
David A. Gottardo
COMMENTS

COMMERCIALISM AND THE DOWNFALL OF INTERNET SELF GOVERNANCE:
AN APPLICATION OF ANTITRUST LAW

I. INTRODUCTION

I looked, and there before me stood a pale horse! Its rider was named Death, and Hades was following close behind him.¹

To many users² of the Internet, the above phrase may represent an

¹ Revelation 6:8.
² Originally, the Internet consisted of an uncommercialized medium of communication. See Jeff Pelline, Junk Email Victims Fight Back (visited Mar. 7, 1997) <http://www.news.com/News/Item/0,4,5288,00.html>. However, intrusive on-line advertisements and commercialism are presently invading the Internet. Id. Many Internet users dislike this surge of commercialism. Id.

[1] Increasingly there’s a culture clash about the practice [of sending unsolicited e-mail advertisements], thanks largely to the noncommercial origins of the Net. Not too long ago, the Internet largely was the domain of researchers and scientists who used the network to communicate on lofty projects. Now, of course, it is becoming a mass medium, with commercialism as its main ingredient. To many users, that spells frustration.

Id. See also Ken Brown, Valley Woman Reveals Path to Fortune on the Internet, Bus. J. - PHOENIX, Jan. 3, 1997, available in 1997 WL 7466841 (“The Internet, in all its incarnations, is almost completely inundated with commercialism . . . . It was really pie-in-the-sky to imagine that it wasn’t going to happen. You didn’t have to be a rocket scientist to figure that one out, even then.”) Growing commercialism also produces technical problems with the Internet. See Larry Lange, Bandwidth Becomes Big Business, OEM MAG. June 1, 1996, available in 1996 WL 8758471.

[1] What was once an ivory tower of data networking . . . is morphing into Internet Inc . . . . [T]he problem is not just about researchers bedeviled by slow connections . . . its about the growing mass of PC users whose embrace of the Internet is bringing the giant network of networks to its knees. What commercial users once called “surfing the Web” is now generally known as wading through mud . . . . [As] more and more users employ it as a low-cost conduit for . . . e-mail and electronic commerce . . . service providers [at a minimum] will have to install more bandwidth.

Id.
omen for current Internet regulation. Growing on-line commercialism will spell the Death of Internet self-governance, with Hades, the federal government, following closely behind. In 1981, the Internet comprised fewer than 300 host computers. This number increased to 90,000 by 1989 and to 1,000,000 by 1993. Continued growth occurred, with the number of host computers linked to the Internet exceeding 9,400,000 by 1996. Finally, by December of 1996, the total number of computers accessing the Internet had grown to approximately 35,000,000.

As the popularity of Internet use continues to grow, so does on-line commercial activity. Commerce on the Internet grew from $6,700,000 in 1994 to $103,000,000 in 1996. According to a recent survey, the value of goods purchased by shoppers using the Internet will reach $1,300,000,000 in 1997, growing to $7,000,000,000 by the year 2000. Correspondingly, on-line advertising campaigns have grown to support this emerging commerce. The Direct Marketing Association, a Washington D.C. trade group, estimated that more than half of the direct marketers in existence now use the Internet as a medium for their

---

3. See Jim Erickson, Advent of Junk E-mail Raises Host of Questions, J. REC., July 3, 1995, available in 1995 WL 6388916 (noting that government regulators now recognize the problem of unethical on-line marketing tactics).

Direct-mail solicitors have discovered the Internet and the on-line world of electronic commerce. The chance that one's e-mail box will remain a pristine file for personal communications has passed. The computerization and automation of what many consider to be boorish marketing tactics is not without controversy. The advent of junk e-mail is raising privacy questions among consumer advocates and government regulators alike.

Id. (emphasis added).


5. Id.

6. Id. This number of host computers linked to the Internet does not include personal computer users who access the Internet with a modem.


10. Businesses now recognize that the Internet is an important tool to reach the masses. See Businesses to Earmark More Ad Dollars for the Internet, INTERACTIVE MKTG. NEWS, Mar. 7, 1997, available in 1997 WL 8474809 [hereinafter Businesses]. Furthermore, Cahners Business Confidence Index reported that 40% of companies plan to increase spending on advertisements on the Internet. Id. See Internet Advertising Survey Finds Steady Growth, NEWSBYTES, Dec. 11, 1996, available in 1996 WL 12028250 (stating that companies advertising on the Internet experienced a steady growth in sales revenue).
advertising campaigns.11 Another survey reported that on-line advertisement expenditures reached $12,400,000 in the last quarter of 1995, with that number growing to $74,000,000 through 199612 and finally to an estimated $400,000,000 by the end of 1997.13 The reason for this growth is obvious; the Internet can deliver advertisements to a mass audience for less money than traditional advertising means.14

Numerous on-line advertising methods exist on the Internet.15 "Spamming" is one of these on-line advertising methods.16 Spamming occurs when an Internet user indiscriminately distributes large amounts of unsolicited information, in the form of e-mail messages, to large numbers of other Internet users.17 Both Internet users and service providers

---

11. Erickson, supra note 3.
14. Internet advertisements reach an estimated 20,000,000 people in the United States. Brown & Raysman, supra note 12, at 3. See also Erickson, supra note 3 (stating that the Internet presents an “unprecedented opportunity” for marketers to reach a large number of people while simultaneously reducing advertising costs). Smaller firms are likely to invest in on-line advertising because this type of advertising allows the smaller firms to reach the same number of potential customers that the larger firms are able to reach. See Businesses, supra note 10 (“What we’re seeing is these small companies seem more optimistic about the ability of the Internet to be a way of communicating to a very wide audience . . . without spending all their money on other forms of advertising.”).
15. See Dee Pridgen, How Will Consumers Be Protected on the Information Superhighway?, 32 LAND & WATER L. REV. 237, 239-43 (1997) (illustrating that four different types of advertising methods exist on the Internet: (1) spamming - the electronic equivalent of junk mail; (2) classified advertising services; (3) individual commercial advertisement sites on the World Wide Web; and (4) cyber malls, a web site possessing multiple, interactive advertisements).
16. See LANCE ROSE, NETLAW: YOUR RIGHTS IN THE ONLINE WORLD, 41 (1996) (discussing how “spamming” first occurred in 1993 when two Arizona attorneys sent e-mail advertisements of their immigration law practice to thousands of Internet users, drawing thousands of angry e-mail responses in return); David J. Loundy, Lawyers’ Electronic Ads Leave Bad Taste, CHI. DAILY L. BULL., Mar. 9, 1995, at 6 [hereinafter Loundy] (detailing an analysis of spamming activity of the Arizona attorneys). See also James Coates, Cyber-lynched! A Victim of Mob Justice on the Internet Lives to Tell the Tale, CHI. TRIB. TEMPO, Jan. 16, 1997, at 1 (“[Spamming] started when Laurence A. Canter and Martha S. Siegel, two Scottsdale, Arizona immigration attorneys, made the fatal mistake . . . of sending unsolicited e-mail to all members of more than 9,000 Internet news groups advertising their legal services . . . Uncounted thousands of angry [users] responded to the two hapless barristers by inundating them with e-mail complaining about [their] unsolicited e-mail.”).
consider spamming “wrongful” conduct because the excessive data that comprise the e-mail messages slow or disrupt the computer servers processing Internet data transfers, resulting in a possible loss of service to the user.\textsuperscript{18} Furthermore, the excessive quantities of e-mail generated by spammers causes both Internet users and service providers alike to incur unwanted expenses. Recipients of these unsolicited e-mail advertisements must pay the service provider for any on-line time required to retrieve or delete these messages\textsuperscript{19} while the service provider must expend valuable computer storage area by holding the recipients’ unretrieved messages.\textsuperscript{20}

Spamming is one of the most intrusive advertising methods currently existing on the Internet. An attorney for Internet projects at the Securities and Exchange Commission in Washington, D.C. estimated that he receives between thirty and forty spamming complaints per day.\textsuperscript{21} “Spams are just about the number one complaint [that] we get here with regard to the Internet.”\textsuperscript{22} Unfortunately, no laws currently exist that prohibit a spammer from engaging in this unscrupulous act.\textsuperscript{23}

\textit{Users,} BUS. PRESS, Nov. 18, 1996, at 11. In the comedy performance, a patron orders food at a restaurant, repeating the word “Spain” to the point of absurdity. \textit{Id.} The patron states “I'm having Spam, Spam, Spam, Spam, Spam, Spam, baked beans, Spam, Spam and Spam!” \textit{Id.} The receipt of “Spam” e-mail requires an Internet e-mail addressee to repeatedly open and cancel unsolicited advertisement e-mail messages to the point of absurdity. \textit{Id.}

\textsuperscript{18} See Cyber Promotions, Inc. v. America Online, Inc., 948 F. Supp. 436, 437 (E.D. Pa. 1996) (stating that Cyber Promotions' practice of sending unsolicited e-mail significantly disrupted America Online's e-mail system where Cyber Promotions sent as many as 1,900,000 messages per day to America Online subscribers). Note, however, that despite these problems, some Internet users support this method of advertising. \textit{See Pelline, supra} note 2 (“Of course, not everybody hates receiving junk email . . . . Some people find it useful, and companies involved in the practice defend their legal right to communicate with would-be customers, just as with regular mail.”).

\textsuperscript{19} Shelley Reese, \textit{The E-mail Posse,} MKTG. TOOLS, Sept. 1, 1996, at 1.

\textsuperscript{20} Loundy, \textit{supra} note 16, at 6.

\textsuperscript{21} Tom Petruno, \textit{Net Surfers, be Aware of "Spam" Wipeouts,} CHI. SUN-TIMES, Oct. 22, 1996, at 42. One can attribute the growth to the fact that advertising, through the transmission of unsolicited e-mail, provides a low-cost and rapid method to reach millions of people, worldwide. \textit{Id.} Small companies use e-mail advertising as a way to compete with wealthy corporations that can afford more expensive promotional campaigns. \textit{Id.} For example, Mr. Petruno describes a small biomedical company which uses e-mail advertisements as a promotional medium to reach potential investors because such advertising methods are economical. \textit{See Janet Kornblum, Spam King Challenged} (visited Mar. 7, 1997) <http://www.news.com/News/Item/0,4,5967,00.html> (“Some argue that junk mail is the only way small businesses can compete with wealthy corporations that can afford elaborate Web sites and expensive publicity campaigns to promote them.”).

\textsuperscript{22} Petruno, \textit{supra} note 21, at 42 (statement of John Stark, counsel for Internet Projects at the Securities and Exchange Commission in Washington D.C.).

\textsuperscript{23} \textit{See} Loundy, \textit{supra} note 16, at 6 (stating that spamming is only a breach of Internet etiquette and not currently illegal); McAfee, \textit{supra} note 17, at 11. However, several states
Instead, only Internet self-governing principles are available that allow an Internet user to prevent the receipt of unsolicited advertisement e-mail messages or that deter a spammer from initially sending the messages.24

Because of the foregoing, this Comment asserts that enforcement mechanisms of self-imposed Internet regulations, although well intended, may violate existing statutes or common law regulations, thus requiring state or federal governmental intervention. Part II of this Comment illustrates the development of the present, decentralized Internet structure and then introduces the “Gate Keeper” method of self governance, applied to the Internet through the use of self-imposed, voluntary standards. Furthermore, Part II introduces the boycott, the enforcement mechanism that Internet users and service providers currently utilize to enforce these self-imposed, voluntary Internet standards. Next, Part II introduces antitrust law, the doctrine under which liability may arise for those Internet users or service providers who ap-

24. For example, some Internet users created World Wide Web sites offering instructions on how to deal with the receipt of unsolicited e-mail. Pelline, supra note 2. Such sites may instruct a user to notify his Internet service provider of his receipt of unsolicited advertisement e-mail. Id. The Web site may also suggest that a user copy the unsolicited e-mail and return it to the sender. Id. Other Internet users have compiled “blacklists” of “junk” e-mailers and published their e-mail addresses for others to copy for the purpose of sending return junk mail. Id. Internet users may also utilize e-mail software that “filters” incoming e-mail transmission for unsolicited e-mail advertisements. See Lon Wagner, Junk E-Mail: Despite Online Companies’ Efforts, Junk E-Mail will Proliferate, Va. Pilot & Ledger Star, Nov. 8, 1996, at D1 (discussing an e-mail filtering software, “Eudora,” that blocks the entry of unsolicited advertisement e-mail); see also Janet Kornblum, ISP: Internet Spam Provider (visited Feb. 19, 1997) <http://www.news.com/News/Item/0,4,8061,00.html> (discussing “Deadbolt” e-mail software that “filters out” e-mail possessing the domain name or IP address of a known Internet unsolicited e-mail sender). Finally, Internet users may keep two or more e-mail accounts with their Internet service provider. See Coates, supra note 16, at 1. Thus, the user can publicly use one e-mail box and fervently guard the other, disclosing the guarded address only to close friends, family members and important business contacts. Id. If the public e-mail box becomes inundated with unsolicited advertisement e-mail, a user can continue to use the guarded e-mail account. Id.
ply this boycott enforcement mechanism towards others not following their standards.

Part III illustrates an application by Internet users and service providers of the boycott enforcement mechanism towards those parties (spammers) who violate voluntary Internet standards by sending unsolicited, advertisement e-mail messages. Part III continues with an analysis of existing case law that finds the occurrence of antitrust violations by parties applying boycott enforcement mechanisms towards others not following their voluntary standards. Part III then uses a similar analysis to illustrate potential violations of antitrust law by Internet users and service providers who enforce voluntary, self-imposed Internet standards by applying the boycott enforcement mechanism towards spammers. Finally, Part III proposes practices that companies can follow to avoid antitrust violations. Part IV of this Comment then concludes with an assertion that an increase in Internet antitrust actions, brought about by increased on-line commercialism and the careless enforcement of self-imposed, voluntary standards, will result in the promulgation of governmental Internet regulations replacing such voluntary standards, thus effectively limiting Internet self-governing principles.

II. BACKGROUND

A. THE DECENTRALIZED INTERNET STRUCTURE AND INTERNET SELF-GOVERNANCE

The Internet is a decentralized global medium of communication designed by the United States military in the 1960's to survive an enemy nuclear attack. KENT D. STUCKEY, INTERNET AND ONLINE LAW xvi (1996); see Colin McRae, The Internet: A Timeline - the Events Leading to the Passage of the Telecommunications Act of 1996 (visited Jan. 24, 1996) <http://faraday.clas.virginia.edu/~lcm8d/usem.htm>. During the cold war, the United States and its allies envisioned a military command and control network that existed between the numerous military bases located within various cities and countries. McRae, supra. Having no central control point for communist enemies to target, communications between the allies would survive a nuclear attack through the near infinite number of communication routes that existed between the allied bases. Id. In 1969, under commission of the Department of Defense, the Advanced Research Project Agency (“ARPA”) developed an experimental network exhibiting the decentralized characteristics envisioned by the United States and its allies. Stuckey, supra, at xvi. This-experimental network, “ARPANET,” for ARPA-network, consisted of multiple, linked “nodes” or computers. McRae, supra. Each network possessed “the ability to originate, pass, and retrieve messages.” Id. If a given computer within the network was destroyed in a nuclear attack, other computers within the network could continue to communicate with one another. Id. ARPANET became available for academic use between the years 1979-81. Stuckey, supra, at xvi. Military influence withdrew from ARPANET and consequently changed ARPANET into its own multi-network system. McRae, supra. A “network of networks” steadily evolved, expanding to accommodate increased commercial activity. Stuckey, supra, at xvi; McRae, supra.
that, through the use of interactive Web sites, links people, institutions, corporations, and governments around the world. Internet operation exists and functions through hundreds of thousands of separate operators of computers and computer networks that communicate through common data transfer protocols. Because of the great number of computer and computer networks existing on the Internet, no single entity, be it academic, corporate, governmental, or non-profit, presently administers its use. Instead, Internet administration or control takes place at numerous locations, typically at points of Internet access to users or by virtue of the working relationship existing between Internet system operators. This decentralized administration of the Internet forms the foundation for the promulgation and enforcement of self-imposed Internet rules and regulations.

26. In 1994, hypertext markup language ("HTML") emerged, allowing further decentralization through the development of the World Wide Web ("Web"). See Stuckey, supra note 25, at xvi. Numerous host computers (servers) comprise the Internet and communicate with one another using hypertext transfer protocol language ("HTTP"). Id. Upon connecting to one of these servers or "Web sites," an Internet user will view a graphical page that includes highlighted text (hypertext markup). Id. If the user points and clicks on the highlighted text with the mouse, information from another Web site will appear. Id. The information from the other Web site includes hypertext links to other web sites. Id. The user can therefore browse or "surf" through numerous Web sites. Id.

27. Reno, 929 F. Supp. at 830 n.4; see David G. Post, Anarchy, State, and the Internet: An Essay on Lawmaking in Cyberspace, 1995 J. ONL;E L. art. 3, 913 (visited Jan. 24, 1997) <http://www.cli.org/DPost/X0023_ANARCHY.html> ("[The Internet] can be characterized as a multitude of individual, but interconnected, electronic communication networks, e.g., individual BBS systems, Prodigy, the Georgetown University LAN, the 'Cyberia' discussion list, or the network of machines that can communicate across the World Wide Web.").

28. The introduction of standardized network language protocols occurred in 1982. Stuckey, supra note 25, at xvi. Known as Transmission Control Protocol/Internet Protocol ("TCP/IP"), the language allowed for standardized communication between network computers. McRae, supra note 25; Stuckey, supra note 25, at xvi. TCP converts messages at the source computer into "packet streams" and then reconverts them into messages again when these "packet streams" reach the destination computer. McRae, supra note 25. IP identifies the addresses of the source and destination computers involved in the data delivery. Id. The TCP/IP communication standard allowed for interconnectivity between individual networks, laying the groundwork for further decentralization and Internet growth. Stuckey, supra note 25, at xvi.

29. Reno, 929 F. Supp. at 832 n.11.

1. Internet Use and the Gate Keeper Theory of Self Governance: A Decentralized Foundation for Internet Rule Enforcement

Before a person can use the Internet, that person must first gain access. Internet access typically requires a computer, modem, and an Internet service provider. Internet service providers ("ISPs") are typically companies or organizations that offer telephone dial-up or other moderate bandwidth connections to facilitate connecting individual users to the Internet. ISPs require consideration from a user in exchange for the granting of access before an ISP allows a user on-line. Therefore, a contract exists at the core of every relationship between an ISP and user. The basis for an Internet access contract is quite simple. A service provider promises to provide the user access to the Internet in exchange, the user agrees to pay for the access provided and to follow system rules established by the ISP (for example, do not harm other users; do not disrupt the network servers).

31. See generally Henry H. Perritt, Jr., How to Connect to the Internet, 443 PLI/PAT 35, 37-38 (1996) [hereinafter Perritt, Connect to the Internet] (discussing how either an individual computer user or a company local area network must access the Internet through a subscription with an Internet service provider).


33. Reno, 929 F. Supp. at 832 n.12; Perritt, Connect to the Internet, supra note 31 at 37.

34. Information Superhighway, supra note 32, at 5,7.

Bandwidth is the possible rate of information transferred through a communications channel. It thus measures capacity of a network and is usually expressed in kilo (thousands) of bits per second (kbps), or mega (millions) of bits per second (mbps). For example, a 100 megabit per second . . . [network] has ten times more information transfer capacity than a 10 megabit per second . . . [network] . . . . Dial-up connections are similar to those used in ordinary voice telephone communication. The originator of a communication session establishes a connection by dialing the number of another station. Computers, working through modems, do exactly the same thing, using exactly the same dial tones, to establish connections with other computer systems.

Id. at 7.

35. See Reno, 929 F. Supp. at 833 n.18; see also Multimedia Law, supra note 32, app. E; Perritt, Connect to the Internet, supra note 31, at 37. With the establishment of many new ISPs occurring every month, competition between ISPs is intense. Perritt, Connect to the Internet, supra note 31, at 37. Some ISPs provide connection services to individual computer users while others like MCI, AT&T, PSI and UUNet provide high bandwidth connections to company networks. Id.


37. Id. at 39.

38. Id. at 40.

39. Id. at 39-40.
Similarly, before an ISP can grant Internet access to contracted users, the ISP must first purchase bandwidth from an Internet bandwidth provider ("bandwidth provider"). Like the relationship between the ISP and the user, a contractual agreement exists between the bandwidth provider and the ISP that includes system rules that an ISP must follow. Again, these rules dictate the "do's and don'ts" of an ISP's use of the Internet (for example, abide by prohibition against using the Internet for child pornography).

To ensure conformity with these rules, an ISP or bandwidth provider agreement sets forth a means of rule enforcement. Regarding Internet or bandwidth access, enforcement for non-conformance usually consists of a relinquishment of Internet or bandwidth access. An ISP denies Internet access to a user while a bandwidth provider denies bandwidth to an ISP, each for failing to follow a set of rules. Because ISPs and bandwidth providers alike promulgate and enforce conduct rules for Internet or bandwidth use, each plays the role of a "gatekeeper," preventing system access by non-conformists.

Finally, these enforcement principles, although not resulting from an express agreement, may exist between each of the various ISPs ex-

---

40. See INFORMATION SUPERHIGHWAY, supra note 32, at 35-36 (explaining the relationships that exist between a provider of Internet bandwidth and a provider of Internet services); Henry H. Perritt, Jr., Basic Technological Terms and Concepts, 443 PLI/PAT 23, 28 (1996) (hereinafter Perritt, Terms and Concepts); see also DIGEX to Supply Internet Connectivity to Southwestern Bell, RBOC UPDATE, Nov. 1, 1996, available in 1996 WL 5804301 (discussing bandwidth lease agreement between bandwidth provider and Internet service provider); John Evan Frook, ISPs Take Niche Approach to Marketing, COMM. WK., Oct. 14, 1996, available in 1996 WL 12486393 (explaining that large companies may purchase bandwidth directly instead of through Internet service providers, who buy it wholesale); Bob Metcalfe, Beware of Fraud: Today's Internet Telephony Isn't Really Free or Reliable, INFOWORLD, July 22, 1996, available in 1996 WL 10765235 (explaining how Internet service providers, through agreement, can receive Internet bandwidth in a given direction, distance or quantity required for the application of Internet telephony).

41. The relationship that exists between an Internet bandwidth provider and service provider falls within the same classification as the relationship that exists between the Internet service provider and user; the "vertical" provider/consumer relationship. See INFORMATION SUPERHIGHWAY, supra note 32, at 35-36. Some authorities classify bandwidth and service providers under the rubric of "system operator." See, e.g., Johnson, supra note 30. Thus, system operator contracts often set forth the obligations that exist between bandwidth and service providers. See Rose, supra note 16, at 42-43.

42. Rose, supra note 16, at 42-43.

43. Johnson, supra note 30 (discussing how a system operator can enforce Internet access and use rules by banishing those users that break them); Johnson & Post, supra note 30 ("System operators (sysops) have an extremely powerful enforcement tool at their disposal to enforce rules - banishment.").

44. See Gillett, supra note 30 (discussing how an Internet service provider acts as a "gatekeeper" by deciding which users will receive Internet access privileges); Johnson & Post, supra note 30 (discussing how a system operator governs the access and use of a given network).
isting on the Internet. For example, ISPs may agree to provide some minimal level of privacy protection for e-mail messages transmitted between themselves. To enforce this rule, ISPs may agree to exclude any user who deliberately acts to defeat such protection. Similarly, ISPs may use exclusionary enforcement principles to limit the exchange of e-mail traffic to only those ISPs that honor certain minimum standards. These standards may, for example, pertain to accurate labeling of message contents to ensure that users receive a specific type of message.

The foregoing relationships all promulgate and enforce a given set of guidelines regulating Internet use. However, a unilateral proclamation of rules for a particular relationship does not work without conformity by other parties to the same relationship. Whether a relationship exists between two ISPs, between ISPs and bandwidth providers, or between ISPs and users, all parties must agree to a common set of rules or regulations. Realizing the need for a common set of standardized rules and enforcement strategies, Internet service providers, bandwidth providers, and users alike have created associations for the purpose of promulgating standardized Internet rules for members to follow.

2. Standardized Internet Regulations Created by Trade Associations and Established as a Source of Antitrust Liability

A standard is a constant, uniform, or invariable means, method, or tool adopted by a group for use in an industry to reach a specified goal. Modern technology, consumer convenience, and considerations of efficiency and economy are the impetus for adopting industry-wide stan-

45. See Johnson, supra note 30.
46. Id.
47. Id.
48. Id.
49. See id.
50. Id. To facilitate the establishment of such rules, one commentator proposed the following procedure:

(1) Any new proposed rule would be published in an easily accessible place and distributed by mail to a list of system operators ("sysops") and others interested in reviewing such proposals; (2) All comments and debate would be collected in the same location and distributed to interested parties; (3) Sysops prepared to accept and enforce the rule would register their agreement at this location; (4) Vigorous opposition to particular rules, coupled with an indication of unwillingness to connect to systems that adopt the proposed rule, would be registered; (5) After a suitable interval, the sysops who agree upon the rule would proceed to implement and enforce it.

Id.
51. GEORGE P. LAMB & CARRINGTON SHIELDS, TRADE ASSOCIATION LAW AND PRACTICE 76 (1971); cf. DAVID HEMENWAY, INDUSTRY WIDE VOLUNTARY PRODUCT STANDARDS 8 (1975) (defining standard as "something taken for a basis of comparison, or that which is accepted for current use through authority, custom or general consent . . . ").
standards and implementing certification programs.\textsuperscript{52} An implementation of standards allows for the achievement of many objectives.\textsuperscript{53} With regard to the Internet, an implementation of standards allow for the establishment of uniform rules for Internet operation and on-line conduct.\textsuperscript{54} The purpose of such rules of conduct is the elimination of abusive business practices, the reduction of injurious competition, the implementation of ethical considerations, and the overall improvement of the status or image of the trade, profession or industry.\textsuperscript{55}

The creation\textsuperscript{56} and implementation of standards typically\textsuperscript{57} result from the actions of private, standard-setting trade and professional associations.\textsuperscript{58} Individuals and companies interested in furthering their common commercial and professional goals join forces and form trade and professional associations.\textsuperscript{59} Trade associations exist "to provide [their] members with tools, usually in the form of information, that will

\begin{footnotesize}
\begin{enumerate}
\item[52.] Tedd Blecher, \textit{Product Standards and Certification Programs}, 46 \textit{Brook. L. Rev.} 223, 223 (1980).
\item[53.] \textsc{Lamb & Shields}, \textit{supra} note 51, at 76. A standard may establish dimensional or quality guidelines in the design and manufacture of goods. \textit{Id.} at 77. A standard may outline procedures and goals for the quality and performance testing of goods and materials. \textit{Id.} Standards may also establish rules and instruction for the use of a given good or service. \textit{Id.}
\item[54.] See Johnson, \textit{supra} note 30.
\item[55.] Blecher, \textit{supra} note 52, at 229.
\item[56.] Companies and product users within a given industry promulgate both suggestions for new standards and revisions of existing standards. \textsc{Lamb & Shields}, \textit{supra} note 51, at 77-78. Engineers, scientists, and other specialists employed by the member companies draft the standards for trade association programs. \textit{Id.} at 77. Also, qualified trade association employees assist the member companies in drafting the standards. \textit{Id.} Member company employees and trade association employees work together to determine the soundness and feasibility of the newly drafted standards. \textit{Id.} If the standard passes muster, the member company or trade association may submit these standards to the American Standards Institute, the National Bureau of Standards, or other agency, for national recognition. \textit{Id.} at 78.
\item[58.] See Gerla, \textit{supra} note 57.
\item[59.] \textsc{Robert H. Morse & Timothy J. Waters}, \textit{Introduction To Antitrust And Trade Associations: How Trade Regulation Laws Apply To Trade And Professional Associations} 3 (Robert H. Morse & Timothy J. Waters eds., 1996). Thousands of trade and professional associations exist in the United States. \textit{Id.} These associations represent manufacturers, contractors, service providers and a variety of other occupations. \textit{Id.} Typically, these associations focus on conducting business efficiently, responsibly and legally. \textit{Id.}
\end{enumerate}
\end{footnotesize}
enable them to operate more efficiently and more effectively.\textsuperscript{60} By establishing trade associations for the Internet, the associations can implement standards that unify Internet regulations, thereby increasing on-line communication efficiency.

The need for standardized Internet regulations has resulted in the emergence of a proliferation of on-line trade associations, each intent on bringing uniformity to Internet use.\textsuperscript{61} Many of these new associations are currently in the process of drafting standards for on-line commerce and advertising.\textsuperscript{62} For example, the creation of a non-profit association called the Internet Local Advertising and Commerce Association ("ILAC") resulted in the promulgation of commerce and advertising standards intended for on-line buyers and sellers.\textsuperscript{63} ILAC transforms the Internet into a valuable resource for advertisers and consumers by drafting and promoting on-line commerce standards.\textsuperscript{64} Many of the leading Internet companies serving the growing on-line advertising and commerce market, including Microsoft Corp., Pacific Bell Interactive Media, GTE Directories and R. H. Donnelley, attended an organizational meeting held by ILAC.\textsuperscript{65}

Established associations are also drafting standards for on-line commerce and advertising activities. The Direct Marketing Association collaborated with the Internet Services Association to develop standards promoting consumer privacy protection and to direct those marketers

\textsuperscript{60} LAMB \& SHIELDS, supra note 51, at 1.


\textsuperscript{64} Id.

\textsuperscript{65} Id. See also Hotnews Business Briefs, INTERNET WK., Mar 10, 1997, available in 1997 WL 8527489 (discussing the proposed participation of nearly 200 Internet executives in the organizational meeting of the Internet Local Advertising and Commerce Association and how "the group intends to accelerate the development of standards and business practices to improve local Internet advertising . . . [with] Microsoft Corp., Digital City, Times Mirror Co., and R. H. Donnelley . . . expected to attend").
utilizing interactive, on-line media.66 Furthermore, the Better Business Bureau ("BBB") recently launched "BBBOnline," an on-line certification program.67 "Like the BBB's real world counterpart, BBBOnline will award a seal of approval to companies that agree to abide by a set of business practices . . . [to include] participation in the BBB's [on-line] advertising self regulation program."68 Not unlike the creation of ILAC, which drew industry-wide support, this project attracted large corporate sponsors such as Netscape, Ameritech, GTE, and Eastman Kodak, all hoping to bring standardized self-imposed regulation to the on-line marketplace.69

The creation of present standardization and certification programs for the Internet remains largely in the hands of trade associations, who may gain both financial support and substantive standardization ideas from private Internet corporations and companies. However, executives of private companies, who are also members of these trade associations, may possess a "strong motive to suppress competition."70 Thus, these Internet companies, under the guise of an association promoting standardized Internet regulation, may promulgate and enforce Internet rules designed to harm on-line competition.71 Such questionable use of Internet rules and enforcement mechanisms therefore invokes the federal antitrust laws.72

---

66. Reese, supra note 19.

The principles advocate: posting on-line solicitations to news groups, bulletin boards, and chat rooms only when consistent with a service provider's stated policies; clearly identifying on-line solicitations as such and disclosing the marketer's identity—solicitations should contain an opt-out mechanism for consumers who do not wish to be included on mailing lists that will be sold, rented, or exchanged with other companies marketing on-line; individuals and companies harvesting information from on-line activities should give consumers the option of having their names and e-mail suppressed; marketers who operate chat areas, news groups, and other public forums should inform users that information they volunteer in these areas may result in unsolicited messages from others.

Id.


68. Helft, supra note 9, at D1.

69. Phone Companies, supra note 67.

70. Gerla, supra note 57, at 471.

71. Id.

72. Id.
To preserve the American system of competition, lawmakers created United States antitrust laws by enacting the Sherman Act of 1890. The Sherman Act ensures that unlawful agreements among competitors, customers, and suppliers do not inhibit competition among business enterprises.\(^\text{73}\) The Sherman Act, although comprised of seven sections, contains only two sections relevant to trade associations and rule standardization.\(^\text{74}\)

Section 1 of the Act prevents business practices that restrain trade.\(^\text{75}\) Section 2 prevents business practices that result in trade and industry monopolies.\(^\text{76}\) “Although section 2 occasionally serves as the basis of an antitrust action against an association, section 1 is far more commonly cited both in antitrust complaints and in court opinions discussing alleged and proved antitrust violations by associations.”\(^\text{77}\) Section 1 is cited more often because trade association activities “by their very nature, constitute a ‘contract,’ ‘combination’ or ‘agreement’, . . . one

\(^{73}\) Standard Oil Co. v. FTC, 340 U.S. 231, 248-49 (1951); Morse & Waters, 2 supra note 59, at 1.

The Sherman Act, in part, was a reaction to “trusts” and “combinations” by companies seeking to find ways to maximize efficiency or eliminate market dislocations through coordinated industry-wide conduct. The business combinations or trusts of the late 19th century were viewed as artificial devices to control markets, restrict competition, and exploit the public. The sponsors of antitrust legislation, however, were not hostile to new business arrangements, mere size, or market power. Cooperative trade groups and chambers of commerce were a product, in part, of the industrialization of America. Indeed, associations can trace their origins to the merchant guilds of medieval times. Rather, the purpose underlying the Sherman Act was to “preserve the competitive process and to channel it along socially productive lines”. In many respects, today’s trade associations are an evolution of last century’s trust and business.

Fortunately, the fear and suspicion about business combinations of the late 19th century has been dissipated, if not disabused. As we approach the 21st century, the courts and antitrust agencies fully recognize that trade and professional associations perform a great number of functions that are useful and valuable, not only to their members, but also to society generally. The self governing activities of many associations serve to educate businesses and professionals, as such, advance the consumer welfare. The internationalization of the United States economy underscores the need for industries to harmonize and interface different product standards and business practices with foreign trading partners. These tasks are not well suited to individual corporate efforts. Collaboration and coordination among businesses is inevitable and increasingly essential. Nevertheless, given the genesis of the Sherman Act, and its focus on collective activity, trade associations have and will continue to have an inextricable relationship with the antitrust laws.

\(^{74}\) Arthur L. Herold & George D. Webster, Antitrust Guide for Association Executives 2 (2d ed. 1979).

\(^{75}\) 15 U.S.C. § 1 (1994); Herold & Webster, supra note 74, at 2.

\(^{76}\) 15 U.S.C. § 2; Herold & Webster, supra note 74, at 2.

\(^{77}\) Herold & Webster, supra note 74, at 2.
of the [two] threshold elements [required for an antitrust violation under] . . . section 1 of the Sherman Act.\textsuperscript{778} The nature of the association's activity resulting from the combination or agreement dictates\textsuperscript{79} the second threshold element for a section 1 antitrust violation; whether the conduct of any trade association creates an unreasonable restraint of trade.\textsuperscript{80}

1. **Requirements for Finding an Antitrust Violation: Parallel Conduct and Plus Factors**

A violation of section 1 of the Sherman Act, which prohibits restraints of trade resulting from combinations and agreements, requires a finding of "concerted action" between at least two separate parties or entities.\textsuperscript{81} Although evidence of a concerted action may exist in the form of an express agreement,\textsuperscript{82} the courts also deduce the existence of an agree-

---

\textsuperscript{778}Morse & Waters, supra note 59, at 3.

\textsuperscript{79}Id.

\textsuperscript{80}"Restraint of trade" is a term of art derived from the common law. Lamb & Shields, supra note 51, at 21.

The courts originally applied the term to covenants under which one individual agreed not to compete with another, usually for a limited time and within a limited territory. With time, the courts extended the term "in restraint of trade" to test the legality of agreements among competitors to refrain from competing with one another and to agreements restricting the ability of outsiders to conduct business. If a court found such an agreement to be "in restraint of trade," the court held that the agreement was illegal. As trade associations may affect the legality of these aforementioned agreements, "restraint of trade" thus became a test of the legality of a trade association's activities.

\textsuperscript{81}See, e.g., Fisher v. City of Berkeley, 475 U.S. 260 (1986) (actions required by an ordinance were unilateral and not "concerted," as required by section 1 of the Sherman Act); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) ("[A] plaintiff seeking damages for a violation of section 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently."); Copperweld Corp. v. Independence Tube Corp., 487 U.S. 752 (1984) (alleged conspiracies between a corporation and its employees and subsidiaries constituted a unilateral action not subject to section 1 prohibition under the Sherman Act); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) (finding no concerted action existed where individual complaints from dealers caused the termination of a competitor; the action did not satisfy the concerted requirement of section 1 of the Sherman Act).

ment from circumstantial evidence.\textsuperscript{83}

In early antitrust decisions, proof of "parallel" conduct by a group of co-conspirators provided the requisite probative evidence to prove the existence of an agreement between them.\textsuperscript{84} However, the courts now require "plus factors" as additional evidence to bolster the inference of collusion through parallel conduct.\textsuperscript{85} For example, the courts use the following factors to bolster the circumstantial proof of parallel conduct: attendance of meetings by the defendants where defendants have an opportunity to conspire; hostile statements made by defendants; presence of a motive for defendants to agree; behavior by defendants that extends beyond that which is expected of them absent an agreement; behavior by

\begin{flushright}
83. See Eastern States Retail Lumber Dealers' Ass'n. v. United States, 234 U.S. 600, 612 (1914).

But it is said that in order to show a combination or conspiracy within the Sherman Act, some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done; and when, in this case, by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.\textit{Id.} at 612. See also Reazin v. Blue Cross and Blue Shield of Kan., Inc., 899 F.2d 951, 963-64 (10th Cir. 1990), \textit{cert. denied}, 497 U.S. 1005 (1990) (illustrating a situation where circumstantial evidence supported an inference of an agreement between a health care financing organization and a hospital's competitors).

84. Another phrase for such conduct is "conscious parallelism of action." \textit{Lamb & Shields, supra} note 51, at 25. Conscious parallelism of action allows a court to infer a conspiracy between two parties under section 1 of the Sherman Act from evidence showing that the two "had access to the same information and reacted in a similar manner to the information." \textit{Id}. Early anti-trust court decisions used "conscious parallelism" as a sufficient basis for a finding of concerted actions between parties. See American Tobacco Co. v. United States, 328 U.S. 781 (1946) (finding that an agreement existed because of the presence of parallel pricing and competitive bidding behavior); Interstate Circuit v. United States, 306 U.S. 208 (1939) (stating that concurrent acceptance of "invitations" to engage in similar pricing behavior by a group of suppliers was sufficient to prove a concerted action existed, where such acceptance was essential for implementing the pricing scheme); Bigelow v. RKO Radio Pictures, Inc., 150 F.2d 882-83 (7th Cir. 1945), \textit{rev'd on other grounds}, 327 U.S. 251 (1946) ("Knowing participation by competitors without previous agreement in a plan, the necessary consequence which is carried out is unlawful restraint of interstate commerce, is sufficient to establish an unlawful conspiracy."); William Golman Theatres, Inc. v. Loews, Inc., 150 F.2d 738, 745 (3d. Cir. 1945), \textit{cert. denied}, 334 U.S. 811 (1948) ("Uniform participation by competitors in a particular system of doing business where each is aware of the other's activities, the effect which is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the statutes before us.").

85. See, e.g., Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41 (1954) (stating that, parallel business behavior, although admissible to infer agreement between two parties, is insufficient by itself to prove the occurrence of an antitrust violation); E.I. Du Pont De Nemours & Co., v. FTC, 729 F.2d 128, 139 (2d Cir. 1984) (stating that parallel pricing of an identical product within a given market is not sufficient by itself to prove a violation of antitrust laws).
defendants that is contrary to their economic self interest; and a simultaneous imposition by defendants of substantially identical terms of sale.\textsuperscript{86} Therefore, if companies doing business on the Internet engage in parallel conduct with any of these aforementioned "plus factors" present, their activities may satisfy the requirement of a concerted action under section 1 of the Sherman Act.

2. \textit{Restraint of Trade: Enforcement of Standards Through Boycott and the Per Se / Rule of Reason Dichotomy for Finding Antitrust Violations}

Effective governance of the Internet through self-regulation requires more than merely promulgating various standards.\textsuperscript{87} Governance of the Internet requires "actual enforcement of [these] standards through the imposition of sanctions for noncompliance."\textsuperscript{88} Typically, sanctions exacted against violators of self-imposed Internet standards take the form of "concerted refusals to deal."\textsuperscript{89} The courts have defined such concerted

\textsuperscript{86} See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596-97 (1986) (discussing how the presence or absence of a motive is a factor to consider when trying to determine whether the ambiguous conduct of the defendants constituted a conspiracy under antitrust laws); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1243-45 (3d Cir. 1993) (noting that defendant's conduct of refraining from bidding on accounts already serviced by other defendants was a factor to consider when determining the presence of an antitrust violation because such conduct was contrary to the defendant's economic self interest); Bolt v. Halifax Hosp. Med. Ctr., 891 F.2d 810, 826 (11th Cir. 1990) (stating that the defendant's conduct was a factor to consider in determining the occurrence of an antitrust violation where "each defendant engaging in the parallel action [may have] acted contrary to its economic self interest . . . .''); Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1059-61 (5th. Cir. 1985) (finding conspiracy where there are hostile comments combined with predatory economic coercion and refusals to deal); Penne v. Greater Minneapolis Area Bd. of Realtors, 604 F.2d 1143, 1148-49 (8th Cir. 1979) (stating that lower court should not have granted summary judgment where evidence of conspiracy included allegation of hostile comments, blacklisting, and punitive commission shares).


\textsuperscript{88} Id.

\textsuperscript{89} For example, a Web site exists on the Internet that advocates the boycott of on-line advertisers. See Axel Boldt, \textit{Blacklist of Internet Advertisers} (visited July 14, 1997) <http://math-www.uni-paderborn.de/~axel/BL/blacklist.html> ("If you judge that one of the judged [advertising] behaviors deserves some punishment, you could for example . . . [boycott the advertising business."). Thus, the administrator of this Web site recommends boycotting companies that engage in on-line advertising. \textit{Id.} ("[T]he Internet is probably as close to anarch[y] as we can get . . . . Therefore, punishing of unwelcome [advertising] behavior [through boycotting] should be done by private individuals following the same grassroots philosophy that governs the rest of the Internet."). For an interesting article that discusses this Web site, see Reese, \textit{supra} note 19. \textit{See also} Kornblum, \textit{supra} note 24 (discussing that bandwidth providers will boycott Internet service providers that support bulk e-mail advertising).
Group boycotts refer to the activities a given party performs to pressure another party into acting in a desired way when the given party withholds, or enlists others to withhold, patronage or services from the other party. Furthermore, the courts have added judicial gloss by distinguishing between two altogether different categories of group boycotts; those so inherently anti-competitive that the courts deem them as per se illegal, and those where anti-competitive behavior is justifiable under a rule of reason analysis. Thus, a pattern of Supreme Court decisions regarding the antitrust legality of commercial boycotts may aid in charting the presently unexplored legal territories of the Internet.

a. The Per Se Doctrine of Boycott Illegality

The doctrine of "per se boycott illegality" allows a plaintiff to prove the occurrence of an anti-competitive action without extensive inquiry by the court into the factual circumstances justifying the occurrence or a

90. See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (referring to "group boycotts" as "concerted refusals by traders to deal with other traders"); cf. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 801-02 (1993) (distinguishing a "concerted agreement to terms" from a "conditional boycott," by which companies collectively use unrelated transactions as leverage to achieve desired terms for a specific transaction).


92. See Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co., 472 U.S. 284, 296 (1985) (distinguishing between per se illegality, which requires a showing of market power or service control, and rule of reason illegality, which does not require such a showing).

Unless the cooperative possesses market power or exclusive access to an essential to effective competition, the conclusion that expulsion is virtually always likely to have an anti-competitive effect is not warranted. Absent such a showing with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis. At no time has [the plaintiff] made a threshold showing that the structural characteristics are present in this case.

Id. (citations omitted).

93. Because the Supreme Court decided only a small number of antitrust cases regarding trade associations, legal precedent is limited in this area of law. Morse & Waters, supra note 59, at 7. Thus, trade associations must refer to outdated case law when seeking legal guidance with regard to antitrust law. Id.

94. See Stuckey, supra note 25, at x-xi.

There is a growing need for specific laws to optimize the development of these new (Internet) markets and to minimize risks and threats of harm. Such laws are needed to identify efficiently and allocate risks, resolve disputes, enhance security and privacy, and achieve certainty in commercial dealings that do not involve traditional paper instruments and signatures. Laws are needed to establish boundaries to acceptable conduct and accountability for exceeding them . . . . At present the amount of directly applicable law is relatively scant, with only "pockets" of law having been specifically addressed. The range of relevant legal issues is extremely broad—reflecting the vast scope of potential on-line conduct and communication.

Id.
finding by the court of an actual occurrence of trade restraint. The doctrine evolved through a series of Supreme Court decisions, with each consecutive decision giving per se illegality increased strength. In Fashion Originators' Guild of America, Inc. v. FTC, (hereinafter "Fashion Originators") clothing manufacturers, as members of The Fashion Originators' Guild of America ("FOGA"), boycotted clothing retailers who sold garment "copies" made by manufacturers. Although FOGA members tried to justify their actions as an attempt to prevent an "unfair trade practice" and "tortious invasion of their rights" resulting from the manufacture and sale of copied garments, the Supreme Court declared that the FOGA boycott constituted both an "unfair method of competition" and a Sherman Act offense.

In their decision, the Court noted that the FOGA boycott ran contrary to the Sherman Act by restraining general competition. The

97. Id. at 461. Garment manufacturers, who claimed to create original and distinctive garment designs for women, sought to curb "style piracy," a practice whereby other clothing manufacturers merely copied these designs and sold them to the public at a lower price. Id. The manufacturers, as members of the Fashion Originator's Guild of America ("FOGA"), sought, as a group, to eliminate competitors benefiting from the sale of copied garments by "influencing" retailers not to sell them. Id. FOGA accomplished this objective by distributing to member clothing manufacturers the names of retailers selling the copied garments. Id. The member manufacturers then refrained from selling their goods to retailers known to sell garment copies. Id. As a result of their efforts, thousands of clothing retailers throughout the country signed agreements to not sell copied garments. Id. Of these retailers, more than half agreed to FOGA's demands only because they did not want clothing manufacturers to refuse to sell their garments. Id. at 461-62.
98. Id. at 464-65.
99. Id. at 465.

[T]he many respects in which FOGA's plan runs contrary to the policy of the Sherman Act are these: it narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy; subjects all retailers and manufacturers who decline to comply with the FOGA's program to an organized boycott; takes away the freedom of action of members by requiring each to reveal to the FOGA the intimate details of their individual affairs; and has both as its necessary tendency and as its purpose the effect of direct suppression of competition from the sale of unregistered textiles and copied designs.
Court further averred that the manufacturers, who claimed that their actions “were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of [their] original designs,” had no justifiable reason to engage in a boycott.\textsuperscript{100} The Court stated: “[A]s we have pointed out... the aim of [the manufacturers] was the intentional destruction of one type of manufacture and sale which competed with Guild members.”\textsuperscript{101} “The purpose and object of [the boycott], its potential power, ... the coercion it could and did practice upon a rival method of competition, all brought it within the policy and prohibition declared by the Sherman ... Act.”\textsuperscript{102} Finally, the Court admonished FOGA for, in effect, creating an extra-governmental agency that proscribed the regulations of antitrust law.\textsuperscript{103}

In a second case, the Supreme Court again applied a strict per se approach to determine that a boycott by appliance manufacturers violated the Sherman Act. In \textit{Klor’s, Inc. v. Broadway-Hale Stores, Inc.},\textsuperscript{104} (hereinafter “Klor’s”) a San Francisco appliance store brought an antitrust action against a competitor, alleging that the larger competitor threatened appliance manufacturers by refusing to buy from them if they also sold appliances to Klor’s.\textsuperscript{105} The Court, in reversing the appellate court decision\textsuperscript{106} and remanding the case to the district court, held that the boycott against Klor’s constituted a combination or conspiracy in restraint of trade under section 1 of the Sherman Act, despite the fact that Klor’s offered no evidence supporting a negative affect on

\textsuperscript{100} Id. (citations omitted).
\textsuperscript{101} Id. at 467.
\textsuperscript{102} Id. at 467-68.
\textsuperscript{103} Id. at 465 (“[T]he [boycotting party] is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violation, and thus ‘trenches upon the power of the national legislature and violates the statute.’”).
\textsuperscript{105} Id. at 208-09. The manufacturers included “such well-known brands as General Electric, RCA, Admiral, Zenith [and] Emerson . . . .” Id. at 209.
\textsuperscript{106} Id. at 214. In district court, the defendants filed a motion for summary judgment, alleging that the plaintiff failed to state a cause of action. Id. at 209. In support of its motion, the defendants submitted affidavits showing the existence of other appliance retailers in the same geographic region as Klor’s, who, although also in competition with the defendant, sold many of the competing brands of appliances allegedly not supplied to Klor’s because of the defendant’s influence. Id. at 209-10. The district court thus dismissed the complaint and entered summary judgment for the defendants, concluding that the controversy between Klor’s and Broadway-Hale did not violate the Sherman Act. Id. at 210. The Court of Appeals for the Ninth Circuit affirmed the district court’s issuance of a summary judgment, holding that the competitive activities of the defendant did not harm the public good, as proscribed by antitrust laws, because they had no effect on the quality or quantity of goods offered for sale. Id.
The Court justified its per se holding that the boycott violated the Sherman Act by stressing the wrongful conduct incurred by Klor's. "The [appellate court] holding, if correct, means that unless the opportunities for customers to buy in a competitive market are reduced, a group of powerful businessmen may act in concert to deprive a single merchant, like Klor's, of the goods he needs to compete effectively." Therefore, in addition to giving no consideration to reasons of justification in finding a given party's boycott in violation of the Sherman Act, as in Fashion Originators, the Supreme Court found the boycott action in violation of the Sherman Act without proof that the action actually constituted a restraint on competition. The culmination of the per se doctrine of boycott illegality, however, came with the 1963 Supreme Court decision of *Silver v. New York Stock Exchange* (hereinafter "*Silver*").

In *Silver*, the Court held that the stock exchange's action of withdrawing the telephone wire connections that enabled Silver to trade securities constituted a boycott and per se violation of the Sherman Act. After a minimal analysis of trade restraint and a brief emphasis on the wrong incurred by the plaintiff, the Court held that the boycott activity of the exchange constituted an antitrust violation because no ex-

---

107. *Id.* at 210. In support of its decision, the court stated that boycotts breach antitrust laws because they constitute a class of restraint that is "unduly restrictive," of commerce. *Id.* at 211.

Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category of restraint. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parceled out or limited production, or brought about a deterioration in quality."

*Id.* at 212 (citation omitted).

108. *Id.* at 210.

109. *Id.* at 213.


112. *Id.* at 343. Since there was no central trading place for securities traded over the counter, the wire connections enabled Silver to trade securities with numerous firms throughout the country. *Id.* at 348. The wire connections also enabled Silver to obtain market information to aid in the decision of whether to buy or sell securities. *Id.*

113. *Id.* at 347 ("The concerted action of the exchange and its members here was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed to compete effectively as broker/dealers in the over-the-counter securities market.").

114. *Id.* at 348.
isting statute justified this activity.\textsuperscript{115} Also, as in \textit{Fashion Originators}, the Court again admonished the exchange for engaging in activities that were extra-governmental.\textsuperscript{116} Thus, \textit{Silver} strengthened the per se doctrine by allowing for a finding of illegality under the Sherman Act for any boycott deriving no justification from existing statutes. However, many lower courts were critical of the sweeping rule set forth by \textit{Silver},\textsuperscript{117} eventually leading to a modification of the per se doctrine and the introduction of the “rule of reason” analysis.

\textbf{b. The Rule of Reason Doctrine of Boycott Illegality}

After \textit{Silver}, the Supreme Court withdrew from a sweeping application of the per se doctrine for commercial boycotts and instead applied a “doctrine of reasonableness” to determine antitrust liability.\textsuperscript{118} The doctrine of reasonableness “enables the courts to avoid an all-encompassing literal application of the Sherman Act while permitting the courts to give substance to its broad language, thereby saving the statute from attack on the grounds of vagueness.”\textsuperscript{119} For example, in \textit{Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.}, (hereinafter “\textit{Northwest Wholesale}”) the Supreme Court limited the per se illegality applied in \textit{Fashion Originators} to boycotts that caused a restraint of trade while simultaneously providing no commercial benefit.\textsuperscript{120}

In \textit{Northwest Wholesale}, the expelled member of a purchasing cooperative brought suit, alleging the expulsion constituted a group boycott

\begin{itemize}
\item \textsuperscript{115} \textit{Id.} at 348-49.
\item \textsuperscript{116} \textit{Id.} at 348. \textit{See id.} at 357 (explaining that the courts do not exempt self-regulatory conduct from antitrust laws or other statutes and that the courts do not favor any actions repealing governmental laws).
\item \textsuperscript{117} \textit{See, e.g.,} Phil Tolkan Datsun \textit{v.} Greater Milwaukee Datsun Dealers' Adver. Ass'n, 672 F.2d 1280, 1286-87 (7th Cir. 1982) (ignoring the \textit{Silver} per se standard); United States Trotting Ass'n \textit{v.} Chicago Down Ass'n, 665 F.2d 781, 789-90 (7th Cir. 1981) (stating that a growing number of courts recognize that an application of the \textit{Silver} per se standard is improper).
\item \textsuperscript{118} \textit{See Nat'l Soc'y of Prof'l Eng'rs \textit{v.} United States}, 435 U.S. 679, 688 (1978).
\item \textsuperscript{119} Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition . . . . Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of the reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.
\item \textit{Id.} at 688.
\item \textsuperscript{120} \textit{Standard Oil Co. \textit{v.} United States}, 221 U.S. 1, 63 (1911).
\end{itemize}
in per se violation of the Sherman Act. The Supreme Court, in upholding a summary judgment granted to the cooperative by the district court, cited \textit{Klor's} and \textit{Silver} as boycott cases deserving of per se invalidation under the Sherman Act. The Court justified a per se finding only because the boycotting parties in these cases possessed a "dominant position" in the relevant market.

According to this rationale, the Court, in effect, modified the per se rule for boycotts to include ingredients of reasonableness. Thus, according to the reasonableness inquiry of \textit{Northwest Wholesale}, "[u]nless the [boycotting party] possesses market power or exclusive access to an element essential to effective competition, the conclusion that [boycott] is virtually always likely to have an anti-competitive effect is not warranted." The Supreme Court again applied the rule of reason standard of \textit{Northwest Wholesale} in \textit{FTC v. Indiana Federation of Dentists} (hereinafter "Indiana Federation") when dentists, fearing encroachment on their professional independence and economic well being, formed a federation to resist an insurer's request for x-rays for benefit payment evaluation. The Supreme Court, in reviewing the decision of the Seventh Circuit reversed, holding that the uncontroverted facts of the case supported a finding of per se liability.

---

121. \textit{Northwest Wholesale}, 472 U.S. at 288. A purchasing cooperative expelled one of its members, Pacific, a seller of both retail and wholesale office supplies, after Pacific failed to notify the cooperative that the Pacific's sales operations changed owners. \textit{Id.} at 287. Prior to the ownership change of Pacific, the cooperative amended its bylaws to prohibit members from engaging in both retail and wholesale operations. \textit{Id.} Although Pacific engaged in both retail and wholesale operations, a grandfather clause preserved Pacific's membership rights. \textit{Id.} Pacific's new owners did not officially inform the cooperative of this change. \textit{Id.} Pacific's failure to notify the cooperative violated the cooperative's bylaws. \textit{Id.} Later, the cooperative's directors voted to expel Pacific. \textit{Id.} However, the issue of whether the cooperative expelled Pacific for failing to notify the cooperative of Pacific's new owners or whether the cooperative expelled Pacific because Pacific engaged in both retail and wholesale operations remained in dispute. \textit{Id.}

122. \textit{Id.} at 288. The district court rejected application of the per se standard, and instead applied a rule of reason analysis to find no occurrence of anti-competitiveness, thus granting summary judgment to the cooperative. \textit{Id.} The Court of Appeals for the Ninth Circuit reversed, holding that the uncontroverted facts of the case supported a finding of per se liability. \textit{Id.}

123. \textit{Id.} at 293.

124. \textit{Id.} at 294.

125. Although per se illegality does not ordinarily involve a factual evaluation of facts or circumstances surrounding a commercial wrong, the Court nonetheless described their factual finding of an antitrust violation as a per se analysis instead of one involving a rule of reason analysis. \textit{See id.} at 296.

126. \textit{Id.} at 285. Absent such a showing with respect to a cooperative buying arrangement, courts should apply a rule of reason analysis. \textit{Id.}


128. \textit{Id.} at 451. Dental health insurers, in an effort to contain the cost of dental treatment, requested that dentists submit x-rays with their claim forms so that the insurers could review a dentist's evaluation and diagnosis before paying insurance claims. \textit{Id.} at
Circuit Court of Appeals that vacated a Federal Trade Commission cease and desist order\textsuperscript{129} against the Federation of Dentists, used a “rule of reason” standard to determine that the Federation’s conduct constituted a concerted refusal to deal.\textsuperscript{130} Although the Court noted past decisions holding boycotts as unlawful per se, it nonetheless “declined to resolve [the] case by forcing the Federation’s policy into the ‘boycott’ pigeonhole and invoking the per se rule.”\textsuperscript{131}

The Court found the dentists’ boycott in violation of the Sherman Act because, under a rule-of-reason analysis of the boycott’s purpose and effect, the boycott impaired the provision of price-competitive dental care to consumers.\textsuperscript{132} Hence, unlike the per se holdings of Fashion Origina-
tors, Klor’s, and Silver, Northwest Wholesale and Indiana Federation require a finding of anti-competitive affect on a given market before a court can find a party liable for boycott actions under the Sherman Act. Notwithstanding, the Supreme Court deviated from the holdings of Northwest Wholesale and Indiana Federation by rejecting this narrow application of the per se rule in a later decision.

\textsuperscript{449} After the insurance company receives the claim forms and accompanying x-rays from a given dentist, the insurance company forwards the materials to claim examiners, who, after reviewing them, may approve the payment of claims. \textit{Id.} If the claim examiners determine that the treatment recommended by the dentist is possibly unnecessary, they refer the claims to a dental consultant, typically a licensed dentist, who then further reviews the materials. \textit{Id.} After this further review, the dental consultant may recommend that the insurer either approve or deny a claim. \textit{Id.} at 449. The consultant may also recommend that the insurer seek a less expensive treatment. \textit{Id.} Concerned about their economic livelihood, the dentists initially resisted as part of a state dental association. \textit{Id.} at 449-50. However, after the association consented to a Federal Trade Commission order requiring it to cease and desist from further efforts to resist sending x-rays, dentists formed a separate federation to continue their boycotting efforts. \textit{Id.} at 450-51.

\textsuperscript{129} Before an administrative law judge, the FTC concluded that the federation’s x-ray boycott policy constituted a restraint of trade because the boycott prohibited competition between dentists with respect to the use of their insurance policies. \textit{Id.} at 451-52. The Seventh Circuit Court of Appeals concluded that the Commission erred in finding that the boycott violated the Sherman Act because “the evidence did not support the finding that, in the absence of restraint, dentists would compete for patients by offering cooperation with the requests of the patient’s insurers . . . .” \textit{Id.} at 453. The Seventh Circuit also faulted the Commission “for not finding that the alleged restraint on competition had actually resulted in higher dental costs to patients and insurers.” \textit{Id.}

\textsuperscript{130} \textit{Id.} at 458.

\textsuperscript{131} \textit{Id.} The Court referred to Northwest Wholesale in explaining that “the category of restraints classed as group boycotts is not to be expanded indiscriminately” and that the Court has “been slow to condemn rules adopted by professional associations as unreasonable per se . . . .” \textit{Id.}

\textsuperscript{132} Indiana Federation, 476 U.S. at 459. The Court stated that the boycott “impair[ed] the ability of the market to advance social welfare by ensuring the provision of desired goods to consumers at a price approximating the marginal [insurer’s] cost of providing them.” \textit{Id.}
c. Coming Around Full Circle: A Return to the Per Se Doctrine of Boycott Illegality

In FTC v. Superior Court Trial Lawyers Ass'n (hereinafter "SCTLA"), FTC v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411 (1990), a group of private attorneys agreed not to represent destitute criminal defendants until they received an increase in compensation.134 In reviewing the appellate court’s ruling that vacated an FTC cease-and-desist order barring the attorneys’ boycott, the Supreme Court used the per se test to uphold the FTC’s prohibition.135 The Court held that the lawyers’ boycott “constituted a classic restraint of trade within the meaning of section 1 of the Sherman Act.”136 Furthermore, the Court disagreed with the appellate court’s assumption that the per se standard “is only a rule of administrative convenience and efficiency, not a statutory command.”137 Rather, the Court stated that “[t]he per se rules are . . . the product of judicial interpretations of the Sherman Act . . . [that] nevertheless have the same force and effect as other statutory commands.”138

Therefore, as SCTLA demonstrates, the Supreme Court may continue to apply the per se doctrine when deciding the antitrust legality of commercial boycotts. Because the per se doctrine allows a finding of antitrust liability with a minimal showing of restraint on competition, the

134. Id. at 414. Because of the growing number of indigent defendants seeking representation at the public defender’s office, attorneys in private practice were appointed and compensated, pursuant to the Criminal Justice Act, to accept the overflow cases from the public defenders office and provide the needed legal representation. Id. at 415. At an Association meeting, the attorneys agreed that the only viable way to get an increase in fees was to stop accepting new cases and that the boycott should aim for a minimal increase in attorney pay rates. Id. at 416. The attorneys prepared and signed the following petition:

We, the undersigned private criminal lawyers practicing in the Superior Court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act.

Id. Pursuant to their petition, about 90 percent of the attorneys refused to accept any new cases from the public defender’s office. Id.

135. Id. at 420-21. The FTC filed a complaint against the SCTLA alleging that their attorneys “had entered into an agreement among themselves and with other attorneys to restrain trade” by refusing to accept new cases from the public defender’s office. Id. at 418. At a hearing, the administrative law judge found that the facts alleged by the FTC were true. Id. Nevertheless the judge concluded that dismissal of the complaint was proper because the boycott, in attracting lawyers in search of higher pay rates, had the beneficial effect of lowering the overbearing caseload. Id. at 419. Disagreeing with the ALJ, the FTC nonetheless issued the cease and desist order which was later vacated by the court of appeals. Id. at 420.

136. Id. at 422.
137. Id. at 432.
138. Id. at 433. Also, the Court noted that, not unlike a rule of reason analysis, the per se standard assumes that prohibited commercial practices impact competition. Id.
doctrine is well suited for application in deciding the legality of Internet boycott actions, where the boundaries of on-line competition remain undefined.

III. ANALYSIS

As Internet users and service providers "collaborate in formulating standards" for the provision of access services, "questions of antitrust law [will] inevitably arise." Industry formulated standards have the potential to injure service providers unable or unwilling to comply with them. As a result, the courts may consider industry-wide voluntary standards for Internet service providers as a restraint of trade under section 1 of the Sherman Antitrust Act, which prohibits unreasonable restraints on interstate trade or commerce.

To date, "[n]o court has held that an association standardization program, by itself, constituted a per se violation of the antitrust laws." "On the contrary, the courts have emphasized the basic legality of industry standardization." However, while the courts support the basic le-

139. Brody & Havighurst, supra note 87, at 199. Antitrust laws seek to prohibit collaboration between members of a trade profession that affects prices or the ability of others within the trade or profession to compete. HEROLD & WEBSTER, supra note 74, at 7. To avoid antitrust liability, trade associations must monitor their collaborative activities to ensure that anti-competitive effects do not result. Id. Failure by an association to take the above precautions may result in the association becoming the target of antitrust enforcement proceedings by the government or other actions by either private parties or the government. Id. See Susan J. Braden, The Cutting Edge of Antitrust: Lessons From Deregulation, Remarks at the Panel Discussion on Self-Regulation (June 13, 1988), reprinted in 57 ANTITRUST L.J. 809, 811 (1989) (setting forth antitrust complaint principles to guide regulatory agencies in judging an administered standard).

140. 15 U.S.C. § 1 (1994) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or within foreign nations, is hereby declared to be illegal . . . .").

141. THE UNITED STATES SUPREME COURT ONCE ONE EXPLAINED THE UNDERLYING PURPOSE FOR ENACTING THE SHERMAN ACT AS FOLLOWS:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions. But even were that premise open question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." Although this prohibition is literally all encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition.

Northern Pacific Ry. v. United States, 356 U.S. 1, 4-5 (1968).

142. HEROLD & WEBSTER, supra note 74, at 76.

143. Id. The favorable view by the courts of the basic legality of trade association standards has its origins in early Supreme Court decisions. See, e.g., Maple Flooring Ass'n v.
gality of standardization programs, their application of antitrust laws to these programs is “rife with uncertainty and outright confusion.”

No consensus currently exists among the courts on whether standardization programs harm competition at all, therefore making it deserving of a restraint of trade classification. Also, no agreement exists within the courts regarding the application of a consistent antitrust rationale when using a given standard of review to evaluate standardization programs. Consequently, the uncertainty inherent in the application of antitrust laws to standardization programs make their further application to the Internet a perplexing task.

Furthermore, little guidance exists with regard to on-line antitrust case law, since only one party, Cyber Promotions, has to date brought an antitrust action before a court for alleged on-line commerce violations. Although the Pennsylvania district court in that action held that no section 2 violation of the Sherman Act occurred, the court inadvertently set the stage for the occurrence of future section 1 violations to occur against that same party by means of a group boycott by others.

This analysis will utilize the facts of this existing case to introduce the present occurrence of an Internet group boycott against this party for alleged violations of self-imposed Internet standards. Using this exam-

---

United States, 268 U.S. 563, 566 (1925) ("[D]efendants have engaged in many activities to which no exception is taken by the government, and which are admittedly beneficial to the industry and to consumers; such as . . . the standardization and improvement of its products."); Tag Mfrs. Inst. v. FTC, 174 F.2d 452, 462 (1st Cir. 1949) ("These standardizations are deemed to be to the advantage of all concerned, including the consumer who, among other benefits, is thereby better enabled to know what he is buying and to make intelligent price comparisons.").

144. Gerla, supra note 57, at 471. While some courts suggest that benefits conferred from standardization and accreditation programs do not play a role in determining the affects of standards on trade, other courts warrant their consideration. Id.

145. Brody & Havighurst, supra note 87, at 199.

146. Id. For example, courts apply different justification reasons in applying a given standard of review. Compare Nat'l Soc'y of Prof'l Eng'rs v. U.S., 435 U.S. 679 (1978) (rejecting safety and health justification for association rule and emphasizing that, instead, effect on competition was the standard for judging a challenged act or practice), with Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36 (1977) (setting forth the justification of association rules in that manufacturers need to "assume direct responsibility for the minimum safety and quality of their products").

147. Advisory Opinion Digest No. 4 (1970-71 Transfer Binder) CCH Trade Reg. Rep. ¶ 1718.20 (March 17, 1971) ("The difficulty of approving a standard certification program is increased by the uncertainty which exists in the court decisions on this subject. Accordingly, the problems of establishing a program which will qualify for approval before it can be seen in action are formidable.") (Federal Trade Commission advisory opinion to the American National Standards Institute).
ple, the analysis will illustrate how courts may apply\textsuperscript{148} section 1 of the Sherman Act to find occurrences of on-line violations of antitrust law, therefore limiting Internet self-governance and expanding federal Internet regulation.

A. \textit{Cyber Promotions v. America Online: Prelude to a Section 1 Sherman Act Violation}

Despite the aforementioned efforts of the Internet industry to self-govern on-line advertising through the use of trade associations and standards, a recent effort by a major on-line service to prevent the receipt of unsolicited, mass e-mail advertisements (spamming) resulted in antitrust litigation. In \textit{Cyber Promotions, Inc. v. America Online, Inc.}, \textsuperscript{149} (hereinafter \textquotedblleft Cyber Promotions\textquotedblright) a Pennsylvania district court refused to grant a temporary restraining order that required an on-line service to deliver plaintiff's unsolicited e-mail advertisements to subscribers.\textsuperscript{150}

Cyber Promotions, is an Internet advertising firm that receives payment from businesses to send, \textit{en masse}, unsolicited advertisement-bearing e-mail to the on-line public.\textsuperscript{151} America Online, Inc. (\textquotedblleft AOL\textquotedblright), an online service provider\textsuperscript{152} having over 7,000,000\textsuperscript{153} users, was the target of

\begin{itemize}
\item \textsuperscript{148} Benjamin Cardozo once stated that a judge considers factors of history and analogy while \textit{making} law. \textit{Benjamin A. Cardozo, the Nature of the Judicial Process} 53-54 (1991). Cardozo stated:
\begin{quote}
I do not mean that the directive force of history, even when its claims are most assertive, confines the law of the future to uninspired repetition of the law of the present and past. I mean simply that history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future.
\end{quote}
\textit{Id.}

Lawmakers, faced with regulating new technologies, may proceed as recommended by Cardozo, searching history for the right analogy. \textit{Id.}


\item \textsuperscript{150} \textit{Id.} at 438, 446. The controversy began when America Online, Inc. (\textquotedblleft AOL\textquotedblright) advised Cyber Promotions, in a letter dated January 26, 1996, that AOL disapproved with Cyber Promotions' transmission of unsolicited e-mail to AOL members over the Internet. \textit{Id.} at 437 As an alleged retaliatory act, AOL subsequently sent a number of bulk e-mail transmissions to Cyber Promotions' Internet service provider (\textit{ISP}), causing it to shut down. \textit{Id.}

Cyber Promotions subsequently filed Civil Action No. 96-2486 against AOL on March, 1996, in a Pennsylvania district court. \textit{Id.} Cyber Promotions alleged that, \textit{as a result of AOL's [disabling bulk e-mail transmission]}, two of Cyber Promotions' ISP's terminated their relationship with Cyber Promotions and a third refused to enter into a contract with Cyber Promotions. \textit{Id.} AOL, in turn, filed a complaint against Cyber Promotions in a district court. \textit{Id.} On July 24, 1996, the Virginia district court hearing AOL's complaint transferred the action to the Pennsylvania district court hearing Cyber Promotions' complaint because the two had \textit{arise[n]} from the same nucleus of operative facts . . . . \textit{Id.} at 438.

\item \textsuperscript{151} \textit{Id.} at 439 n.13.

\item \textsuperscript{152} \textit{Id.} at 438 n.3.

\item \textsuperscript{153} \textit{Id.} at 449 n.22.
\end{itemize}
much of Cyber Promotions' mailings.\footnote{154} AOL gathered all of Cyber Promotions' unsolicited messages and returned them to Cyber Promotions in a bulk e-mail transmission,\footnote{155} causing an interruption in service to Cyber Promotions' Internet service provider.\footnote{156}

Under continued threat from such further mailings, the service provider thereafter refused to provide further on-line access to Cyber Promotions.\footnote{157} Cyber Promotions, as a result, sued AOL in a Pennsylvania district court alleging, amongst other wrongs,\footnote{158} violations of antitrust law.\footnote{159} Specifically, Cyber Promotions alleged that "AOL obtained a monopoly in the market for providing direct marketing advertising material via electronic transmission to AOL's own subscribers in violation of sec-

\begin{footnotes}
\footnotetext[154]{Id. at 437. On average, Cyber Promotions sent AOL approximately 1 million e-mail messages per day. \textit{Id.} at 452.}
\footnotetext[155]{Cyber Promotions referred to these bulk mailings as "e-mail bombs." \textit{Cyber Promotions}, 948 F. Supp. at 437 n.1. Cyber Promotions alleged that AOL transmitted "e-mail bombs" with intent to cripple Cyber Promotions ISP by gathering all unsolicited e-mail sent by Cyber Promotions and returning them to Cyber Promotions in a bulk transmission. \textit{Id.}}
\footnotetext[156]{Cyber Promotions experienced difficulty in sending much of its e-mail to AOL subscribers because many of the target AOL addresses changed. William S. Galkin, \textit{Unpalatable Spam Has Big Online Services Boiling}, \textit{Balt. Bus. J.}, Nov. 15, 1996, available in 1996 WL 11828484. Thus, when Cyber Promotions attempted to send e-mail to non-current AOL e-mail addresses, AOL's computer "bounced" the messages back to Cyber Promotions as undeliverable. \textit{Id.} The excessive quantity of messages returned to Cyber Promotions burdened the computers of Cyber Promotions Internet service provider. \textit{Id.} To avoid this complication, Cyber Promotions inserted a false return address in all e-mail messages sent to AOL, using the AOL e-mail address as both the mailing address and the return address. \textit{Id.} After AOL discovered that Cyber Promotions was the true source of these mailings, AOL accumulated and returned the mass of messages, in a single mailing, to Cyber Promotions' service provider. \textit{Id.} This bulk mailing disrupted the network servers of Cyber Promotions service provider. \textit{Id.}}
\footnotetext[157]{See \textit{Cyber Promotions}, 948 F. Supp. at 437 ("[A]s a result of AOL's 'e-mail bombing,' two of Cyber Promotions' [Internet service providers] ISPs terminated their relationship with Cyber Promotions and a third refused to enter into a contract with Cyber Promotions.").}
\footnotetext[158]{Cyber Promotions original complaint asserted a claim for violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, and state law claims for both intentional interference with contractual relations and tortious interference with prospective contractual relations. \textit{Id.} Cyber Promotions later amended the complaint by adding a declaratory judgment claim that sought a "declaration that [Cyber had] the right to send to AOL members via the Internet unsolicited e-mail advertisements." \textit{Id.} AOL's complaint against Cyber Promotions alleged service and trade name infringement, service mark and trade name dilution, false designation of origin, false advertising, unfair competition, violations of the Virginia Consumer Protection Act, the Electronic Communication Privacy Act, the Computer Fraud and Abuse Act and the Virginia Computer Crimes Act. \textit{Id.} AOL later amended its complaint to include claims for misappropriation, conversion, and unjust enrichment. \textit{Id.}}
\footnotetext[159]{\textit{Id.} at 457-58. Cyber brought the antitrust allegation as an amendment to its first amended complaint. \textit{Id.}}
\end{footnotes}
tion 2 of the Sherman Act."\textsuperscript{160} Cyber Promotions objected to AOL's implementation of an e-mail filtering device\textsuperscript{161} that required AOL subscribers to choose affirmatively to receive "junk e-mail."\textsuperscript{162} Cyber Promotions' section 2 claim alleged that the ability to advertise to AOL subscribers over the Internet, via e-mail, constituted an "essential facility" and that AOL refused to deal with Cyber Promotions by prohibiting AOL users from viewing Cyber Promotions' e-mail without taking affirmative steps.\textsuperscript{163}

However, the court ruled that Cyber Promotions was not likely to win under an "essential facilities" section 2 antitrust claim because AOL did not totally prohibit Cyber Promotions from accessing its system.\textsuperscript{164} AOL did not prohibit the receipt of Cyber Promotions' messages, but instead allowed AOL's subscribers to choose whether or not to receive Cyber Promotions' e-mail.\textsuperscript{165} Moreover, AOL's filtering software did not prevent Cyber Promotions from accessing AOL subscribers through the U.S. mail system, telemarketing efforts, newspaper ads, or other traditional means.\textsuperscript{166} Because of the existence of these other means for accessing AOL subscribers, AOL's e-mail system did not constitute the "essential facility of access" required for Cyber Promotions to bring a section 2 antitrust violation.\textsuperscript{167}

Finally, the court stated that Cyber Promotions could avoid AOL's voluntary blocking software for unsolicited e-mail by "[s]end[ing] its advertisements to the subscribers of the many other on-line services [not utilizing blocking software] which compete with AOL, including Compuserve, the Microsoft Network, and Prodigy."\textsuperscript{168} "Cyber could [also] attempt to lure AOL subscribers away from AOL by developing its own

\begin{itemize}
\item \textsuperscript{160} Id. at 458.
\item \textsuperscript{161} AOL called this device "Preferred Mail—The Guard Against Junk E-Mail." Id. at 459. The device enabled AOL to receive Cyber's e-mail advertisements for only those AOL subscribers who wished to receive them. Id.
\item \textsuperscript{162} Id. Cyber objected to the device because it placed an "onus on the AOL subscriber to take affirmative steps to access Cyber's e-mail by checking off a box on the screen having the caption 'I want junk e-mail' and because it grouped 'legitimate' advertisers such as Cyber with pornographic advertisers, thereby discouraging the AOL subscriber to choose to receive Cyber's e-mail." Id.
\item \textsuperscript{163} Id. at 460.
\item \textsuperscript{164} Cyber Promotions, 948 F. Supp. at 463.
\item \textsuperscript{165} Id. at 463.
\item \textsuperscript{166} We believe there is little likelihood that Cyber will be able to show that the ability to advertise to AOL's subscribers is vital to Cyber's competitive ability. . . . AOL has not even completely excluded Cyber from the AOL system. AOL's Preferred Mail simply gives the AOL subscribers the option to choose whether he wishes to view Cyber's e-mail advertisements.
\item \textsuperscript{167} Id.
\item \textsuperscript{168} Id.
\end{itemize}
commercial on-line system or advertising web site and charging a competitive rate.\textsuperscript{169}

In holding that no section 2 violation of the Sherman Act occurred, the court plainly assumed the availability of a market outside of AOL to allow Cyber Promotions to continue its business practice of sending unsolicited advertisements to the on-line public.\textsuperscript{170} However, numerous on-line services have either resisted efforts by Cyber Promotions to reach their customers with e-mail\textsuperscript{171} or have not allowed Cyber Promotions to utilize their service to gain access to the Internet altogether.\textsuperscript{172} For example, Concentric Network Corp., Compuserve Inc. and Sprint's Netcom have all discontinued providing Internet access service to Cyber Promotions.\textsuperscript{173}

Furthermore, bandwidth providers may be unwilling to grant bandwidth to Cyber Promotions to enable it to create its own Internet service provider business. Pursuant to Judge Weiner's suggestion in \textit{Cyber Promotions} that Cyber Promotions become an independent ISP to lure away AOL subscribers desiring on-line advertisements, Sanford Wallace, president of Cyber Promotions, decided to launch his own Internet service provider business.\textsuperscript{174} However, as stated above, Wallace may encounter difficulty with this effort. In predicting Cyber Promo-

\begin{tiny}
\textsuperscript{169} Id.
\textsuperscript{170} See \textit{id.} at 464.
\textsuperscript{Merely defining the relevant market as Cyber has done by the subscribership of AOL without further distinguishing AOL's subscribers from the other on-line subscribers... begs the question of whether the subscribership to AOL is an essential facility... Cyber has failed to show why its advertising to AOL subscribers is any more vital than its advertising to the subscribers of the many other commercial on-line services...}
\textsuperscript{171} Id.
\textsuperscript{172} See, e.g., Compuserve Inc., v. Cyber Promotions, Inc., 962 F. Supp. 1015 (S.D. Ohio 1997) (granting injunction to Compuserve to prevent Cyber Promotions from sending unsolicited e-mail to Compuserve's computer equipment); see also Concentric Network Corp. v. Wallace, No. C-96-20829-RMW (EAI), (N.D. Cal. Nov. 5, 1996) available in \texttt{<http://www.jmls.edu/cyber/cases/concent1.html>} (granting injunction to Concentric Network Corp. to prevent Cyber Promotions from sending unsolicited e-mail to Concentric's subscribers).
\textsuperscript{173} See Dan Goodlin, \textit{Judge Weighs ISP vs. Spammer} (visited Sept. 30, 1997) \texttt{<http://www.news.com/News...2e4%2C14429%2C00.html/?nd>} (federal judge to decide whether backbone provider AGIS must reconnect Cyber Promotions' on-line service to the Internet); see also Kornblum, \textit{supra} note 24 ("Cyber Promotions has been kicked off of at least 20 ISPs in less than three years.").
\textsuperscript{174} See Court to Decide Whether Spamming is Trespassing, \textit{Interactive Daily}, Dec. 17, 1996, \texttt{available in 1996 WL 13462491} [hereinafter \textit{Court to Decide}] ("After being bumped off Compuserve and Concentric... Cyber was kicked off Sprint's Netcom and other major national ISPs.").
\textsuperscript{174} Kornblum, \textit{supra} note 24.
\end{tiny}
tions' forthcoming difficulty in procuring bandwidth to launch an independent service, a critic of Cyber Promotions stated the following:

He can set up some little podunk attempt [to launch an independent service], but [as] soon as he does, [the bandwidth providers] are going to get the message loud and clear that [they] just signed up a loser . . . . He'll be on for a little while. Ultimately, [they] might as well tell him that he just might [as well] give it up now because he's never going to find a permanent home. The reality is he's been chased out of everywhere he's hooked to. We'll continue to chase him until there are no dark corners for him to hide.175

Hence, under the guise of an enforcement of Internet conduct standards, service and bandwidth providers may act in accordance to this chilling statement by denying bandwidth or service to Cyber Promotions. Therefore, although the Cyber Promotions court did not find that a section 2 antitrust violation existed because America Online did not constitute a monopoly, the collective actions of multiple ISPs may nonetheless constitute a boycott that may result in a section 1 violation of the Sherman Act.

B. SELF-GOVERNANCE OF INTERNET E-MAIL AFTER CYBER PROMOTIONS V. AMERICA ONLINE: THE LIKELIHOOD FOR OCCURRENCE OF AN ANTITRUST VIOLATION UNDER SECTION 1 OF THE SHERMAN ACT

Under Internet self-governance principles, the enforcement of conduct standards can make the Internet a hostile environment for an online business not acting in accordance with such standards. However, where the "wrongful conduct" of the business does not violate existing laws, the enforcement of these Internet conduct standards may themselves result in a violation of law.176

175. Id. (discussing the futility of Cyber Promotions' efforts to establish an independent Internet provision service that encourages the sending and receipt of unsolicited advertisement e-mail).

176. For example, after Cyber Promotions began disseminating large quantities of commercial e-mail to America Online subscribers, AOL attempted to block all of Cyber promotions e-mail from reaching AOL subscribers. Cyber Promotions Inc. v. America Online Inc., No. 96-2486, 1996 WL 565818 (E.D. Pa. Sept. 4, 1996). Cyber Promotions thereafter sought an injunction to prevent AOL from blocking its e-mail. Id. After hearing oral argument on Cyber Promotions' motion for a preliminary injunction and after reviewing the parties' submissions on the motion, the court temporarily restrained AOL, until the time of trial, from blocking Cyber Promotions' e-mail to AOL recipients and from interfering with Cyber Promotions' business relationships with its Internet service providers. Id. See Janet Kornblum, Short Take: ACLU Challenges South Dakota Net Law (visited Mar. 3, 1997) <http://www.news.com/News/Item/0,4,6334,00.html> (ACLU launched an investigation to determine whether the state of South Dakota violated the First Amendment when it blocked the receipt by state employees of all e-mail sent by a specific ISP regarding a controversy involving Native Americans).
The current treatment of Cyber Promotions by Internet service and bandwidth providers illustrates this very principle. Although Cyber Promotions has not violated any existing law by sending unsolicited e-mail advertisements to on-line users, Internet service providers presently engage in what some may classify as anti-competitive behavior. Presently, at least twenty Internet service or bandwidth providers have prohibited Cyber Promotions from accessing the Internet while others have blocked their receipt of Cyber Promotions’ e-mail transmissions, causing Cyber Promotions to lose revenue. Such commercial activity is deserved of section 1 antitrust analysis.

1. Section 1 Antitrust Analysis: The Concerted Actions of Service or Bandwidth Providers

Under the doctrine of “conscious parallelism,” one may infer the existence of an agreement between parties if the parties’ parallel conduct is supported by “plus factors.” The parallel conduct of Internet service or bandwidth providers is obvious; they either deny Internet access to Cyber Promotions or they prohibit the receipt of Cyber Promotions’ e-mail. Thus, to establish the existence of a concerted action between Internet service or bandwidth providers, one must prove the existence of the requisite plus factors.

One such plus factor is the attendance of trade association meetings by industry competitors. Because trade associations by their very nature bring together competitors, the conduct of the association potentially involves two evils that antitrust policies strive to prevent: (1) collusion by competitors in restraint of trade; and (2) unfair actions by a limited number of members that may unfairly benefit some members at the expense of other members or non member competitors. Internet

---

177. See supra note 23 and accompanying text.
178. See supra notes 172-73.
179. See Court to Decide, supra note 173 (explaining that Cyber Promotions has had trouble honoring its contracts with clients after on-line services began blocking their receipt of Cyber's e-mail transmissions).
180. See supra notes 84-86 and accompanying text.
181. See supra notes 171-73 and accompanying text.
182. See supra note 86 and accompanying text.
183. See supra note 86 and accompanying text.
184. MORSE & WATERS, supra note 59, at 67; see LAMB & SHIELDS, supra note 51, at 232.
trade associations already hold meetings attended by industry competitors. Hence, under existing case law, attendance at such meetings by service and bandwidth providers may satisfy the plus factor requirement to prove the existence of concerted activity against Cyber Promotions.

In Bray v. Safeway Stores, Inc., (hereinafter “Bray”) a number of cattlemen brought an action against a large retail grocery chain alleging antitrust violations for conspiring to regulate beef prices. The cattlemen alleged that the grocer, a member of the National Association of Food Chains (“NAFC”), used association meetings as a vehicle to conspire with other grocery chains. Although the defendant grocer argued that no negative inferences existed with regard to its association meetings, the cattlemen presented the testimony of an alleged co-conspirator stating that meat prices were a discussion topic of a meeting. The cattlemen also presented evidence that an aura of secrecy frequently surrounded such meetings. The Northern District Court of California held that, although no evidence of an express agreement to fix prices existed, the fact that price discussions took place during association meetings was of paramount importance.

Citing a Ninth Circuit decision holding that such evidence proved sufficient in absence of an express agreement, the court held that the opportunity to fix prices, together with actual price discussion at association meetings, was sufficient to support a price fixing conspiracy. “As

---

185. See supra note 65.
187. Id. at 855. Originally, the cattlemen brought the action against three large retail grocery chains, but two of the defendants settled. Id.
188. Id. at 856.
189. Id.
190. Id. at 857.
191. Id. “The meeting topics, agenda, and minutes were confidential and generally unavailable.” Id. Meeting attendees all wore color-coded badges to preserve their anonymity at the meetings instead of wearing badges bearing their names and company representations. Id. Finally, grocer officials were reluctant at trial to admit or discuss their participation in association meetings. Id.
192. Id.
193. C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489, 493 (9th Cir. 1952) (“It is uncontroversed that this committee held meetings at which [the defendant], as well as representatives of the other defendant corporations, was present . . . . That an opportunity was thus afforded to discuss and agree upon prices and pricing policies on an industry-wide basis, cannot be denied.”).
is usual in cases such as this [sic], there exists no proof of a formal agreement between the [defendant] and the co-conspirators . . . yet, the law contemplates that seldom will direct proof of a conspiracy be available." Hence, "the jury could have reasonably concluded that, by a preponderance of the evidence, the NAFC was . . . a vehicle through which the conspiracy was nurtured and implemented." Thus, as demonstrated by Bray, Cyber Promotions need only prove that discussions regarding "Internet service denials" or a "prohibition of e-mail receipts" took place at an association meeting attended by service or bandwidth providers to satisfy the "plus factor" requirement that the parties acted in concert.

Another plus factor available to Cyber Promotions for proving the concerted actions of Internet providers engaging in parallel conduct is the presence of hostile statements made by them, to include disparaging remarks and classification of Cyber Promotions within "blacklists." As indicated at the beginning of this analysis, such statements have recently become commonplace on the Internet.

In Park v. El Paso Bd. of Realtors, (hereinafter "Park") a real estate broker filed suit against the board of realtors and numerous real estate companies alleging that defendants, in retaliation for his attempts to cut real estate commissions, conspired to boycott him. The defendants challenged the sufficiency of the evidence set forth to prove a section 1 antitrust violation. Park had introduced evidence demonstrating the

195. Id. at 861.
196. Id. at 859.
197. Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1059-61 (5th Cir. 1985) (holding that a concerted refusal to deal and hostile comments were sufficient plus factors for a finding of conspiracy); Penne v. Greater Minneapolis Area Bd. of Realtors, 604 F.2d 1143, 1148-49 (8th Cir. 1979) (holding that lower court erred in granting summary judgment to defendant where plus factors such as hostile comments and blacklisting were present). But see Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1406-07 (9th Cir. 1986) (stating that defendant's comments that plaintiff was "no good, unethical, worthless and generally of bad repute" did not "add up to a conspiracy by the [defendants] to restrain trade").
198. See supra note 175 and accompanying text.
199. Park, 764 F.2d at 1057. The El Paso Board of Realtors was a non-profit trade organization having approximately 2000 brokers and sales people—roughly half of the number of total brokers and sales people in El Paso. Id. at 1058. Park charged homeowners a flat sales fee instead of a percentage-based commission because Park believed that "no relation existed between the work and expense involved in selling a home and [the home's] price." Id. After initially posting record sales, Park's sales fell drastically, causing him to sell his real estate practice. See id. at 1058-59. Although some attributed the decline in Park's sales to the fluctuating real estate market, Park attributed the decline in sales to the conspiring, competing brokers. Id. at 1059.
200. Id.
parallel conduct of the defendants\textsuperscript{201} and proving that the defendants made disparaging remarks about him, including statements questioning his reputation.\textsuperscript{202}

Citing an Eighth Circuit decision\textsuperscript{203} finding similar evidence sufficient to withstand a summary judgment, the Fifth Circuit Appellate Court found the disparaging remarks sufficient to sustain a jury finding of conspiracy to boycott under section 1 of the Sherman Act.\textsuperscript{204} In light of the \textit{Park} decision, Cyber Promotions may prove the concerted action of Internet providers acting in parallel against it by showing that they made disparaging remarks concerning the way that it conducts business. Because Internet bandwidth and service providers are presently engaging in the parallel conduct required to either deny bandwidth to Cyber Promotions or refuse their e-mail transmissions, the foregoing cases allow them to prove their concerted action in alleging an antitrust violation against them.

2. \textit{Section 1 Antitrust Analysis: Restraint of Trade and the Application of the Per Se Doctrine of Boycott Illegality}

Courts may apply a per se doctrine when deciding the antitrust legality of a commercial boycott, thus allowing a finding of antitrust liability of defendants with a minimal showing of restraint on competition. The case applying this doctrine having a factual background most similar to that existing with regard to the boycott actions of Internet providers against Cyber Promotions is \textit{Radiant Burners, Inc. v. Peoples Gas, Light \& Coke Co.}\textsuperscript{205} (hereinafter "\textit{Radiant}").

In \textit{Radiant}, a gas burner manufacturer, Radiant, brought action against an association and its members, including suppliers of natural gas, alleging a section 1 violation of the Sherman Act.\textsuperscript{206} The complaint alleged that the association and its members conspired to restrain inter-

\textsuperscript{201} \textit{Id.} Park presented evidence of practices of other real estate brokers that discriminated against him and interfered with his attempts to charge a fixed commission. \textit{Id.} For example, other brokers, when providing purchasers for Park's listings, "attempted to raise the commission fee to seven percent of the selling price despite the fact that \[Park\] . . . had originally listed the property with a flat fee." \textit{Id.} Conversely, when Park sold the listings of other realtors, those brokers sometimes attempted to split the commission fee in a way unfair to him. \textit{Id.}

\textsuperscript{202} \textit{Id.} The disparaging remarks included statements by competing brokers to customers that Park was not reputable, equitable and did a poor job in selling his listings. \textit{Id.} Other brokers told customers that they "avoided him like the plague" when doing business. \textit{Id.} at 1060.

\textsuperscript{203} Penne, 604 F.2d at 1143, 1148-49 (stating that blacklisting and deprecatory statements by defendants "could . . . constitute violations of section 1 of the Sherman Act.").

\textsuperscript{204} \textit{Park}, 764 F.2d at 1060.


\textsuperscript{206} \textit{Id.} at 657.
state commerce in the manufacture, sale and use of Radiant's gas burn-
ers by reason of the association's unreasonable failure to approve them,
resulting in a refusal by utility members of the association to supply gas
for the burner's use.\textsuperscript{207} The Supreme Court held that the association
members' concerted refusal to supply gas to Radiant's burners constitu-
ted a boycott in per se violation of section 1 of the Sherman Act.\textsuperscript{208}

The court cited \textit{Klor's} \textsuperscript{209} for the proposition that the association and
its members effectuated an unlawful combination and conspiracy under
section 1 of the Sherman Act by refusing to supply gas to Radiant's burn-
ers, not approved by the association members.\textsuperscript{210} The court implied that
no rational reason existed for the association to disapprove of Radiant's
burners where no differences existed between Radiant's burners and
those bearing the association's seal.\textsuperscript{211} As stated by the court: "It is obvi-
ous that [Radiant] cannot sell its gas burners . . . if, because of the al-
leged conspiracy, the purchasers cannot buy gas for those burners.\textsuperscript{212}
"The conspirational [sic] refusal to provide gas for use in [Radiant's]
burners because they are not approved by [the association] . . . falls
within one of the classes of restraint which . . . are unduly restrictive and
hence forbidden by both the common law and the statute."\textsuperscript{213} The court

\textsuperscript{207} \textit{Id.} at 658. The Association operated testing laboratories that determined the

\textsuperscript{208} \textit{Id.} at 659-60. One authority contends that scholars and others regularly misread

\textsuperscript{209} See \textit{supra} notes 104-10 and accompanying text.

\textsuperscript{210} \textit{Radiant}, 364 U.S. at 658-59.

\textsuperscript{211} \textit{Id.} at 659.

\textsuperscript{212} \textit{Id.}

\textsuperscript{213} \textit{Id.} at 659-60. The court further classified the defendant's actions as having the

nature and character of a monopolistic tendency. \textit{Id.} at 660. Thus, the alleged conspirato-

then concluded by noting that it would not tolerate such actions merely because a business is small and has little impact on the economy.214

Applying Radiant analysis to the facts surrounding the refusal of Internet providers to supply Cyber Promotions with bandwidth or to allow receipt of Cyber Promotions' e-mail, their actions would likely constitute a boycott in per se violation of section 1 of the Sherman Act. Not unlike association members who wrongly refused to supply natural gas to Radiant's burners lacking association approval, Internet providers refuse to supply bandwidth to Cyber Promotions or receive their e-mail because on-line associations do not support its e-mail practices. Like Radiant, such activity has caused economic damage to Cyber Promotions because they cannot service its customers in absence of either.

Furthermore, whereas Radiant asserted that their gas burners were no different in quality than those bearing the association's seal, Cyber Promotions' advertising methods are no more intrusive or unethical than those practiced by Internet service providers not disapproved by on-line associations.215 Finally, like the plaintiff in Radiant, the courts should not tolerate any antitrust injustice against Cyber Promotions merely because it is not as expansive as other Internet service providers with regard to its on-line customer base. Thus, in light of the holding in Radiant, the actions of Internet providers, in refusing to grant bandwidth to Cyber Promotions or receive Cyber Promotions' e-mail, may result in a per se violation of section 1 of the Sherman Act.

3. Additional Factors of Consideration in Support of Finding an Antitrust Violation

A danger exists where an antitrust defendant's actions of self regulation amount to "an extra judicial agency encroaching on the judicial and legislative domains."216 In Fashion Originators, Justice Black condemned the guild for creating "an extra-governmental agency, which prescribed rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for the determination and punishment of violations, and thus trenched upon the power of the national legisla-

---

214. Id. at 660.
215. See supra note 62 and accompanying text.
216. Robert Heidt, Industry Self-Regulation and the Useless Concept 'Group Boycott', 39 Vand. L. Rev. 1507, 1590 (1986). "Of concern is the fact that highly self interested parties may arrogate to themselves quasi-governmental police functions that belong, according to the courts, only to the government . . . . A related impulse is the judicial hostility towards vigilantism—a private group's attempt to make and impose behavioral rules on others." Id.
ture and violates the statute . . . .”217 Also, in Silver, the court held that self regulatory conduct or any other action repealing governmental laws is not favored.218 Therefore, if the self regulatory conduct of associations and their respective members encroach upon any legislative or judicial domain of the U.S. government, a court may summarily condemn the action as unlawful.

4. A Proposal to Dissuade Governmental Intervention of Internet Regulation Through the Avoidance of On-Line Antitrust Violations

For those parties or individuals opposing governmental regulation of the Internet, a proposal for avoidance of antitrust violations is in order. On-line parties can avoid antitrust illegality by ensuring that their conduct does not satisfy the requisite elements of an antitrust violation. Hence, on-line parties, when enforcing common on-line rules or standards, should ensure that: (1) their actions are not “in concert;”219 (2) their enforcement mechanism, if boycott, does not satisfy the per se doctrine of antitrust illegality;220 (3) and their actions do not encroach on the legislative or judicial domain of the U.S. government.221

Internet service or bandwidth providers, who together enforce anti-spamming standards through the denial of service or bandwidth to on-line companies in the business of sending unsolicited e-mail advertisements, must avoid practices (“plus factors”) which bolster the inference that they “acted in concert.” Therefore, if these parties attend common meetings, they must document the meeting to record that they did not discuss denials of bandwidth or service to a boycotted on-line company.222 Furthermore, these same parties must avoid making disparaging remarks about the way the boycotted company conducts its business.223 Failure to take these protective measures can lead to the inference by a court that the boycotting companies acted “in concert,” thus satisfying one of the elements required to prove an antitrust violation.224

Also, service or bandwidth providers must first evaluate their decision to prohibit an on-line company of service or bandwidth because the per se doctrine requires only a minimal showing of a restraint of trade of

217. See supra note 103 and accompanying text.
218. See supra note 116.
219. See supra note 81 and accompanying text.
220. See supra notes 133-38 and accompanying text.
221. See supra notes 103, 116 and accompanying text.
222. COMEGYS, supra note 95, at 111; HEROLD & WEBSTER, supra note 74, at 129; LAMB & SHIELDS, supra note 51, at 237; see supra notes 86, 184 and accompanying text.
223. See supra notes 86, 175, 197, 199-204 and accompanying text.
224. See supra notes 85-86 and accompanying text.
a boycotted party for finding the occurrence of an antitrust violation.\textsuperscript{225} If the companies thus seek to enforce spamming prohibitions, they must justify their proposed boycott actions by ensuring that detrimental differences exist between the spamming on-line advertising method and those methods that they currently allow.\textsuperscript{226}

Boycotting companies must therefore ensure that the spamming practices of an on-line company have detrimental effects on their system and users while the permitted advertising methods do not. Such detrimental effects may include costs incurred by the user though the expenditure of on-line time required to read unsolicited e-mail and computer system costs incurred by the company in having to store and process the data comprising the advertisements.\textsuperscript{227} If no differences exist and their eventual boycott actions have a minimal detrimental effect on the boycotted company's commercial viability, a court may interpret their actions as unduly restrictive and in violation of section 1 antitrust laws.\textsuperscript{228} A court may be more inclined to make such an interpretation if the boycotted company is small and has little impact on the economy while the boycotting company is of larger economical stature.\textsuperscript{229}

Finally, before on-line companies consider boycotting a company not following on-line standards that forbid spamming, that company must first ensure that state or federal laws do not exist which themselves prohibit the practice. Currently, legislators within many states are drafting laws which prohibit the practice of sending unsolicited e-mail advertisements.\textsuperscript{230} If these bills go into effect, a court may interpret a company's subsequent boycott enforcement of non-government imposed Internet standards as an encroachment on the judiciary branch of that state. Since such encroachment is strongly disfavored by the courts, it may influence a court to decide against an encroaching boycotting party when making an antitrust decision.\textsuperscript{231}

\textbf{IV. CONCLUSION}

This Comment demonstrated that increased Internet commercialism results in the development of an on-line advertising method that is subject to considerable controversy. This Comment also demonstrated that, although Internet users and on-line industries may attempt to self-
regulate this controversial advertising method through the creation and enforcement of association standards, exercise of such standards may violate antitrust laws. Because the Internet will continue to grow, so will on-line commercialism, self-governmental attempts by Internet parties to regulate it, and, if these parties are not careful, antitrust violations. Such violations will result in either: (1) an increase in judicial exercise to correct the anti-competitive results of overly aggressive self-governance principles; or (2) in the enactment of new legislation\textsuperscript{232} to replace faulty self-governing principles. Inevitably, this increased involvement of state and federal governmental authority will spell the demise of Internet self-governance.

{\textit{David A. Gottardo}}

\footnotetext{232. Legislation for the regulation of Internet e-mail advertisement, as of this comment's writing, is currently pending approval in several states. See supra note 23 and accompanying text.}