speech to be conducted. While these speech characteristics of the Internet have already been discussed above, they can be briefly summarized as follows:

- **Maximum Participation:**⁷⁰ Unlike any other mass communications technology, the Internet allows anyone with a computer to participate in the global exchange of information, either as a listener or a speaker. This participation can take place in real time, from anywhere around the globe.
- **Maximum Diversity:**⁷¹ Because of the low barriers to entry to the Internet, "at any given time 'tens of thousands of users are engaging in conversations on a huge range of subjects.' It is 'no exaggeration to conclude that the content on the Internet is as diverse as human thought.'"⁷² This diversity is further facilitated by the Internet's capacity to allow a seemingly unlimited amount of communications of an ever-increasing variety, including print, audio, and video.
- **Parity Among Participants:** No other form of communication,

68. See *ACLU v. Reno I*, 929 F. Supp. at 873 (following the "medium-specific" approach to First Amendment analysis requiring that the particular characteristics of a medium be the guideposts to determining the appropriate level of First Amendment protection.).

69. See *id.* at 881 (concluding that, as a result of the Internet's characteristics, any restriction on the free flow of information would be a "constitutionally intolerable result").

70. See *id.* at 877 ("the Internet presents very low barriers to entry. . . . [T]hese barriers to entry are identical for both speakers and listeners.").

71. See *id.* ("as a result of . . . low barriers, astoundingly diverse content is available on the Internet").

72. *Reno v. ACLU*, 117 S. Ct. 2329, 2335 (1997) (citing *ACLU v. Reno I*, 929 F. Supp. at 835, 842).

neither print nor the spoken word, allows the same level of speaker parity as the Internet. All information sent over the Internet is delivered in the same manner and with the same dispatch, regardless of the content or the speaker. Moreover, “[n]o single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked.”⁷³ Thus, it is difficult, if not impossible, for one speaker to exercise controls over the speech of another. As one policy analyst has observed, “[t]he world of the [Internet] is a true democracy: your influence is measured not by wealth or position, bu[t] by how well you write and reason.”⁷⁴ As a result, all ideas have an unprecedented opportunity to be heard and considered.

By enabling a world-wide dialogue with these characteristics, the Internet allows for the free exchange of ideas that the Marketplace Theory envisions.

However, this synergy between the Internet and the Marketplace Theory goes beyond the mere operational aspects of speech over the Internet. Rather, these speech characteristics are a product of the far more immutable structural, functional and cultural characteristics of the Internet. An examination of these fundamental aspects reveals that the Internet, in nearly every respect, is designed to achieve the same goal as that sought by the Marketplace Theory — maximizing the exchange of information.

A. Structural Characteristics

The Internet is physically structured to continually maximize the ability to exchange information. The Internet consists of a global matrix of interconnected computers that use the Internet Protocol (“IP”) to communicate with each other.⁷⁵ Beyond this basic definition, one prominent policymaker has summarized the Internet as being defined by three basic network characteristics. First, the Internet is a distributed network.⁷⁶ “A distributed network has no one central repository of

73. *ACLU v. Reno I*, 929 F. Supp. at 838.

74. MIKE GODWIN, *CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE* 9 (1998).

75. For a more detailed description of the Internet, its structure, and its history, see KEVIN WERBACH, *FEDERAL COMMUNICATIONS COMMISSION, DIGITAL TORNADO: THE INTERNET AND TELECOMMUNICATIONS POLICY 10–25* (1997), available at <http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp29pdf.html>.

76. *See id.* at 17.

information or control, but is comprised of an interconnected web of 'host' computers, each of which can be accessed from virtually any point on the network."⁷⁷ Unlike centralized networks, there is no central location through which information distributed over the Internet must pass. Instead, all computers on the Internet are connected to each other such that information from a host computer in another state or country can be obtained just as easily as from across the street. Thus, there is no single path through which information must travel in order to reach its destination; in the event one part of the network is shut down or blocked, information will be rerouted through another part of the Internet in order to reach its destination.

Second, the Internet is fully interoperable.⁷⁸ In other words, the Internet does not depend on any specific type of physical facility or technology. Rather, any medium capable of transmitting information in the IP format, whether it be copper wire, radio waves, fiber optic lines, or coaxial cable, can become attached to and part of the Internet. Moreover, the IP protocol can support any form of digital information, including video, audio, and text. Thus, any person with a computer capable of supporting the IP protocol can connect to the Internet from any location on the network and transmit nearly any type of information he or she chooses.

Third, the Internet is a packet-switched network.⁷⁹ Packet-switched networks transfer data by splitting it up into discrete, easy-to-deliver, segments which allow the data to be split up and rerouted in accordance with the most efficient use of the network. Thus, even two segments of information from the same e-mail message may take different paths over the Internet to arrive at its destination.

These three operational characteristics of the Internet serve one common purpose: to maximize the flow of information. As a distributed network, the Internet does not depend on any single portion of the network in order for information to reach its destination. As a result, "[n]o organization or entity controls the Internet; in fact, the chaotic, random structure of the Internet precludes any exercise of such control."⁸⁰ This fact alone "may doom any attempt to regulate content."⁸¹

77. *Id.* at 17.

78. *See id.*

79. *See id.*

80. *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 164 (S.D.N.Y. 1997). *See also* *ACLU v. Reno I*, 929 F. Supp. 824, 838 (E.D. Pa. 1996) ("No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked.").

81. WERBACH, *supra* note 75, at 44.

As an interoperable network, it is impossible to limit the size and reach of the Internet. "The Internet has no territorial boundaries. To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps 'no there there,' the 'there' is every where there is Internet access."⁸² As a result, any information placed on the Internet is instantly accessible to all others on the Internet. It is therefore all but impossible to prevent someone from placing or accessing information on the Internet.

Finally, as a packet-switched network, the Internet is able to facilitate the maximum exchange of information at any given time. If one portion of the network is congested, the Internet simply reroutes that information through another path of the Internet. The more computers connect to the Internet, the more paths there are to carry information. This characteristic also ensures that no particular path over the Internet will become blocked due to heavy traffic, thereby ensuring that the Internet remains accessible to the maximum number of participants.

These characteristics demonstrate how the Internet has been structured so as to resist any attempt to prevent or limit the flow of communication. As one commentator has noted, "[t]he Internet was designed to survive a nuclear war . . . ; if one route had been destroyed, the message had to be able to 'react' and find a new path to its intended destination."⁸³ Thus, any attempts to control or regulate the flow of information over the Internet will be extremely difficult, if not futile. For this reason, at least one court has indicated that any regulation of the Internet that affects speech interests may be indefensible.⁸⁴ At the very least, the structural characteristics of the Internet demand that the flow of information be protected in the manner required by the Marketplace Theory.

B. Functional Characteristics

Two functional attributes of the Internet bind the Internet to the Marketplace Theory. The first is the digitization of information. All information on the Internet, regardless of its content or format, is transferred digitally in the form of bits. While information is traveling

82. *Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997). See also *ALA v. Pataki*, 969 F. Supp. at 164 ("The nature of the Internet makes it very difficult, if not impossible, to determine its size at any given moment.").

83. See Marc D. Goodman, *Why the Police Don't Care About Computer Crime*, 10 HARV. J.L. & TECH. 465, 478-82 (1997).

84. See *ALA v. Pataki*, 969 F. Supp. at 178 (noting that probable ineffectiveness of any attempt to regulate the flow of information over the Internet makes such regulation unjustifiable from a First Amendment standpoint).

over the Internet, it is unrecognizable and indistinguishable from any other information traveling on the Internet.⁸⁵ This “deep convergence”⁸⁶ of the information exchanged over the Internet effectively precludes attempts to prioritize or block certain types of information while in transit. Only a recipient of the information who is able to translate the digital information into a readable form may make such content distinctions. Thus, like the Marketplace Theory, the Internet does not limit the delivery or exchange of information based on its content; rather, the determination of what consideration a particular piece of information deserves is left entirely to the end user.⁸⁷

Second, the Internet functions as a feedback loop. “A feedback loop occurs when the output of a system is directed back into the system as an input.”⁸⁸ The defining characteristic of the feedback loop is the existence of an output of the loop that also serves as the basis for growth. For example, a telephone network is a feedback loop, because its utility to consumers increases as more people are connected to it; the greater its utility, the more people will wish to be connected to it. This trait of feedback loops facilitates the exponential growth and increasing returns with decreasing costs that have characterized the Internet’s expansion in recent years.⁸⁹ The Internet’s ability to function as a feedback loop is therefore critical to its success.

In the case of the Internet, the output driving the feedback loop is the exchange of information. Indeed, the Internet was originally constructed to facilitate data exchange between distant educational institutions.⁹⁰ As the volume, speed, and diversity of the information exchange over the Internet has grown, more and more information providers and

85. See Computer Systems Policy Project, *Public Policy in the Information Age: Digitization and Competition* (Oct. 1996) <<http://www.cspp.org/reports/digicomp.html>>.

86. “Deep convergence” refers to the convergence of all information, regardless of its form, into a single transmission format, such as binary digits. See WERBACH, *supra* note 75, at 5.

87. Of course, there remain Online Service Providers (“OSPs”) and Internet Service Providers (“ISPs”) who have some capability of acting as bottlenecks in order to prevent the dissemination of certain information to their subscribers. However, this is only because these subscribers are not directly connected to the Internet. Rather, they are connected to the OSP or ISP who then allow the subscriber to access the Internet through their systems.

88. WERBACH, *supra* note 75, at 3.

89. See KEVIN KELLY, *OUT OF CONTROL: THE RISE OF NEO-BIOLOGICAL CIVILIZATION* 184–202 (1994).

90. See Angela E. Wu, *Spinning a Tighter Web: The First Amendment and Internet Regulation*, 17 N. ILL. U. L. REV. 263, 264–67 (1997) (describing the historical foundations of the Internet as a means of facilitating the exchange of information between research institutions).

information seekers have demanded to be connected to it. Through the contribution of these added participants (in the form of money, technology, and information), the volume, speed, and diversity of information on the Internet continues to increase. Thus, the exponential growth of the Internet depends on the continued expansion of the exchange of information taking place on it.

Due to the Internet's status as a feedback loop, any attempt to limit or control the exchange of information would jeopardize the chain of events on which its growth depends. To interfere with the exchange of information in the name of e-commerce would therefore undermine the very connectivity and capacity that make the Internet so valuable to commercial interests. Even the most seemingly "valueless" information is part of the diverse wealth of information that attracts an ever-increasing number of users to the Internet.⁹¹ Thus, the attributes that have made the Internet such a valuable and revolutionary network demand continued adherence to the Marketplace Theory.

C. Cultural Characteristics

Finally, the Internet is culturally bound to unfettered exchange of information demanded by the Marketplace Theory. Unlike other media, the Internet has an established history of freedom from all government regulation.⁹² The Internet has evolved in a virtual anarchy, where users can say and read what they want without consequences or interference.⁹³ As one observer has noted: "[Internet users] assert what they call a First

91. Indeed, many scholars have argued convincingly that it is precisely the "odd" or seemingly "deviant" types of information available on the Internet that have fueled the rapid and widespread acceptance of the Internet as a medium of communications. See, e.g., Peter Johnson, *Pornography Drives Technology: Why Not to Censor The Internet*, 49 FED. COMM. L.J. 217 (1996) (arguing that the availability of pornography on the Internet has been critical to the growth of the Internet); Wu, *supra* note 90, at 299 (describing how the presence of "perverse," "shocking" and "mysterious" information on the Internet has drawn new users); Phillip Elmer Dewitt, *On a Screen Near You; It's Popular, Pervasive and Surprisingly Perverse, According to the First Survey of Online Erotica*, TIME, July 3, 1995, at 38 (describing the "gaper phenomenon" on the Internet, which holds that persons are naturally drawn to the Internet by the presence of unusual and extraordinary information).

92. See, e.g., *Reno v. ACLU*, 117 S. Ct. 2329, 2342 (1997) (noting the Internet's historical freedom from regulation).

93. See *ACLU v. Reno I*, 929 F. Supp. 824, 883 (E.D. Pa. 1996) ("The absence of governmental regulation of Internet content has unquestionably produced a kind of chaos"); Walter S. Mossberg, *Accountability Key to Democracy in On-line World*, PLAIN DEALER (Cleveland), Feb. 5, 1995, at 4G (documenting the Internet as a culture which has evolved without speaker accountability).

Amendment right of unencumbered access to whatever information they deem personally useful or desirable, and deplore intervention by outsiders or even the proscriptions of their own institutions.”⁹⁴ This attitude is best exemplified by the “Declaration of Independence of Cyberspace” issued by the Electronic Frontier Foundation, an organization created for the specific purpose of protecting the Internet from government intervention. Speaking on behalf of all citizens of cyberspace, the Declaration reads, in part:

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.⁹⁵

As a result of this cultural attitude, any attempt by the government to exercise control over the Internet will encounter substantial resistance and even rebellion. Such resistance is demonstrated by the alacrity with which the CDA was challenged. Behind the efforts of over forty seven separate plaintiffs, the Supreme Court struck down the objectionable portions of the CDA a little over a year after its passage, representing a milestone in appellate efficiency.⁹⁶ Indeed, opponents of the CDA, while unable to defeat its passage, specifically secured a provision for the expedited appeal of the Act to the Supreme Court to assure its prompt invalidation.⁹⁷ Even more explosive was the reaction of internet

94. Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1641 (1995). See also Knoll, *supra* note 29, at 277 (“Freedom of speech is assumed by Internet users.”).

95. John Perry Barlow, *A Cyberspace Independence Declaration* (Feb. 9, 1996) <http://www.eff.org/pub/Publications/John_Perry_Barlow/barlow_0296.declaration>. Mr. Barlow co-founded the Electronic Frontier Foundation. See also Mike Godwin, *The First on a New Frontier*, QUILL, Sept. 1991, at 18, 19 (extolling the value of the unfettered exchange operating on the Internet).

96. See *Reno v. ACLU*, 117 S.Ct. at 2339.

97. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 561, 110 Stat. 56,

users to a proposal by Bell Atlantic that the FCC allow the imposition of per minute access charges on internet service providers.⁹⁸ Though the FCC had expressly disavowed any intent to adopt the proposal,⁹⁹ the Bell Atlantic proposal drew hundreds of thousands of e-mail messages objecting to its mere suggestion.¹⁰⁰ Such reactions are typical of the resistance with which the internet culture will confront any attempt to regulate the free exchange of information over the Internet.

IV. THE INTERNET'S ADHERENCE TO THE MARKETPLACE THEORY REVEALED

As its fundamental characteristics reveal, the Internet, by design, treats speech controls in the same manner as the Marketplace Theory. As the Internet becomes a prominent vehicle of commerce, its heightened sensitivity to speech controls has great potential to add new conflict to the traditionally settled areas where commerce and speech intersect. This potential for conflict is demonstrated by the outcomes of three early internet cases: *Bernstein v. United States Department of State* ("Bernstein"),¹⁰¹ *Religious Technology Center v. Netcom On-line Communication Services, Inc.* ("Netcom"),¹⁰² and *Zeran v. America Online, Inc.* ("Zeran").¹⁰³ These cases reflect the operation of the Marketplace Theory on the Internet in that all three place an overarching importance on the *exchange* of information over the Internet. As explained more fully below, this priority afforded to the free exchange of information expands the traditional parameters of First Amendment doctrine and thereby alters existing regulatory frameworks.

142-43 (1996).

98. See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; Usage of the Public Switched Network by Information Service and Internet Access Providers, FCC 96-488, 11 F.C.C.R. 21354 (1996) (Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry).

99. See, e.g., *The FCC, Internet Service Providers, and Access Charges* (last modified Jan. 9, 1998) <http://www.fcc.gov/Bureaus/Common_Carrier/Factsheets/ispfact.html> (FCC Fact Sheet explaining the history of misconceptions regarding the FCC ISP policy).

100. See *Sample Comments on FCC 96-488: Internet Service Providers and Access Charges*, (last modified Mar. 7, 1997) <http://www.fcc.gov/Bureaus/Common_Carrier/Comments/access_reform>.

101. 922 F. Supp. 1426 (N.D. Cal. 1996) (order denying defendants' motion to dismiss).

102. 907 F. Supp. 1361 (N.D. Cal. 1995).

103. 129 F.3d 327 (4th Cir. 1997), *cert. denied* 118 S. Ct. 2341 (1998).

A. *Bernstein v. Department of State: Source Code as Speech*

In *Bernstein*, the Northern District of California overturned a State Department licensing scheme designed to control, inter alia, the export of encryption products.¹⁰⁴ The plaintiffs in *Bernstein* put forth a number of theories to justify overturning the law, including an abuse of discretion on the part of the State Department and a variety of First Amendment challenges based on the licensing scheme's effect on (rather than direct restriction of) speech activities.¹⁰⁵ Oddly, the court chose none of these bases and, instead, found the State Department's actions unconstitutional by determining that source code, the computer language through which encryption products communicate with computers, was itself speech protected by the First Amendment.¹⁰⁶

Judge Patel's conclusion was hardly compelled by legal precedent.¹⁰⁷ Indeed, Judge Patel's opinion is unable to call upon a single decision even addressing the constitutionality of restrictions on computer language. Rather, in support of her position, Judge Patel employed a series of analogies. First, she pointed to the protection of the right to speak in foreign languages.¹⁰⁸ Judge Patel argued that speaking in a "computer language," such as source code, is indistinguishable from speaking in a foreign language and therefore equally deserving of First Amendment protection.¹⁰⁹ In further support of this position, she made a second analogy between source code and "functional speech" such as a "do-it-yourself" manual.¹¹⁰ Because the First Amendment has been found to protect speech with a purely functional purpose, Judge Patel argued that source code, even if created for the sole purpose of directing a computer, was nevertheless speech protected by the First Amendment.¹¹¹

104. See 922 F. Supp. at 1434–36.

105. See *id.* at 1430–31.

106. See *id.* at 1434–46.

107. See, e.g., *Karn v. United States Dep't of State*, 925 F. Supp. 1, 9 n.19 (D.D.C. 1996) (expressing serious doubt as to whether source codes fall within the protection of the First Amendment).

108. See *Bernstein*, 922 F. Supp. at 1435 (citing *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 934–36 (9th Cir. 1995) (striking down as unconstitutional an Arizona state requirement that government employees conduct their business in no other language but English), *vacated as moot*, 520 U.S. 43 (1997)).

109. See *id.*

110. See *id.* at 1435 (citing *United States v. The Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wisc. 1979) (determining that a manual on how to create a hydrogen bomb, despite its functional purpose, was nonetheless speech for the purposes of the First Amendment)).

111. See *id.* at 1435 ("Even object code, which directly instructs the computer,

Both of these analogies prove unconvincing for the same reason. Unlike source code, both speaking in a foreign tongue and conveying information in a “how-to” manual remain comprehensible to human beings.¹¹² Source code, on the other hand, is in most instances neither directed toward nor intended for comprehension by human beings. Rather, source code normally consists of a machine-readable language that directly instructs the computer. Thus, Judge Patel’s attempt to rely on such precedent in order to establish First Amendment protection for source code misunderstands the critical point that the protection of foreign languages and “how-to” manuals is based upon a “pragmatic desire to convey information to someone so that they may understand it.”¹¹³ For this reason, even the plaintiffs who put forth the “source code as speech” rationale seemed to find it necessary to support this argument by pointing to examples of how the restrictions on source code affected communications between persons.¹¹⁴ Nonetheless, Judge Patel rejected the necessity of these arguments by insisting that “computer language” warranted First Amendment protection even if it communicated information only to a computer.¹¹⁵

Despite being at odds with traditional First Amendment precedent, Judge Patel’s decision remains entirely consistent with the Marketplace Theory. As noted above, the essence of the Marketplace Theory is the protection of the *exchange* of ideas, rather than just the ideas themselves. Judge Patel’s decision to treat computer language as speech affords the ultimate protection to the exchange of ideas over the Internet. Under her reasoning, the means of conveying ideas via a computer (i.e., the functional component of a computer language) is inextricably woven with the ideas themselves. Just as a scroll of music for a player piano remains an iteration of the musical piece it instructs the piano to perform, so too computer language that instructs the computer to perform an expressive function becomes a manifestation of the expression itself.¹¹⁶ Thus, the First Amendment not only protects words conveyed over the Internet, but also the commands and instructions by which the computer conveys them. This protection is necessary not because of the secondary

operates as a ‘language’ [and is therefore speech].”).

112. In fact, the *Yniguez* court relied heavily on the utility of the speech in question to the Spanish speaking population of Arizona in determining that a restriction that prevented one from speaking in Spanish was unconstitutional. See *Yniguez*, 69 F.3d 920 at 934–36.

113. *Bernstein* at 1435 (quoting *Yniguez* at 935).

114. See *id.* at 1434 n.13 & n.14.

115. See *id.* at 1435 (“[C]omputer language is just that, language, and it communicates information either to a computer or to those who can read it.”).

116. See *id.*

effects of impeding the use of such computer language on exchange of ideas, but because the *means* of exchanging ideas is itself speech. In this manner, *Bernstein* provides the precise protection demanded by the Marketplace Theory — protection of the *exchange of ideas* to the same extent as the ideas themselves.

B. Religious Technology Center v. Netcom: Copyright as a First Amendment Violation

Traditionally, the First Amendment has not imposed an impediment to the enforcement of copyright laws. In the only case to directly address the subject, the Supreme Court had little difficulty determining that First Amendment rights do not override an author's copyrights.¹¹⁷ As a result, defenses to copyright infringement based on the First Amendment have been almost non-existent.¹¹⁸

In *Netcom*, this traditional absence of First Amendment influence on the assessment of copyright liability was abandoned. *Netcom* concerned the placement of infringing material on a bulletin board system carried by the ISP Netcom. Despite the fact that Netcom had copied and distributed the protected material over its systems thousands of times, the court found that Netcom was not liable for direct infringement.¹¹⁹ In determining that Netcom's actions did not constitute a direct copyright infringement, the *Netcom* court essentially rewrote the Copyright Act.¹²⁰ Under the Copyright Act, direct infringement is assessed on a strict liability standard (i.e., if you copy a protected document, you commit an infringement, regardless of whether such an infringement was intended).¹²¹ Despite this statutory requirement, the *Netcom* court refused to hold Netcom liable for its admitted duplication of the copyrighted documents. Instead, the *Netcom* court expressly required "some element of volition or causation" before it would find Netcom guilty of infringement.¹²² In doing so, the court ignored the express language of the Copyright Act.

117. See *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1985).

118. See PAUL GOLDSTEIN, *COPYRIGHT: PRINCIPLE, LAW, AND PRACTICE* § 10.3 (2d ed. 1991) ("[I]n retrospect it is clear that the perceived conflict between copyright and the First Amendment was a tempest in a very small teapot.").

119. See *Religious Technology Center v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361, 1368–73 (N.D. Cal. 1995).

120. See Fraser, *supra* note 32, at 41–43 (discussing the manner in which *Netcom* essentially rewrote the Copyright Act).

121. See 17 U.S.C. § 501 (1994) (allowing a finding of infringement without any showing of intent).

122. *Netcom*, 907 F. Supp. at 1370.

Analysis of *Netcom* reveals that this failure to conform to the strict requirements of the Copyright Act was actually dictated by the operation of the Marketplace Theory on the Internet. In justifying the decision not to find Netcom guilty of infringement, the court placed primary emphasis on the deleterious effect such a ruling would have on the exchange of information: "If usenet servers were responsible for screening all messages coming through their systems, this could have a chilling effect on what some say may be the best public forum for free speech yet devised."¹²³ The court further acknowledged that it was not so much Netcom's failure to know of its infringement, but rather the interests of Netcom's customers in being able to freely exchange ideas over the Internet that dictated the outcome of the case. As the court stated: "Netcom and Klemesrud play a vital role in the speech of their users. Requiring them to pre-screen postings for possible infringement would chill their users' speech."¹²⁴

These statements reveal that *Netcom* is best understood as an application of the Marketplace Theory. If internet service providers were found liable for unintentional copyright infringement, the free flow of ideas over the Internet would be severely impeded. Thus, in accordance with the Marketplace Theory, strict enforcement of the copyright laws was found impermissible.

C. Zeran v. America Online: *The Chilling Effect of Libel*

A final case demonstrating the operation of the Marketplace Theory on the Internet is the Fourth Circuit decision in *Zeran v. America Online, Inc.*¹²⁵ Similar to *Netcom*, the *Zeran* court refused to adhere to the traditional application of libel law due to the negative effect such liability would have on the free exchange of information on the Internet.

Zeran considered the application of section 230 of the Communications Act¹²⁶ to a libel action against the online service provider, America Online ("AOL"). Section 230 states, in pertinent part, that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."¹²⁷ Section 230 was adopted for the express purpose of overturning *Stratton Oakmont, Inc. v. Prodigy*

123. *Id.* at 1377-78.

124. *Id.* at 1383.

125. 129 F.3d 327 (4th Cir. 1997), *cert. denied* 118 S. Ct. 2341 (1998).

126. 47 U.S.C. § 230(c)(1) (West Supp. 1999).

127. *Id.*

Services,¹²⁸ in which a New York state court held Prodigy strictly liable as the publisher of defamatory comments made by an unidentified speaker on one of Prodigy's bulletin boards simply because Prodigy had the power to exercise editorial discretion over the bulletin board material. Worried that such a decision would prevent interactive computer services from taking affirmative steps to control libelous, defamatory, or offensive content displayed on their systems, Congress enacted section 230.¹²⁹ Dubbed the "good Samaritan law," section 230 allowed interactive computer services, such as Prodigy and AOL, "to restrict or to enable restriction of access to objectionable online material" without being exposed to publisher liability.¹³⁰ In this manner, interactive computer services notified of libelous, obscene, or otherwise offensive material being exchanged or displayed over their networks could take action without an intolerable risk of liability. Thus, section 230 was essentially an anti-free speech provision created to encourage interactive service providers to suppress or restrict speech that it found offensive or inappropriate.

Zeran interpreted section 230 in a manner that further confirms the operation of the Marketplace Theory on the Internet. The *Zeran* court determined that AOL was immune from libel claims even though it had knowledge and notice of the libelous material being distributed on its systems. Thus, despite clear legal precedent arguing for a narrow interpretation of section 230,¹³¹ the court extended the scope of section 230 to provide AOL immunity from *distributor* liability as well as publisher liability.¹³² In doing so, the *Zeran* court ignored the specific

128. No. 31063-94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

129. See S. REP. NO. 104-230, at 194 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 208 [hereinafter Conference Report] (adopting section 230 to specifically overturn *Stratton Oakmont* because "such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services").

130. See *id.* at 194.

131. See *Zeran v. America Online, Inc.*, 129 F.3d 327, 333-34 (referring to *United States v. Texas*, 507 U.S. 529 (1993), in which the Court required the retention of common law principles, such as distributor libel, unless Congress speaks directly to the issue).

132. In addition to ignoring the intent of section 230, the *Zeran* court's determination that section 230 provided immunity from distributor liability ignored the plain language of section 230 that clearly limited the scope of protection to publisher and speaker liability. See *supra* note 127 and accompanying text. The *Zeran* court attempted to overcome this contradiction between its interpretation and the plain language of the statute by interpreting the meaning of "publisher" to include a "distributor." See *Zeran*, 129 F.3d at 331-34. However, this argument is somewhat unconvincing given the clear recognition of separate publisher and distributor liability in the *Stratton Oakmont*

intent of Congress in passing section 230, which was to facilitate the restriction of offensive material, not restrict its dissemination.¹³³

Instead, the court focused on discrete portions from the legislative history in order to find a First Amendment purpose behind Congress' enactment of section 230. As the court stated: "The purpose of [section 230] is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning internet medium."¹³⁴ In support of their argument, the court noted that "Congress recognized the Internet and interactive computer services as offering 'a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.'"¹³⁵ Moreover, Congress had expressly stated that "it is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet."¹³⁶ Based on these statements, the court inferred a congressional intent to adopt what amounts to a marketplace of ideas approach to the Internet in the case of libel. Through this inference, the court concluded that distributor liability could not be imposed upon AOL. As the court stated: "[L]ike strict liability, [distributor liability] has a chilling effect on the freedom of internet speech. . . . Because [of] the probable effects of distributor liability on the vigor of internet speech . . . we will not assume that Congress intended to leave [such] liability [] intact."¹³⁷

Thus, *Zeran* set aside the legislative history and plain language of the statute in order to avoid imposing liability on AOL because of the deleterious effect such liability would have on the exchange of ideas over the Internet. In others words, consistent with the Marketplace

decision. See *Stratton Oakmont*, 1995 WL 323710 (holding defendant strictly liable as publisher rather than applying the lesser liability standard applicable to distributors); see also *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

133. Throughout the legislative history of section 230, Congress clearly indicated that it did not intend to grant interactive service providers the right to ignore libelous or defamatory speech once it was known to them that such speech was being displayed on their networks. See Conference Report, *supra* note 129, at 194 (expressly stating that Congress' objective in passing section 230 was to enable interactive service providers "to restrict or to enable restriction of access to objectionable online material"). To the contrary, section 230 was created to specifically preserve the right of interactive service providers to remove such speech from their networks without exposure to liability. See *id.* Distributor liability would require interactive service providers to remove libelous content from their networks once its libelous nature was made known to them. Such liability appears entirely consistent with Congress' intent.

134. *Zeran*, 129 F.3d at 330.

135. *Id.* (quoting 47 U.S.C. § 230(a)(3)).

136. *Id.* (quoting 47 U.S.C. § 230(b)(2)).

137. *Id.* at 333.

Theory, the exchange of information over the Internet took precedence over the application of traditional libel law.

D. Review of the Marketplace Theory

Although involving different circumstances, different courts, and different legal principles, the *Bernstein*, *Netcom*, and *Zeran* cases all exemplify the Marketplace Theory. In all three cases, the need to protect the exchange of information necessitated a departure from established legal precedent. While the First Amendment has been applied for such purposes in the past,¹³⁸ never before has the First Amendment's protection of the exchange of information been applied to the same degree as it has in these cases involving the Internet.¹³⁹ As explained more fully below, this priority on protecting the exchange of information over the internet promises to pose unique and complex challenges to e-commerce policymakers.

V. THE MARKETPLACE THEORY AND E-COMMERCE

Government action will be critical to the future of commerce on the Internet. While the bright future of internet commerce has been much ballyhooed, it remains true that "many businesses and consumers are still wary of conducting extensive business over the Internet because of the lack of a predictable legal environment governing transactions."¹⁴⁰ "[C]oncerns about enforcement of contracts, liability, intellectual property protection, privacy, security and other matters have caused businesses and consumers to be cautious."¹⁴¹ Thus, despite continuing preference for self-regulation,¹⁴² the U.S. government has recognized

138. *See, e.g.,* Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (overriding the traditional operation of copyright law in deference to the "public interest" in the dissemination of information).

139. In addition to the cases already discussed in this section, the marketplace of ideas model has influenced a number of other decisions related to the Internet. *See, e.g.,* United States v. Morris, 928 F.2d 504 (2nd Cir. 1991) (adopting a strict scienter requirement in the interpretation of a federal criminal statute in the interest of not deterring the exchange of information over the Internet); Blumenthal v. Drudge, 992 F.Supp. 44 (D.D.C. 1998) (refusing to find liability for defamation for co-defendant AOL because such liability would impede the flow of information over the Internet); U.S. v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1994) (discussing influence of First Amendment interests on whether wire fraud statute could be applied to Internet copyright violations).

140. *E-commerce White Paper*, *supra* note 17, at "Background."

141. *Id.*

142. *See* THE EMERGING DIGITAL ECONOMY, *supra* note 11, at 50 (advocating a

that establishing a fertile environment for the growth of internet commerce may require direct government action.¹⁴³ Even private industry entities, normally finding any form of government intrusion repellant, have now called for some limited amounts of internet regulation in order to secure the Internet's commercial future.¹⁴⁴

The Internet's parallels with the Marketplace Theory has significant implications for these future regulatory efforts. The free flow of information protected by the Marketplace Theory creates unprecedented conflicts between First Amendment interests and laws designed to protect commercial interests. Current regulatory initiatives assure that future conflicts will arise. As demonstrated below, this is particularly true in three areas the U.S. government has deemed critical to the future of internet commerce: intellectual property protection, security, and privacy.¹⁴⁵ By looking at these areas of expected regulation from the standpoint of how such regulation might conflict with the Marketplace Theory, potential issues with respect to how such regulations will affect the Internet can be discerned.

A. Intellectual Property Protection

One of the crucial issues for the future of e-commerce is the protection of intellectual property rights on the Internet.¹⁴⁶ As the Clinton Administration has stated: "Commerce on the Internet often will involve the sale and licensing of intellectual property. To promote this commerce, sellers must know that their intellectual property will not be stolen and buyers must know that they are obtaining authentic products."¹⁴⁷ The Administration has attempted to achieve this goal is by advocating the development of "copyright management" technology.¹⁴⁸ Copyright management technologies allow copyright

market-driven model for Internet commerce regulation driven by self-regulatory bodies).

143. See, e.g., *E-commerce White Paper*, *supra* note 17, at "Privacy," "Content." (noting problems in the area of E-commerce where government action will be appropriate).

144. See, e.g., Susan Stellin, *10 Laws The Net Needs*, CNET COVERAGE (Mar. 23, 1998) <<http://www.cnet.com/Content/Features/Dlife/Laws10>> ("Like it or not, this genie's been let out of the bottle; Net laws are on the way. So as the saying goes, if you can't beat 'em, join 'em.").

145. See *E-commerce White Paper*, *supra* note 17, at "Issues" (identifying intellectual property protection, security, and privacy as the three legal issues that must be addressed in order to facilitate Internet commerce).

146. See *id.*

147. *Id.*

148. See, e.g., U.S. DEP'T OF COMMERCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON

owners who put their material on the Internet to “track” the use of that material by third parties.¹⁴⁹ Information collected by the copyright management technology would include the identity of who was using the copyrighted work, whether and when that person was opening, copying, modifying or printing the work, and the amount of fees (if any) that person should pay the copyright owner for engaging in such activities.¹⁵⁰

In order to accommodate the use of copyright management technologies, Congress adopted the Digital Millennium Copyright Act (“DMCA”).¹⁵¹ Specifically, section 103 of the DMCA essentially prohibits anyone from impeding the effective use of copyright management technologies through the use of protective software.¹⁵² This policy is consistent with the absolutist view toward copyright protection being advocated by the Executive Branch of the U.S. Government.¹⁵³

A government policy that protects the use of copyright management technologies has critical First Amendment implications. As has been already recognized in the courts, one of the fundamental freedoms that the Marketplace Theory protects is the right to speak and read anonymously on the Internet.¹⁵⁴ The practice of speaking and reading anonymously allows persons communicating over the web to speak more freely, without fear of admonition for their beliefs and values. A loss of the ability to communicate anonymously over the Internet would undoubtedly “chill inquiry, and as a result, public discourse, concerning politically and socially charged issues — precisely those areas where vigorous public debate is most needed and most sacrosanct.”¹⁵⁵ Thus, the Marketplace Theory demands that the right to anonymity on the Internet be preserved.

Copyright management technologies destroy the anonymity of internet speakers. By tracking the reading and use of copyrighted works by individual internet users, copyright management technologies make the users reading habits and expressive uses of works subject to invasive

INTELLECTUAL PROPERTY RIGHTS (1995), *available at* <<http://www.uspto.gov/web/offices/com/doc/ipnii>> [hereinafter NII WHITE PAPER].

149. See Mark Stefik, *Trusted Systems*, SCI. AM., Mar. 1997, *available at* <<http://www.sciam.com/0397issue/0397stefik.html>> (describing the functions and capabilities of copyright management systems).

150. See *id.*

151. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

152. See *id.* at 2863.

153. See NII WHITE PAPER, *supra* note 148, at 233 (“Copyright owners should be free to determine what level or type of protection (if any) is appropriate for their works.”).

154. See *ACLU v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997).

155. Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981, 1007 (1996).

scrutiny. Such monitoring will have an undoubted effect on the freedom of persons to access and exchange information over the Internet.¹⁵⁶ The unrestricted use of copyright management systems is therefore impermissible under the Marketplace Theory.¹⁵⁷ This conflict exemplifies how copyright protection measures have an unprecedented potential to raise First Amendment issues due to the Internet's adherence to the Marketplace Theory.¹⁵⁸

B. Ensuring Security

Another area where government policy has a great potential to conflict with the free exchange of information over the Internet is in developing laws to protect internet security. As both the U.S. government¹⁵⁹ and industry leaders¹⁶⁰ have noted, the improvement of internet security is crucial to the future of commercial activity on the Internet. It is a commonly held notion among consumers that the Internet contains a number of "dark alleys" where hackers, IP spoofers,¹⁶¹ and other cyber-criminals lurk, waiting to take advantage of new users naive enough to do business on the Internet.¹⁶² This problem

156. See generally *id.* (discussing how copyright management systems will chill the exchange of ideas over the Internet).

157. Other examples of this conflict include *Miller*, 977 F. Supp 1228 (overturning a law aimed at protecting trademarks over the Internet on First Amendment grounds), and *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994) (holding that criminal liability for copyright theft over the Internet was impermissible, partially due to the potential chilling effect on the exchange of information).

158. See Cohen, *supra* note 155, at 1019–30; see also William A. Hodkowski, Comment, *The Future of Internet Security: How New Technologies Will Shape the Internet and Affect the Law*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 217, 268 (1997) (noting the invasiveness of copyright protection systems).

159. See *E-commerce White Paper*, *supra* note 17, at "Security" ("The [Internet] must be secure and reliable. If Internet users do not have confidence that their communications and data are safe from unauthorized access or modification, they will be unlikely to use the Internet on a routine basis for commerce.").

160. See Association for Interactive Media, Research Update Service, May 5, 1996, ¶ 3 (on file with the *Harvard Journal of Law & Technology*) (noting that a recent poll of CEOs consider Internet security a critical issue to the future of commerce on the Internet).

161. IP spoofing is a network attack whereby an outside computer attempts to illicitly impersonate a trusted computer by using its IP network address in order to gain network access. See CERT Coordination Center, *IP Spoofing Attacks and Hijacked Terminal Connections* (Jan. 23, 1995) <<http://www.cert.org/advisories/CA-95.01.IP.spoofing.attacks.and.hijacked.terminal.connections.html>>.

162. See, e.g., Jessica McCausland, Note, *Regulating Computer Crime After Reno v. ACLU: The Myth of Additional Regulation*, 49 FLA. L. REV. 483, 484 (1997) ("[C]oncerned parents and citizens legitimately are wondering whether law enforcement

is exacerbated by the ease and low cost of establishing an impressive business presence on the Internet, allowing less than reputable businesses to appear indistinguishable from established retailers. Without greater assurances of internet security, these factors could prevent consumers from ever having confidence in the Internet as a commercial venue. Similarly, banks, shops and other institutions wishing to conduct transactions over the Internet must know that doing so does not expose their business to theft, vandalism and other crimes. If the risk of such crime is too great, businesses will only be willing to offer a very limited range of goods and services over the Internet.¹⁶³ Thus, the preservation of internet security is essential to future of e-commerce.¹⁶⁴

One significant threat to security on the Internet and, more importantly, consumer confidence in such security is the inability of law enforcement officials to successfully detect and prosecute criminal activity on the Internet.¹⁶⁵ In many, if not most, cases, persons committing crimes over the Internet possess encryption technology beyond the ability of law enforcement to decipher.¹⁶⁶ Through the use of this advanced encryption technology, internet crimes can become virtually undetected.¹⁶⁷ Even when detection of the criminal activity is possible, it is often so delayed and limited as to make the prevention of the crime and the location of the criminal impossible.¹⁶⁸ As a result, the

officials have the legislative tools necessary to prosecute computer criminals.”).

163. See, e.g., Hodkowski, *supra* note 158, at 219 (“Businesses stand ready to capitalize on the potential of the Internet but are deterred by the lack of adequate Internet security.”); *Net Security is a Real Issue with Companies*, SAN DIEGO UNION-TRIBUNE, May 14, 1996, at 17.

164. See, e.g., *E-commerce White Paper*, *supra* note 17, at “Content” (“In order to realize the commercial and cultural potential of the Internet, consumers must have confidence that the goods and services offered are fairly represented, that they will get what they pay for, and that recourse or redress will be available if they do not. This is an area where government action is appropriate.”).

165. See Adam C. Bonin, Comment, *Protecting Protection: First and Fifth Amendment Challenges to Cryptography Regulation*, 1996 U. CHI. LEGAL F. 495, 496 (1996) (“For the law enforcement community, data encryption poses a serious threat to the ability to detect and punish crime.”); Hodkowski, *supra* note 158, at 219; McCausland, *supra* note 162, at 484.

166. See Peter H. Lewis, *The FBI Sting Operation on Child Pornography Raises Questions About Encryption*, N. Y. TIMES, Sept. 25, 1995, at D5 (quoting FBI director Louis Freeh on the inability of federal agents to crack encryption technology used by cyber-criminals).

167. See *id.*; Goodman, *supra* note 83, at 478–83 (1997) (discussing how law enforcement officials have found it nearly impossible to detect and prevent any specific transmission over the Internet).

168. See *Communications and Computer Surveillance, Privacy and Security:*

prevention and deterrence of crime on the Internet is substantially impeded and criminal activity on the Internet remains a serious problem.¹⁶⁹

Efforts to solve the law enforcement problems on the Internet will necessarily raise First Amendment issues. Already, this problem has presented itself in attempts by law enforcement to prevent internet crime through current law enforcement mechanisms. For example, in *United States v. LaMacchia*,¹⁷⁰ the federal government attempted to prosecute a person who had been operating an internet bulletin board system which facilitated the theft of millions of dollars in software.¹⁷¹ While the court had no problem determining that the defendant's acts were reprehensible and should be prohibited under the criminal law,¹⁷² the court nonetheless declined to find the defendant's acts in violation of the federal wire fraud statute based, in part, on First Amendment interests. As the court stated:

While the government's objective is a laudable one, particularly when the facts alleged in this case are considered, its interpretation of the wire fraud statute would serve to criminalize the conduct of not only persons like LaMacchia, but also the myriad of home computer users who succumb to the temptation to copy even a single software program for private use. It is not clear that making criminals of a large number of consumers of computer software is a result that even the software industry would consider desirable.¹⁷³

In other words, the court reasoned that imposing such liability upon the defendant's actions would have an impermissible chill on the current exchange of information over the Internet, a result unacceptable under the Marketplace Theory.

Hearing Before the House Subcomm. on Tech., Env't and Aviation of the Comm. on Science, Space and Tech., 103d Cong., 2d Sess. 25 (1994) (statement of James K. Kallstrom, FBI) ("Realtime decryption is often essential so that law enforcement can rapidly respond to criminal activity and, in many instances, prevent serious and life-threatening criminal acts.").

169. See e.g., CERT Coordination Center, *supra* note 161; John J. Fialka, *Intrusions by Computer Hackers Cost Big Business \$800 Million in 1995*, WALL ST. J., June 6, 1996, at B13; Udo Flohr, *Bank Robbers Go Electric*, BYTE, Nov. 1995, at 48.

170. 871 F. Supp. 535 (D. Mass. 1994).

171. See *id.* at 536-37.

172. See *id.* at 545 ("Criminal as well as civil penalties should probably attach to [defendant's actions].").

173. *Id.* at 544.

Another response to the problem of preventing criminal activity on the Internet that has had persistent support from persons in the U.S. Government has been the mandatory use of "key escrow" systems.¹⁷⁴ "Key escrow systems" require those using advanced cryptographic technology to "register" a "key" to their encryption code with an "escrow" agent in order to enable the government to access the key when necessary to a law enforcement effort. The government would therefore have a "backdoor" into encrypted transmissions over the Internet that would enable the monitoring of internet communications for criminal activities. The U.S. Government has proposed the use of such key escrow systems in a variety of contexts, both domestic and international, as recently as late 1996.¹⁷⁵

The conflicts between the imposition of a key escrow system and the Marketplace Theory are obvious.¹⁷⁶ First, as noted above, the application of the Marketplace Theory to the Internet protects the employment of cryptographic language as speech itself.¹⁷⁷ Thus, any requirement that a particular type of cryptography be used or that the key to the cryptography system be "registered" would directly infringe upon protected speech interests. On a secondary level, it has been widely recognized that privacy in internet communications is critical to the exchange of information over the Internet.¹⁷⁸ The mere knowledge that the government could access communications over the Internet would undoubtedly chill a vast amount of speech and speakers who would otherwise freely and legally participate in the exchange of information over the Internet. Thus, the use of key escrow systems would be an impermissible response to the problem of internet security under the Marketplace Theory.

174. See, e.g., NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY, FEDERAL INFORMATION PROCESSING STANDARDS PUBLICATION 185, ESCROWED ENCRYPTION STANDARD (EES) (1994), available at <<http://www.itl.nist.gov/fipspubs/fip185.htm>>.

175. See, e.g., *Administration Encryption Draft Bill Would Set Key Recovery Standards*, COMM. DAILY, Mar. 27, 1997. The use of the term "key recovery" has now replaced "key escrow" but refers to the same practice of making encryption keys available to the government.

176. In addition, key escrow systems have been persuasively argued as being in violation of the Fourth and Fifth Amendments. See Bonin, *supra* note 165, at 509-15; see also Michelle Skatoff-Gee, *Changing Technologies and the Expectation of Privacy: A Modern Dilemma*, 28 LOY. U. CHI. L.J. 189 (1996).

177. See *infra* notes 104-16 and accompanying text.

178. See, e.g., Branscomb, *supra* note 94, at 1644 (noting how the erosion of the expectation of privacy in Internet communications would impede the free flow of information over the Internet).

C. Privacy

Protecting the privacy of personal information provided over the Internet is perhaps the greatest need for the future of e-commerce. A recent U.S. government survey of the Internet found that “the vast majority of Web sites — upward of 85% — collect personal information from consumers.”¹⁷⁹ Of these Web sites, only 14% attempt to notify consumers that such information is being collected, that the soliciting company may put such information to uses beyond those for which it was submitted, and/or what those uses might be.¹⁸⁰ As a result, any internet user may find their personal information being sold to marketers and/or published without ever being notified or having the opportunity to decline.¹⁸¹ Thus, many consumers forego making purchases or engaging in other commercial activity over the Internet because such activities invariably require the submission of personal information.¹⁸² “It is essential, therefore, to assure personal privacy in the networked environment if people are to feel comfortable doing business.”¹⁸³

For these reasons, the protection of private information has long been seen as an area where direct government regulation may be appropriate.¹⁸⁴ This is especially true in light of recent findings that, “[t]o date, industry has had only limited success in implementing fair information practices and adopting self-regulatory regimes with respect to the online collection, use and dissemination of personal information.”¹⁸⁵ Most companies simply “view[] lists of consumer data as their property — to be sold to other marketers or published at their discretion.”¹⁸⁶ Indeed, consumer information is now considered so valuable to internet businesses that it’s ownership has become a critical

179. FTC PRIVACY REPORT, *supra* note 16, at iii.

180. *See id.* at iii.

181. *See* Stellin, *supra* note 144.

182. *See E-commerce White Paper*, *supra* note 17, at “Privacy”; *see also* Stellin, *supra* note 144.

183. *E-commerce White Paper*, *supra* note 17, at “Privacy.”

184. *See E-commerce White Paper*, *supra* note 17, at “Privacy” (“The Administration considers data protection critically important. We believe that private efforts of industry working in cooperation with consumer groups are preferable to government regulation, but if effective privacy protection cannot be provided in this way, we will reevaluate this policy.”); *see also* FTC PRIVACY REPORT, *supra* note 16, at 41–43 (raising the possibility of legislation in the area of Internet privacy); Stellin *supra* note 144 (recommending the adoption of a ban on the use of personal information provided over the Internet).

185. FTC PRIVACY REPORT, *supra* note 16, at iv.

186. Stellin, *supra* note 144.

element in the sale of Web advertising.¹⁸⁷ Thus, it is highly unlikely that self-regulation will resolve the privacy problem.

In recognition of the limits of self-regulation, several laws have been proposed to address the problem of internet privacy.¹⁸⁸ Specific legislative proposals include (1) a mandatory consent requirement before the disclosure of personal information,¹⁸⁹ (2) absolute prohibitions on the publication of certain personal information,¹⁹⁰ and (3) the mandatory adoption and publication of privacy policies.¹⁹¹ However, the adoption of one or all of these measures has been delayed largely in recognition of the First Amendment implications of such restrictions on the collection and dissemination of information. As policymakers have specifically noted: “[F]undamental and cherished principles like the First Amendment, which is an important hallmark of American democracy, protect the free flow of information. Commerce on the [Internet] will thrive only if the privacy rights of individuals are balanced with the benefits associated with the free flow of information.”¹⁹²

For these reasons, governmental entities charged with ensuring the fair commercial practices on the Internet have argued against direct government involvement, despite the widespread abuses.¹⁹³ Thus, privacy on the Internet represents an area of necessary regulation where the Marketplace Theory operating on the Internet may have already restricted the ability of the government to adopt regulatory remedies.¹⁹⁴

Respect for First Amendment interests has been far less prevalent when it comes to the privacy of children. The problem of Web sites soliciting and using personal information from children has been

187. This information is derived from the author's personal experience as media counsel for Internet content providers.

188. See Courtney Macavinta, *Privacy Bills Stampede on Hill*, CNET NEWS.COM, (Apr. 18, 1997) <<http://news.cnet.com/news/0-1005-200-318246.html>> (describing the plethora of bills being introduced to address the problem of online privacy).

189. See e.g., The Consumer Internet Privacy Protection Act of 1997, H.R. 98, 105th Cong. (1997) (prohibiting the disclosure of personal information without consent).

190. See, e.g., Social Security On-line Privacy Protection Act of 1996, H.R. 1287, 105th Cong. (1997) (prohibiting the publication of social security numbers and other personally identifiable information on the Internet).

191. See Stellan, *supra* note 144 (advocating legislation which would impose a mandatory privacy policy requirement).

192. *E-commerce White Paper*, *supra* note 17, at “Privacy.”

193. See, e.g., *id.* at “Privacy”; FTC PRIVACY REPORT, *supra* note 16, at 41–42 (arguing for increased incentives for self-regulation in response to the privacy problem, rather than direct government involvement).

194. See Branscomb, *supra* note 94, at 1644 (noting the natural tensions between efforts to secure privacy in internet communications and the free flow of information over the Internet).

universally recognized as an intolerable aspect of commercial activity on the Internet.¹⁹⁵ As the U.S. Federal Trade Commission (the "FTC") recently reported:

The results with respect to the collection of information from children are also troubling. Eighty-nine percent of children's Web sites collect personal information *from children*. While 54% of children's sites provide some form of disclosure of their information practices, few sites take any steps to provide for meaningful parental involvement in the process. Only 23% of sites even tell children to seek parental permission before providing personal information, fewer still (7%) say they will notify parents of their information practices, and less than 10% provide for parental control over the collection and/or use of information from children.¹⁹⁶

As a result, immediate government action has been proposed to resolve the problem of children's privacy. Specifically, the FTC has recommended broad and sweeping measures to protect the personal information provided by children over the Internet. The FTC's proposal would address this problem by requiring commercial Web sites that collect personal identifying information from children 12 and under to provide actual notice to the parent and: (1) obtain parental consent prior to collecting any information which would enable one to contact a child offline; (2) obtain parental consent prior to publicly disclosing or publishing a child's personal information; and (3) if a child provides an e-mail address to the Web site, provide parents an opportunity to have

195. In its outline for e-commerce policy, the Clinton Administration summarized the concern regarding personal information from children as follows:

The Administration is particularly concerned about the use of information gathered from children, who may lack the cognitive ability to recognize and appreciate privacy concerns. Parents should be able to choose whether or not personally identifiable information is collected from or about their children. We urge industry, consumer, and child-advocacy groups working together to use a mix of technology, self-regulation, and education to provide solutions to the particular dangers arising in this area and to facilitate parental choice. This problem warrants prompt attention. Otherwise, government action may be required.

E-commerce White Paper, *supra* note 17, at "Privacy."

196. FTC PRIVACY REPORT, *supra* note 16, at iii.

their child's e-mail address removed from the Web site's data bases.¹⁹⁷ This proposal comports with the Clinton Administration's focus on enabling parents to control the information available to their children.¹⁹⁸

While no one disputes the necessity of restricting the collection and dissemination of a child's personal information over the Internet, the FTC proposal provides an example of how the solutions available to policymakers may be restricted by the Marketplace Theory. In *Reno v. ACLU*, the Supreme Court rejected the notion that content providers on the Internet could be required to assume the onus of having to actually know the age of the persons receiving their content over the Internet. As the Court noted, "there 'is no effective way to determine the identity or the age of a user'"¹⁹⁹ Thus, the Court determined that imposing liability on a speaker for disseminating information to a child would be an unreasonable burden on the ability of such speakers to freely exchange information over the Internet.²⁰⁰

The privacy solution proposed by the FTC is equally, if not more, burdensome than the requirements considered in *Reno v. ACLU*. First, as in *Reno v. ACLU*, it remains the case that verifying the age of any internet user is infeasible. For these same reasons, nothing would appear to preclude a child from representing themselves as older than 12 regardless of their actual age. Thus, any web site which could be said to be "directed at children" would essentially have to comply with the FTC requirements with regard to all visitors to its site, regardless of whether the visitor was actually under 12 years of age or not. Moreover, the actual notice requirement would place the burden on the Web site of knowing that the parent had actually consented before disseminating personal information from the child. Acquiring such actual knowledge from each parent would be incredibly burdensome and largely defeat the purpose of mass communication over the Internet.

The combination of these burdens imposed by the FTC requirements would be such that, inevitably, no site "directed at children" could risk collecting any personally identifiable information from any user, thereby vastly limiting the ability of the Web site owner to offer creative and innovative services. At the same time, the FTC's requirement would not effectively solve the problem of children providing personal information

197. FTC PRIVACY REPORT, *supra* note 16, at 43.

198. See *E-commerce White Paper*, *supra* note 17, at "Privacy" ("Parents should be able to choose whether or not personally identifiable information is collected from or about their children.").

199. *Reno v. ACLU*, 117 S. Ct. 2329, 2336 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 845 (E.D. Pa. 1996)).

200. See *id.* at 2337.

over the Internet, given that the requirements would not be applicable to any non-U.S. Web sites and would not prevent children from providing information to sites not “directed at children.”²⁰¹ Such a result would be unacceptable under the Marketplace Theory and almost all other levels of First Amendment scrutiny.²⁰² These problems with the FTC’s proposal with regard to children’s personally identifiable information are indicative of challenges facing lawmakers proposing to regulate the exchange of information over the Internet.

VI. THE PROPER RESPONSE: RESPECT FOR FIRST AMENDMENT INTERESTS

In addressing the conflicts between e-commerce initiatives and the First Amendment, there will be a natural tendency for policymakers to ignore free speech interests in favor of the needs of commerce.²⁰³ Recent First Amendment jurisprudence reinforces the notion that First Amendment freedoms must give way where the government can demonstrate that such a compromise is necessary to the needs of commerce.²⁰⁴ Moreover, as commercial activity and consumer use of the Internet proliferates, both businesses and consumers will expect the Internet to obey the legal norms applicable to other media.²⁰⁵ Indeed, commerce demands a predictable, stable environment where the standards of practice applicable to participants are well defined for the benefit of business efficiency and consumer confidence.²⁰⁶ Thus,

201. For this reason alone, courts have struck down similar legislation aimed at protecting children from the Internet. *See American Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 178 (S.D.N.Y. 1997) (noting that the inability of an internet regulation to preclude the conduct of actors outside the regulation’s jurisdiction probably made the regulation unjustifiable.).

202. *See Reno v. ACLU*, 117 S. Ct. at 2347 (noting that any regulation aimed at protecting children requires that Congress “accomplish its purpose without imposing an unnecessarily great restriction on speech” (citations omitted)).

203. *See* Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 888 (1996) (noting that the openness of access over the Internet could be changed if society so desires).

204. *See, e.g., Glickman v. Wileman Bros.*, 117 S. Ct. 2130, 2142 (1997) (holding that traditional economic regulation by Congress enjoys a strong presumption of validity in the face of First Amendment challenges); *Turner Broad. Sys. v. FCC*, 117 S. Ct. 1174, 1183 (1997) (indicating that economic regulations which have an effect on speech will be evaluated under a relaxed level of scrutiny).

205. *See Branscomb, supra* note 94, at 1646 (“As more and more computer users arrive in these cyberspaces, they bring expectations that the legal norms of the real world will apply.”).

206. *See, e.g., WERBACH, supra* note 75, at 8 (“The Internet must achieve a sufficient

governments will be under increasing pressure to force the Internet to adhere to the legal expectations of society, regardless of First Amendment concerns.²⁰⁷ This tendency is fueled by fairness, which demands that regulations applied to other similar media should be applied to the Internet in the same manner in order to ensure regulatory parity.²⁰⁸ This phenomenon is no better exemplified than by the persistence with which First Amendment theorists and policymakers have tried analogize the Internet to pre-existing media such as newspapers, radio, television, and cable.²⁰⁹

In addition, the sheer power of the Internet as a vehicle for information exchange evokes a desire on the part of society to control it. As Judge Bazelon noted more than twenty years ago, nothing creates a greater desire to regulate a medium than its power to influence the populous.²¹⁰ This is especially true with regard to the Internet, which has been declared "the most powerful tool for sharing information ever developed."²¹¹ Due to the vast amount of information available over the Internet and the ease with which it can be accessed, both valid and baseless claims regarding rampant illegal activity and the dangers created by uncontrolled access to information have emerged from all

level of reliability to gain the trust of consumers and businesses."); *E-commerce White Paper*, *supra* note 17, at "Content" ("In order to realize the commercial and cultural potential of the Internet, consumers must have confidence that the goods and services offered are fairly represented, that they will get what they pay for, and that recourse or redress will be available if they do not.").

207. See WERBACH, *supra* note 75, at 8; see also *E-commerce White Paper*, *supra* note 17, at "Privacy," "Content" (noting that without self-regulation of the Internet, the government will be under increasing pressure to regulate the exchange of information over the Internet).

208. For example, the FCC has faced incredible pressure from the telephony industry to impose traditional telephony regulations on the Internet due to the Internet's facilitation of services similar to traditional telephony. Cf. WERBACH, *supra* note 75, at 48-72 (discussing the problems with regulatory parity arguments being directed at the Internet).

209. See, e.g., Cate, *supra* note 3, at 3 (criticizing the continual attempts to determine the level of First Amendment protection afforded to the Internet through comparison to other media); Mark S. Kende, *The Supreme Court's Approach to The First Amendment in Cyberspace: Free Speech as Technology's Hand-Maiden*, 14 CONST. COMMENTARY 465, 465-66 (1997) (noting the "battle of analogies" being waged to determine the regulatory model for the Internet).

210. See David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 220-23, 228 (1975).

211. *Urofsky v. Allen*, 995 F. Supp. 634, 638 (E.D. Va. 1998), *rev'd sub nom. Urofsky v. Gilmore*, 167 F.3d 191 (4th Cir. 1999).

segments of society.²¹² These fears could likely result in attempts to place controls on the exchange of information on the Internet.²¹³

It is critical that governments resist the pressure to ignore First Amendment considerations when addressing the conflicts between the First Amendment and the facilitation of internet commerce. While limiting the exchange of information over the Internet may seem desirable and relatively harmless in the short term, any such limits will inevitably jeopardize the very growth that makes the Internet so attractive to commercial entities. This is because, as shown below, the Internet's resistance to restrictions on the exchange of information is not simply a product of First Amendment jurisprudence.²¹⁴ Rather, the application of the Marketplace Theory to the Internet reflects the structural, functional, and cultural rules that define the Internet's existence.²¹⁵ Thus, any attempts to limit or control the exchange of information would be antithetical to the attributes that have made the Internet the ever-expanding vehicle for global information exchange that it is today.

As the structural, functional, and cultural attributes of the Internet demonstrate, the Internet is both physically and philosophically bound to the free flow of information protected by the Marketplace Theory.²¹⁶

212. See McCausland, *supra* note 162, at 490–501 (discussing the myths and reality contributing to the Internet's perceived dangers).

213. See, e.g., *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998) (overturning an attempt by a public library to restrict access to sexually explicit materials over the Internet); *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 2 F. Supp. 2d 783, 795 (E.D. Va. 1998) (same).

214. Indeed, the courts have repeatedly articulated that they are required to adopt a “medium-specific” approach to First Amendment analysis of new media, one that takes account of all the unique attributes of the communicative technology. See, e.g., *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) (“Different communications media are treated differently for First Amendment purposes.”); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“We have long recognized that each medium of expression presents special First Amendment problems.”); see also Cate, *supra* note 3, at 3 (noting the prevalence of the Court's medium-specific approach). This “medium-specific” approach has been most prevalent in its recent application to cable television and the Internet. See Kende, *supra* note 209, at 465–66 (criticizing the Supreme Court's medium-specific approach to the Internet as overly deferential to technology). Thus, the theory of First Amendment analysis being applied to the Internet is not a product of jurisprudence, precedent, or policy, but rather a reflection of the Internet itself.

215. See Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998) (describing how the technological attributes of a medium dictate the legal rules which govern that medium).

216. See *id.* at 584 (“[T]he entire philosophy and present design of the [Internet] is

Any regulation that impedes this flow of information will prove unpopular, ineffective, and potentially damaging to the Internet. Thus, as nations consider ways of facilitating e-commerce through government action, an understanding of and respect for the Marketplace Theory is essential. Only by adopting regulatory solutions that work within the parameters of Marketplace Theory will governments obtain the result of facilitating e-commerce without impeding the free flow of information on which the Internet depends.

Unfortunately, finding regulatory solutions to e-commerce problems that do not conflict with the Marketplace Theory represents a substantial challenge. As the analysis in Part II demonstrates, the Marketplace Theory is particularly sensitive to regulation, such that traditional regulatory measures that have been imposed on other media without creating constitutional problems remain unacceptable under the Marketplace Theory. New and Internet-specific remedies to e-commerce problems are required if governments are to face the challenge presented by the operation of the Marketplace Theory on the Internet.

Nonetheless, governments seeking e-commerce policy solutions are far from powerless. Rather, the Marketplace Theory simply demands that regulators approach e-commerce problems from a new perspective. As the Marketplace Theory has always taught, the proper response to objectionable speech is always the facilitation of more speech from sources wishing to contest or clarify the objectionable speech.²¹⁷ In other words, governments, when faced with internet speech activities they wish to discourage, should fashion solutions that empower users to respond to such speech in accordance with their reason. While this axiom may not be literally applicable to all problems facing e-commerce, regulatory actions in the spirit of the "more speech" doctrine will always be more effective than attempts to limit the exchange of information on the Internet. The following are some suggestions of approaches that appear to meet these requirements.

A. The Facilitation of Technological Solutions

In many instances, e-commerce problems are capable of being solved through improved technology.²¹⁸ For example, IPng, an IP

nevertheless geared to maximize information flow.").

217. See FRANKLYN S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 425 (1981) (noting that in dealing with speech viewed as harmful, "the remedy in a free society should always be more speech").

218. See, e.g., Reidenberg, *supra* note 215, at 556-76 (describing the various

protocol slated to replace the current IPv4,²¹⁹ includes authentication and encryption capabilities that will enable levels of security that were previously infeasible.²²⁰ These technological advancements may remove the need for direct government action in the area of security. Thus, the facilitation of technological solutions by governments can be an effective means of resolving e-commerce problems. This can be accomplished by both funding and supporting technology research and development efforts and by removing regulatory barriers that impede the development and/or deployment of new technology. Relevant examples include the ongoing effort by the Canadian government to find a technological solution to the problem of internet privacy²²¹ and efforts by the U.S. Department of Commerce to remove restrictions on the development of encryption technology.²²²

At the same time, technological solutions are generally consistent with the Marketplace Theory. This is because technology solutions must obey the rules imposed by the systems on which they operate.²²³ In the case of the Internet, such rules include an adherence to the Marketplace Theory.²²⁴ Therefore, most technology solutions will empower individual users to engage in “more speech” by giving them the ability to be more efficient and effective in their communications.²²⁵ Thus,

technological solutions to Internet policy problems); Hodkowski, *supra* note 158, at 219 (describing how more encryption technology has emerged to solve security problems).

219. IPng is short for IP Next Generation. The IPng standard was first proposed by the Area Directors of the Internet Engineering Task Force on July 25, 1994. IPv4 is short for Internet Protocol version 4, the current Internet Protocol version being employed on the Internet. The Internet Engineering Task Force hopes to upgrade the Internet to IPng in the next two to six years. For more information about IPng, its characteristics, capabilities, and history, see IP Next Generation (IPng) (visited Apr. 19, 1999) <<http://playground.sun.com/pub/ipng/html>>.

220. *See id.* (providing an overview of the advanced encryption capabilities IPng allows); *see also* Hodkowski, *supra* note 158, at 256–62 (describing how the IPng allows for substantial security advancements).

221. *See* Ministerial Conference on Global Information Networks, Bonn, Germany (July 7, 1997) (statement of John Manley, Canadian Minister of Industry), *available at* <<http://info.ic.gc.ca/cmb/Welcomeic.nsf/ICPages/Speeches>>.

222. *See* Jeri Clausing, *Commerce Secretary Seeks Compromise on Encryption*, N.Y. TIMES, April 16, 1998, at D5 (noting comments made by Commerce Secretary William M. Daley).

223. *See* Reidenberg, *supra* note 215, at 554–55 (describing how technology must obey the information flow rules of the systems on which it operates); *see also* Lessig, *supra* note 203, at 896–97 (explaining how software codes and other technological characteristics act as societal restraints on the Internet).

224. *See supra* Part III (describing how the Internet is structurally, functionally, and culturally bound to the marketplace of ideas theory).

225. *See* Reidenberg, *supra* note 215, at 579 (noting that technological standards

governments can and should address policy problems by accelerating the development of technological solutions.

B. Direct Government Participation

A second method by which governments can solve e-commerce problems without implicating speech interests is through direct government participation in the exchange of information. As courts have long recognized, the First Amendment, while prohibiting the government from restricting the speech of others, does not prevent the government from speaking itself or providing incentives for others to speak on its behalf.²²⁶ Thus, the government remains free to encourage the resolution of e-commerce problems by sponsoring or funding an exchange of information that comports with the government's policy goals. Because government participation in the exchange of information adds to, rather than limits, the flow of information, such measures are fully consistent with the Marketplace Theory.

With regard to the Internet, government participation in the exchange of information has already shown its ability to resolve policy problems. For example, in 1996 the U.S. government, in an effort to accommodate the specific interests of educational institutions operating on the Internet, began the Internet2 project to create a super-fast IP backbone connecting existing advanced research and educational networks.²²⁷ Funded by both public and private grant money, the Internet2 will help create and sustain the leading edge network capability required by the national research community — capability which was once achievable on the original Internet but has begun to erode since the Internet was opened to commercial activity in 1992.²²⁸ By supporting and funding this public network dedicated to the exchange of educational information, the U.S. government has helped avoid the conflicts created by having commercial and educational interests attempt to co-exist on the same network, while at the same time facilitating an even greater exchange of information.²²⁹

generally empower individual participants to make their own choices).

226. See, e.g., *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (holding that governments could spend funds in a manner which advocated their own position without violating the First Amendment).

227. See Mike Ricciuti, *Gore Unveils Internet2 Backbone*, CNET NEWS.COM, (Apr. 14, 1998) <<http://news.cnet.com/news/0-1005-200-328343.html>>.

228. See *About Internet2* (visited Apr. 19, 1999) <<http://www.internet2.edu/html/about-i2.html>>.

229. See *id.*; see also Ricciuti, *supra* note 227 (noting the technological advancements in Internet speech and functionality made possible by the Internet2

C. Education and Empowerment of Consumers and Regulators

A final “more speech” approach to e-commerce policy is the most obvious one — education. Indeed, a lack of education appears to be at the root of many e-commerce problems. This is particularly true with regard to fears about the dangers of the Internet to children. It is all too common for parents to lament that their underage child knows far more than they do about computers and the Internet. The lack of parental familiarity with the Internet, the type of information available over it, and the ways in which such information can be accessed, inevitably leads to misconceptions regarding the extent to which the Internet poses a threat to children.²³⁰ At the same time, parents feel powerless to protect their children from these dangers without government assistance.

There is perhaps no better example of this phenomenon than the passage of the CDA. While the CDA was clearly unconstitutional as a content-based restriction on speech,²³¹ the CDA was also doomed as a policy measure due its complete failure to understand the way information is exchanged over the Internet. Instead, the CDA reflected the exaggerations and hysteria of parents and lawmakers unfamiliar with the Internet’s operation.²³² As a result, defenses included in the statute’s language were demonstrably infeasible²³³ and assumptions underlying the statute’s prohibition were demonstrably false.²³⁴ A greater familiarity with the Internet and its technology among parents and lawmakers would have resulted in the CDA being more carefully crafted or, perhaps, disposed with altogether.

Similarly, education could greatly aid efforts to improve security on the Internet. As noted in Part V.B, one of the greatest impediments to detecting and preventing internet crime is the fact that internet criminals are able to continually develop technological tools that allow them to elude law enforcement.²³⁵ While this is partly due to the technological

project).

230. See McCausland, *supra* note 162, at 490 (noting the hysteria among parents regarding the dangers of the Internet to their children).

231. See *Reno v. ACLU*, 117 S. Ct. 2329, 2344 (1997).

232. See Jo-Ann M. Adams, *Controlling Cyberspace: Applying the Computer Fraud Abuse Act to the Internet*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 403, 407 (1996) (quoting Mike Godwin, attorney for the Electronic Frontier Foundation, regarding the hysteria that led to the passage of the CDA).

233. See *Reno v. ACLU*, 117 S. Ct. at 2349–50 (noting that the age verification called for in the CDA’s defenses was infeasible under the Internet’s current technology).

234. See *id.* at 2342 (noting that, contrary to the justifications advanced by the government, the possibility of inadvertently encountering sexually explicit content on the Internet is remote).

235. See McCausland, *supra* note 162, at 501–03 (discussing the significant problems

dynamism of the Internet, it is also due to a lack of education among law enforcement officials.²³⁶ As one commentator has observed: "[T]he understanding of technology necessary to combat computer crime presents a barrier to police detection. Very few departments, if any, train officers to detect computer crime. Generally, the only computer training police recruits receive consists of how to use criminal database systems to check for warrants or stolen vehicles."²³⁷

This lack of education is exposed by the prevalence of internet security companies, designed to prevent businesses and other customers from becoming victims of computer crime.²³⁸ The success of these companies proves that those with the requisite training and expertise can prevent internet crime.²³⁹ Thus, more education about technology and computer use on the part of governments and law enforcement would do much to solve the problem of security without inhibiting the free flow of information over the Internet.

The above examples are but a few of the methods by which governments can achieve policy objectives in a manner consistent with the Marketplace Theory. Additional examples include the efforts at facilitating self-regulation already being undertaken by governments across the globe.²⁴⁰ Further creation of different and more effective solutions will depend on governments becoming familiar with the parameters of the Marketplace Theory on the Internet. In this manner, an understanding of the Marketplace Theory becomes the key to the future of internet commerce.

VII. CONCLUSION

The Internet functions as a unique speech forum, where the democratic ideals underlying the First Amendment are realized to an unprecedented extent. U.S. courts have recognized this in their application of the Marketplace Theory to communications over the Internet. However, it would be mistaken to think of the Marketplace Theory as a mere byproduct of an idealistic U.S. judiciary. To the

with police detecting computer crime); *see also* Bonin, *supra* note 165, at 495 (same).

236. *See* Goodman, *supra* note 83, at 480–81 (describing the lack of education among police forces regarding computer crime).

237. McCausland, *supra* note 162, at 502.

238. *See* John Helyar & Karen Lundegaard, *A 24-Year-Old Strikes Gold with IPO*, WALL ST. J., Mar. 26, 1998, at B1 (describing the remarkable success of Internet security companies).

239. *See id.*

240. *See generally* Gibbons, *supra* note 25 (discussing the various proposals for self-governance of the Internet).

contrary, the structure, function and culture of the Internet reveal that the free flow of information protected by the Marketplace Theory lies at the core of all that makes the Internet the largest and most powerful means of exchanging information ever developed.

An understanding of the Marketplace Theory is therefore critical to the future of internet commerce. As conflicts arise between e-commerce interests and the First Amendment, traditional regulatory responses will prove unsuccessful and possibly detrimental. Policymakers must be familiar with the parameters of the Marketplace Theory so as to avoid the undesirable result of impeding the free flow of information. The success of government action in the facilitation of e-commerce will depend on the extent to which such action capitalizes on the unique First Amendment characteristics of the Internet, rather than struggles against them.