

COMMENT

STOP, UNSUBSCRIBE, AND OPT OUT: STREAMLINING CONSUMER OPT-OUT LAWS FOR EVOLVING TEXT-BASED “JUNK”*

ABSTRACT

Unsolicited advertising is not just an annoyance; it does collateral damage to our purses, productivity, and planet. The statistics are surprisingly staggering. Each year, the average American household receives 848 pieces of junk mail—the equivalent of about 100 million trees each year. Moreover, about 44% of junk mail (if not more) goes in the trash unopened. Each year, Americans pay around \$370 million to dispose of junk mail—weighing a total of one billion pounds. Furthermore, junk mail manufacturing releases as much greenhouse gas as that of nine million vehicles, more than total car emissions in forty-nine states.

Unsolicited advertising also slows down productivity. On average, about 90% of e-mails are junk. They clutter inboxes and potentially cause important e-mails to get lost in the hay. Deleting these e-mails also wastes invaluable time. In 2003, IT consulting firm Basex, Inc. estimated that unsolicited e-mails were costing individuals and businesses worldwide a total of \$20 billion a year in lost productivity and predicted it would increase by 100% per year. Sixteen years on, unsolicited e-mail could now cost individuals and businesses more than \$327 billion. This amount rivals the government’s Medicaid budget in 2018, exceeds half of the

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country's defense spending, and represents over twenty times the federal spending on children's health insurance programs.

Despite these disheartening statistics, Congress's response has remained disappointingly weak. It has failed to enforce rules against unsolicited junk and instead continues to permit advertisers to legally transmit at least one unsolicited advertisement before consumers can opt out. This Comment describes how technological advancement in text-based communication tools has catalyzed the evolution of faster, cheaper, and more ubiquitous commercial solicitations over time. It summarizes consumer and legislative responses to unsolicited advertisements, explains the strengths and weaknesses of current opt-out methods, and offers recommendations for streamlining laws related to opting out of communications from current and future text-based tools.

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I. INTRODUCTION

*Discourse is fleeting, but junk mail is forever.*¹

On July 4, 1776, fifty-six representatives of the thirteen colonies assembled to declare independence from the Crown.² Among the immortal words of the Declaration of Independence was this key clause: “[G]overnments are instituted among men, deriving their just powers from the consent of the governed”³ From its founding days, the United States of America has based its democracy on the firm foundation of a consenting people.⁴ Yet, despite discourse championing the consent of the people, modern consumers and businesses continue to receive communications without their consent such as unsolicited junk mail, faxes, texts, e-mails, and even social media news feeds.⁵

Unsolicited advertising is not just an annoyance; it does collateral damage to our purses, productivity, and planet. The statistics are surprisingly staggering. Each year, the average American household receives 848 pieces of unsolicited mail⁶—the equivalent of about 100 million trees each year⁷ or “deforesting all of Rocky Mountain National Park every four months.”⁸ Moreover, about 44% of junk mail (if not more) goes in the trash unopened.⁹ Each year, Americans pay around \$370 million to dispose of junk mail¹⁰—weighing a total of one billion pounds.¹¹ Furthermore, junk mail manufacturing releases as much greenhouse gas as that

1. *Joe Bob Briggs Quotes*, BRAINY QUOTE, https://www.brainyquote.com/quotes/joe_bob_briggs_286542 [<https://perma.cc/P5WV-E8BV>] (last visited Jan. 20, 2019).

2. See PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 150–53 (1998).

3. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

4. See MAIER, *supra* note 2, at 151–52 (explaining the role of consent in the Declaration of Independence).

5. See discussion *infra* Parts II and III (discussing text-based commercial solicitations and current methods for opting out).

6. *Junk Mail*, N.Y.U. SCH. L., <http://www.law.nyu.edu/about/sustainability/whatyoucando/junkmail> [<https://perma.cc/S3L7-392Y>] (last visited Jan. 20, 2019).

7. *Junk Mail Facts and Statistics*, WASTE-AWAY GROUP (Jan. 21, 2018), <http://wasteawaygroup.blogspot.com/2018/01/junk-mail-facts-and-statistics.html> [<https://perma.cc/C7NJ-RSLZ>].

8. *Junk Mail*, *supra* note 6.

9. *Id.*

10. *Id.*

11. Mike Volpe, *5 Shocking Statistics—How Junk Mail Marketing Damages the Environment*, HUBSPOT: MARKETING (July 28, 2017), <https://blog.hubspot.com/blog/taxid/6307/bid/3741/5-shocking-statistics-how-junk-mail-marketing-damages-the-environment.aspx> [<https://perma.cc/54T3-KPGG>].

of nine million vehicles,¹² more than total car emissions in forty-nine states.¹³

Unsolicited advertising also slows down productivity. Because an average of 90% of electronic mail (e-mail) is unsolicited,¹⁴ nine out of ten emails are meaningless. They clutter inboxes and potentially cause important emails to get lost in the hay. Deleting them also wastes invaluable time. In 2003, IT consulting firm Basex, Inc. estimated that unsolicited emails were costing individuals and businesses worldwide a total of \$20 billion a year in lost productivity, and it predicted the number would increase by 100% per year.¹⁵ Sixteen years on, unsolicited email could now cost individuals and businesses more than \$327 billion. This amount rivals the government's Medicaid budget in 2018,¹⁶ exceeds half the amount it costs to defend this country,¹⁷ and represents more than twenty times the federal spending on children's health insurance programs.¹⁸

Despite these disheartening statistics, Congress's response has remained disappointingly weak. It has failed to enforce rules against unsolicited junk and instead continues to permit advertisers to legally transmit at least one unsolicited advertisement before consumers have the chance to opt out.¹⁹ This Comment will begin by describing how technological advancement in text-based

12. Andrey, *Junk Mail Around the World Produces as Much CO2 as 9 Million Cars*, ZME SCI. (Oct. 27, 2017, 4:53 PM), <https://www.zmescience.com/ecology/environmental-issues/junk-mail-around-the-world-produces-as-much-co2-as-9-million-cars/> [https://perma.cc/3ERY-8UMU].

13. California had over fourteen million registered vehicles in 2016. The second highest was Texas with just over eight million registered vehicles in 2016. See *U.S. Automobile Registrations in 2016, by State*, STATISTA, <https://www.statista.com/statistics/196010/total-number-of-registered-automobiles-in-the-us-by-state/> [https://perma.cc/HWR7-XP48] (last visited Jan. 20, 2019) (displaying statistics of registered automobiles by state).

14. CYBEROAM, SPAM—A MAIL TO KILL, https://www.cyberoam.com/downloads/Whitepaper/WP_AntiSpam.pdf [https://perma.cc/3KMN-A8U2] (last visited Jan. 20, 2019).

15. Jay Lyman, *Spam Costs \$20 Billion Each Year in Lost Productivity*, TECHNEWSWORLD (Dec. 29, 2003, 8:30 AM), <https://www.technewsworld.com/story/32478.html> [https://perma.cc/J4ZJ-L5VJ].

16. *Health Care: Projections for Major Health Care Programs for FY 2018*, CBO, <https://www.cbo.gov/topics/health-care> [https://perma.cc/DL7Q-LEE5] (last visited Jan. 20, 2019).

17. Kimberly Amadeo, *Department of Defense and Its Effect on the Economy*, BALANCE (Jan. 14, 2019), <https://www.thebalance.com/departments-of-defense-what-it-does-and-its-impact-3305982> [https://perma.cc/X25W-WY2D].

18. *Health Care: Projections for Major Health Care Programs for FY 2018*, *supra* note 16.

19. See *infra* Part III (analyzing weaknesses of the opt-out systems for unsolicited junk).

communication tools has catalyzed the evolution of faster, less expensive, and more ubiquitous commercial solicitations over time. Part II will summarize consumer and legislative responses to unsolicited advertisements. Part III will explain the strengths and weaknesses of current opt-out methods. Finally, Part IV will offer recommendations for streamlining laws related to opting out of communications from current and future text-based tools.

II. EVOLUTION AND REGULATION OF TEXT-BASED COMMERCIAL SOLICITATIONS

A. *Turn of the Century: Door-to-Door Solicitation*

Among the most primitive methods of commercial solicitation was the door-to-door salesman, who traveled “from home to home and knock[ed] on doors or r[a]ng doorbells”²⁰ to “persuad[e] strangers to buy”²¹ an array of products: from *Collier’s Encyclopedia*²² and fax machines,²³ to candy²⁴ and pest control.²⁵ Door-to-door solicitation has long held a negative reputation for bringing out the worst in people.²⁶ In fact, it has been so irritating that the Supreme Court had to intervene.²⁷

In *Martin v. City of Struthers*, the Supreme Court upheld First Amendment freedom of speech and press by preserving the freedom of door-to-door Jehovah’s Witness missionaries “to distribute information to every citizen wherever he desires to receive it”²⁸ However, in a dissenting opinion, Justice Frankfurter

20. *Martin v. City of Struthers*, 319 U.S. 141, 141 (1943).

21. Gillian Zoe Segal, *Door-to-Door Selling as the First Step to Billions*, FORBES (Apr. 14, 2015, 12:02 PM), <https://www.forbes.com/sites/forbesleadershipforum/2015/04/14/selling-as-the-first-step-to-billions/#1e4079bd461b> [<https://perma.cc/R9US-P4ZR>].

22. *Id.*

23. See GILLIAN ZOE SEGAL, *GETTING THERE: A BOOK OF MENTORS* 33 (2015) (ebook) (“I got a job at a local company selling fax machines door-to-door.”).

24. See *id.* at 153 (“[T]he studio I went to held a fund-raising campaign with the students selling mints door-to-door.”).

25. See *15 Year Old Kid Is Selling What?? So Many Tips and Advice You Won’t Want to Miss Out on*, DOOR TO DOOR MASTERY (July 17, 2015), <http://www.doortodoormastery.com/042/> [<https://perma.cc/MGH6-54CB>] (podcast on industry tips on selling pest control via door-to-door solicitation).

26. See Mandy Fox-Raynor, *Door-to-Door Salesmen and Phone Solicitors Are Turning Me into a Bitch*, HUFFPOST (Dec. 6, 2017), https://www.huffingtonpost.com/mandy-foxraynor/doortodoor-salesmen-and-p_b_3038931.html [<https://perma.cc/9SSR-MGPS>] (giving examples of reactions to door-to-door solicitation).

27. Nelson James, *How to Get Rid of Door to Door Salespeople Once and for All!*, SIGNS.COM (July 3, 2013), <https://www.signs.com/blog/how-to-get-rid-of-door-to-door-salespeople-once-and-for-all/> [<https://perma.cc/U3QY-37WR>].

28. *Martin v. City of Struthers*, 319 U.S. 141, 142–43, 146–47 (1943).

warned that the Due Process Clause of the Fourteenth Amendment protected the home “from intrusions upon privacy . . .”²⁹ He argued that door-to-door solicitation should be “circumscribed so as not to sanctify the rights of these peddlers in disregard of the rights of those within doors”³⁰—namely the occupants. The Court later expanded on this holding and has maintained its position in subsequent disputes.³¹ For example, in *Rowan v. United States Post Office Department*, the Supreme Court welcomed more stringent restrictions on unwanted solicitations containing sexually explicit material.³² It reminded academics and practitioners that the Court “traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property.”³³

Since then, consumers and businesses seeking to prevent unwanted door-to-door solicitations have applied the “by order or notice” phrase in *Rowan* to all door-to-door solicitations—even those without sexually explicit content.³⁴ Business owners primarily tackle this problem by putting up a “No Soliciting” or “No Solicitors” sign and enforcing it by ensuring the sign is “posted clearly,” “in good condition,” and in a place “where it cannot be mistaken for another business’s sign.”³⁵ Some homeowners have also placed signs outside their homes, while apartment dwellers generally contact their building managers.³⁶

B. 1950s–1970s: *Snail Mail*

The legislative and legal pushback against the intrusive nature of a stranger’s incessant knocking incentivized businesses to seek more efficient but less aggressive solicitation methods.³⁷ The traveling salesman also grew costly for businesses, and the job became tiring for the salesman himself.³⁸ Instead of person-to-person

29. *Id.* at 153 (Frankfurter, J., dissenting).

30. *Id.*

31. *See, e.g.,* *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 737 (1970).

32. *Id.*

33. *Id.*

34. *Id.*

35. Katy B. Olson, *How to Enforce Your “No Soliciting” Sign*, MYDOORSIGN, <https://www.mydoorsign.com/blog/no-soliciting-sign/> [https://perma.cc/2PVR-38W3] (last visited Jan. 20, 2019).

36. *See id.* (discussing options for homeowners and apartment dwellers to avoid solicitors).

37. *See* Scot M. Graydon, *Much Ado About Spam: Unsolicited Advertising, the Internet, and You*, 32 ST. MARY’S L.J. 77, 94 (2000).

38. This was illustrated by Arthur Miller’s play, *Death of a Salesman*. For a copy of

contact, businesses began to use the United States Postal Services (USPS) to send direct mail, reaching exponentially more consumers and businesses for less.³⁹

According to USPS statistics, postage rates for domestic letters remained consistently low before businesses began taking advantage of the service in the 1960s and 1970s.⁴⁰ For almost half a century, between July 1, 1885 and July 6, 1932, postage rates for domestic letters hovered around 2 to 3 cents per ounce.⁴¹ However, as businesses began to use the USPS more frequently, postage rates also increased.⁴² By August 1, 1958, the postage rate had risen to 4 cents per ounce.⁴³ Five years later, the rate had risen to 5 cents per ounce.⁴⁴ By 1968, postage rates had increased to 6 cents per ounce; by 1971, the rate had jumped to 8 cents per ounce, then 10 cents per ounce by 1974, 13 cents per ounce in 1975, 15 cents per ounce in 1978, and 18 cents per ounce in 1981.⁴⁵ Beginning in 1975, the USPS started charging more for each additional ounce after the first ounce, as well as a surcharge “for non-standard envelope sizes” after 1979.⁴⁶ In stark contrast to the relatively constant rate of 2 to 3 cents per ounce for the forty-seven years between 1885 and 1932, the postage rates skyrocketed six-fold in merely half of that time due to the increased use of mass mailing as the preferred method of solicitation,⁴⁷ reflecting increased demand for the postal service.⁴⁸

The number of postal employees also dramatically increased as mass mailing grew popular among businesses.⁴⁹ Whereas the USPS had only hired about 12,000 more employees between 1930

the original playbill of the 2012 production of the Broadway show, see *Death of a Salesman*, BROADWAY.COM, <https://www.broadway.com/shows/death-salesman/> [https://perma.cc/CSX3-R24S] (last visited Jan. 20, 2019).

39. *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 736 (1970).

40. See *Rates for Domestic Letters Since 1863*, U.S. POSTAL SERV. (Mar. 2018), <https://about.usps.com/who-we-are/postal-history/domestic-letter-rates-since-1863.htm> [https://perma.cc/9AQ2-HX6C].

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at n.1.

47. *Id.*

48. See Adam Hayes, *Economics Basics: Supply and Demand*, INVESTOPEDIA, <https://www.investopedia.com/university/economics/economics3.asp> [https://perma.cc/GVX3-WVBD] (last visited Jan. 20, 2019).

49. See *Number of Postal Employees Since 1926*, U.S. POSTAL SERV. (Mar. 2018), <https://about.usps.com/who-we-are/postal-history/employees-since-1926.pdf> [https://perma.cc/8T6N-MSW3].

and 1940, and about 7,000 more employees between 1940 and 1950, it hired almost 40,000 more employees between 1950 and 1960 and 140,000 more employees between 1960 and 1970,⁵⁰ again reflecting the rush to meet increased demand for the postal service.⁵¹

Because of low postage rates and the ability to reach more households and businesses, “[s]uch mailings often inundated the United States Postal Service and turned the postal carrier into ‘an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home.’”⁵² Worse, the mailings often contained material that “recipients found . . . offensive because of their lewd and salacious character.”⁵³ Congress responded by passing the Postal Revenue and Federal Salary Act of 1967 “to adjust certain postage rates . . . and to regulate the mailing of pandering advertisements.”⁵⁴ The Act allowed recipients of unsolicited mail to request the mailer to remove their names from the mailing list and to stop the mailer from sending any more mailings to those addresses.⁵⁵ The Act affected publishers, distributors, and owners of mailing houses, among others, who argued that they had the constitutional right to “send unwanted mail into the home of another.”⁵⁶ The Supreme Court staunchly asserted the contrary:

Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that “a man’s home is his castle” into which “not even the king may enter” has lost none of its vitality. . . .⁵⁷

As communication technology evolved to become more efficient and effective, the Supreme Court began to recognize the changing landscape of business marketing.⁵⁸ While door-to-door solicitation could afford more freedom, mass mailing required

50. *Id.*

51. *See* Hayes, *supra* note 48.

52. *See* Graydon, *supra* note 37 (quoting *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 737 (1970)).

53. *Rowan*, 397 U.S. at 731.

54. Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 613, 613; *see also Rowan*, 397 U.S. at 729, 731.

55. § 301, 81 Stat. at 645; *see also Rowan*, 397 U.S. at 729.

56. *Rowan*, 397 U.S. at 729, 738.

57. *Id.* at 737.

58. *See id.* at 736.

more stringent parameters.⁵⁹

*C. 1980s: Junk Fax*⁶⁰

To many, the fax machine might have died long ago.⁶¹ Some might associate it with the days of big hair and Dolly Parton⁶² when it was “an office must have.”⁶³ Others might add the fax machine to a growing collection of “vintage technologies,”⁶⁴ such as the floppy disk,⁶⁵ the Walkman,⁶⁶ and cassette tapes.⁶⁷ Still others might seethe in anger at the fax machine’s inefficiencies,⁶⁸ while there are those who believe that the fax machine is still in vogue.⁶⁹ In 2010, fax machine sales reached \$70 million.⁷⁰ In 2011 and 2012, “over thirty-five million all-in-one fax machines were

59. See *id.* at 737.

60. Adam Zitter, *Good Laws for Junk Fax? Government Regulation of Unsolicited Solicitations*, 72 FORDHAM L. REV. 2767, 2768 n.7 (2004).

61. See e.g., Dave Johnson, *4 Obsolete Things Your Business Should Ditch Now*, CBS NEWS (Jan. 5, 2012, 7:56 AM), <https://www.cbsnews.com/news/4-obsolete-things-your-business-should-ditch-now/> [https://perma.cc/VP78-2P3S]; see also Martha C. White, *Millennials and Office Technology? Not Such a Good Match*, NBC NEWS (Aug. 12, 2016, 1:19 PM), <https://www.nbcnews.com/business/consumer/millennials-office-technology-not-such-good-match-n629361> [https://perma.cc/G2R2-N2LH].

62. See, e.g., ifonlytheeighties, *Dolly Parton—Nine to Five*, YOUTUBE (Sept. 1, 2011), <https://www.youtube.com/watch?v=LwDMFOLIHxU> [https://perma.cc/88HN-3WJX]. The fax machine was even featured in the “Museum of Obsolete Objects.” See Museum of Obsolete Objects, *Fax Machine*, YOUTUBE (Oct. 5, 2011), <https://www.youtube.com/watch?v=2cTdfvczaZk> [https://perma.cc/6AEV-BC2S].

63. *Why the Fax Machine Is Still Relevant*, STEELHEAD (Sept. 15, 2016), <https://steelhead.net/fax-machine-still-relevant/> [https://perma.cc/4VSR-DNWW].

64. WDD Staff, *Blast from the Past: Vintage Technologies That We No Longer Use*, WEBDESIGNERDEPOT (Feb. 17, 2010), <https://www.webdesignerdepot.com/2010/02/blast-from-the-past-vintage-technologies-that-we-no-longer-use/> [https://perma.cc/HB54-C9WZ].

65. See CHRIS BILTON & STEPHEN CUMMINGS, CREATIVE STRATEGY: RECONNECTING BUSINESS AND INNOVATION 66–67 (2010) (listing the floppy disk among old business technology).

66. Meghan Haire, *The Walkman*, TIME (July 1, 2009), <http://content.time.com/time/nation/article/0,8599,1907884,00.html> [https://perma.cc/U8HC-W59H].

67. Larry Waldbillig, *History of Cassettes*, HIST.’S DUMPSTER (July 15, 2012, 10:16 PM), <http://historysdumpster.blogspot.com/2012/07/history-of-cassettes.html> [https://perma.cc/5WVL-VTN8].

68. See Stuart, *Boss Goes Mad at Fax Machine*, YOUTUBE (Feb. 5, 2014), https://www.youtube.com/watch?v=D_Oi1AtXkw [https://perma.cc/5FD4-7JCH].

69. Nicholas Jackson, *The Age of the Fax Machine Is (Finally) Coming to an End*, ATLANTIC (Aug. 2, 2011), <https://www.theatlantic.com/technology/archive/2011/08/the-age-of-the-fax-machine-is-finally-coming-to-an-end/242660/> [https://perma.cc/3TXA-CEA2] (“But the joke is really on us, because, while it doesn’t take more than a quarter of an hour, we’re still using the fax machine.”).

70. *Sales of Fax Machines in the United States from 2005 to 2010 (in Million U.S. \$s)*, STATISTA, <https://www.statista.com/statistics/191863/sales-of-fax-machines-in-the-us-since-2005/> [https://perma.cc/W4CU-Z2C4] (last visited Jan. 20, 2019).

shipped worldwide.”⁷¹ In 2013, almost all Japanese companies and 60% of Japanese homes had a fax machine.⁷² In the face of robust competition from faster modern technologies, such as cloud-sharing services like Google Drive⁷³ and Dropbox,⁷⁴ as well as email⁷⁵ and scanner apps,⁷⁶ these impressive numbers provide a glimpse into the surprising longevity and relevance of the fax machine in American and foreign businesses.

The fax machine, more formally known as the telephone facsimile machine, became an office must-have during the mid-1980s.⁷⁷ Because it “automatically accept[ed], processe[d], and print[ed] each message sent,” the fax machine gave businesses and marketers increased access to consumers.⁷⁸ In fact, by the time Congress eventually enacted regulations to restrict unsolicited faxes, “more than 30 billion pages of information were sent via fax each year.”⁷⁹ For businesses, “faxing [was] a cost-effective way to reach customers, particularly for small business for whom faxing [was] a cheaper way to advertise.”⁸⁰

The problem with advertising through the fax machine was that the recipient bore the cost, including the opportunity cost of using the phone for another business deal, because faxing used the phone line.⁸¹ One journalist likened receiving unsolicited fax ads to receiving an advertisement through the mail and having to pay

71. Kat Ascharya, *Facing the Fax*, TIME (July 12, 2013), <http://techland.time.com/2013/06/21/facing-the-fax/> [https://perma.cc/FY9H-KXX5].

72. Chico Harlan, *In Japan, Fax Machines Find a Final Place to Thrive*, WASH. POST (June 7, 2012), https://www.washingtonpost.com/world/asia_pacific/in-japan-fax-machines-find-a-final-place-to-thrive/2012/06/07/gJQAshFPMV_story.html?utm_term=.00ce9f7d4407 [https://perma.cc/F49V-HHSE].

73. Michael Muchmore & Jill Duffy, *The Best Cloud Storage and File-Sharing Services*, PCMAG (July 23, 2018, 1:03 PM), <https://www.pcmag.com/roundup/306323/the-best-cloud-storage-providers-and-file-syncing-services> [https://perma.cc/KL6R-RVZ7] (naming Google Drive one of the best cloud storage services).

74. *Id.* (listing Dropbox among the best cloud storage and file sharing services).

75. Chris Hoffman, *How to Never Fax a Document Again*, HOW-TO GEEK (May 17, 2017, 4:43 PM), <https://www.howtogeek.com/186378/how-to-never-fax-a-document-again/> [https://perma.cc/H35K-W9EN].

76. *See, e.g., Scanbot 8*, SCANBOT, <https://scanbot.io/en/index.html> [https://perma.cc/C73C-RR7K] (last visited Jan. 20, 2019).

77. Ascharya, *supra* note 71.

78. Spencer Weber Waller et al., *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONSUMER L. REV. 343, 353 (2014).

79. *Id.*

80. S. REP. NO. 109-76, at 3 (2005); *see also* Waller et al., *supra* note 78, at 354 n.14.

81. *See* Waller et al., *supra* note 78, at 353.

the cost of shipping.⁸² The onslaught of unsolicited telemarketing calls and facsimile advertisements led to a growing number of consumer complaints.⁸³ States began enacting laws to correct the problem; for example, the Texas legislature made unsolicited fax advertisements a Class C misdemeanor.⁸⁴ However, state law could not prohibit interstate unsolicited fax advertisements and telemarketing calls,⁸⁵ so states began to seek federal legislation limiting unwanted calls and faxes.⁸⁶

On December 20, 1991, Congress responded to the states' demand for federal legislation by enacting the Telephone Consumer Protection Act of 1991 (TCPA).⁸⁷ The TCPA boasted a two-prong goal: to "prevent the shifting of advertising costs to recipients of unsolicited fax advertisements"⁸⁸ and to "facilitate interstate commerce by restricting certain uses of facsimile (fax) machines."⁸⁹ In the same way that the Postal Revenue and Federal Salary Act of 1967 was enacted in response to the sudden onslaught of unwanted postal mailings, the TCPA provided relief to individuals and businesses that received "tens of thousands of unsolicited [fax] messages per week."⁹⁰ However, unlike the Postal Revenue and Federal Salary Act, the TCPA's regulation was much more restrictive. It banned unsolicited fax advertisements sent "us[ing] any telephone facsimile machine, computer, or other device . . . to a telephone facsimile machine,"⁹¹ regardless of whether their content was lewd or salacious. The TCPA defined "unsolicited advertisement" as "advertising the commercial availability or quality of any property, goods, or services . . . transmitted to any person without that person's prior express invitation or permission, in writing or otherwise."⁹² This strict ban reflected Congress's concern that the

82. *Id.* at 354.

83. *Id.*

84. *Chair King, Inc. v. Get Mobilnet of Hous., Inc.*, 184 S.W.3d 707, 710 n.5 (Tex. 2006).

85. *See* Waller et al., *supra* note 78, at 355.

86. S. REP. NO. 102-178, at 3 (1991).

87. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended in scattered sections of 47 U.S.C.).

88. *Phillips Randolph Enters. v. Adler-Weiner Research Chi., Inc.*, 526 F. Supp. 2d 851, 852 (N.D. Ill. 2007).

89. S. REP. NO. 102-178, at 1.

90. H.R. REP. NO. 102-317, at 6–7 (1991); *see also* Waller et al., *supra* note 78, at 374 (quoting H.R. REP. NO. 102-317, at 6–7); Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 613, 645, *amended by* Postal Reorganization Act, Pub. L. No. 91-375, ch. 30, 84 Stat. 719, 748 (1970) (current version at U.S.C. § 3008 (2012)).

91. 47 U.S.C. § 227(b)(1)(C) (2012).

92. *Id.* § 227(a)(5).

recipient of a facsimile would be vulnerable to the cost-shifting effect of unsolicited fax advertisements; would be forced to pay for the printing, paper, ink, and wear-and-tear of the fax machine for advertisements it did not want; and would waste time waiting to receive them.⁹³

Unfortunately, the TCPA left some glaring loopholes. It did not prohibit unsolicited fax advertisements from businesses or individuals with whom the recipient had an “established business relationship” (EBR) or from tax-exempt organizations.⁹⁴ According to the legislative record, the Commission defined “established business relationship” as “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration”⁹⁵

The Commission’s rationale for eschewing regulation of unsolicited faxes from those with which the recipient had an EBR was that the EBR was sufficient evidence of the recipient’s “invitation or permission . . . to receive the facsimile advertisement.”⁹⁶ However, by 2003, the Commission had second thoughts and concluded that an EBR was insufficient evidence of a recipient’s permission to accept fax advertisements.⁹⁷ Consequently, the Commission added heightened requirements by permitting advertisers to send fax advertisements to recipients with whom they had an EBR only when the recipient had provided express permission in the form of prior signed and written approval.⁹⁸

On July 9, 2005, Congress officially amended the language in the TCPA to reflect the express permission requirement by enacting the Junk Fax Prevention Act of 2005 (JFPA).⁹⁹ According to the JFPA, Section (a)(2)(A) of the TCPA would adopt the exemption for unsolicited fax advertisements from businesses with whom

93. Jennifer A. Williams, *Faxing It In*, 72 BROOK. L. REV. 345, 354 (2006). *But see*, e.g., MICHAEL G. GARTNER, ADVERTISING AND THE FIRST AMENDMENT 23–24 (1989) (arguing government regulation of advertising infringes on the right to free speech).

94. *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 21 FCC Rcd. 3787, 3789 (2006).

95. *Id.* (citing *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act. of 1991, 7 FCC Rcd. 8752, 8771 (1992)).

96. *Id.*

97. Restrictions on Telemarketing and Telephone Solicitation, 68 Fed. Reg. 44,177 (July 25, 2003), *as amended by* 68 Fed. Reg. 59,131 (Oct. 12, 2003) (codified at 47 C.F.R. § 64.1200(a)(4) (2018)).

98. 47 C.F.R. § 64.1200(c)(2)(ii).

99. 21 FCC Rcd. at 3790. It was subsequently incorporated into the Telephone Consumer Protection Act, which can be found in 47 U.S.C. § 227 (2012).

the recipient had an EBR.¹⁰⁰ At the same time, it would include an opt-out notice requirement: the recipient must provide express written and signed consent to the sender before the sender can send a fax.¹⁰¹ Under Section (b)(2)(D), the sender must include specific language and instructions, as well as valid contact information, to allow recipients to opt out of future faxes from the sender.¹⁰² Finally, Section (b)(2)(D) describes how a recipient's opt-out notice could comply with the TCPA.¹⁰³

The JFPA also preserved elements of the TCPA, such as the three ways for consumers to enforce TCPA provisions.¹⁰⁴ First, they could bring a private right of action for damages and injunction.¹⁰⁵ Second, "if a state attorney general, or an official or agency designated by a State has reason to believe that any person has engaged or is engaging in a pattern or practice of [violations],"¹⁰⁶ the State could bring a civil lawsuit on behalf of its residents for damages or injunctive relief.¹⁰⁷ Third, the Federal Communications Commission (FCC) could enforce forfeiture penalties on any violators of the TCPA.¹⁰⁸

Unfortunately, the JFPA amendments did not prevent further litigation over unsolicited fax advertisements and opt-out notice requirements. Two recent circuit splits reflected the controversies that the amendment failed to mitigate. As recently as 2016, the Sixth¹⁰⁹ and Seventh¹¹⁰ Circuits split over the standard to apply in deciding vendor liability for sending unsolicited fax advertisements. In both cases, a small business had hired third-party vendors to send fax advertisements to a large number of constituents, some of whom did not give permission to receive fax advertisements from that business.¹¹¹ The Seventh Circuit advocated an agency analysis standard,¹¹² while the Sixth Circuit used an on-

100. *Id.* § 227(a)(2)(A).

101. *Id.*

102. *Id.* § 227(b)(2)(D).

103. *Id.*

104. *See* Waller et al., *supra* note 78, at 358.

105. 47 U.S.C. § 227(b)(3).

106. *Id.* § 227(g)(1).

107. *See* Waller et al., *supra* note 78, at 358.

108. 47 U.S.C. § 503(b)(1).

109. *Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886 (6th Cir. 2016).

110. *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935 (7th Cir. 2016).

111. *Id.* at 937; *Siding & Insulation Co.*, 822 F.3d at 888–89.

112. *Bridgeview Health Care Ctr.*, 816 F.3d at 938. Jerry Clark, owner of a small Illinois business called Affordable Digital Hearing Company (Affordable Hearing) hired Business to Business Solutions (B2B) marketing company to send mass advertisements to one hundred local businesses within a 20-mile radius from Affordable Hearing. *Id.* at 937. But

whose-behalf standard.¹¹³

Another recent controversy is whether opt-out notices are also required for solicited fax advertisements. Initially, the JFPA amendments applied only to unsolicited fax advertisements for which the sender had not “obtained permission” to send to the recipient.¹¹⁴ However, in 2006, the FCC interpreted the TCPA in a way that gave the agency authority to promulgate the Solicited Fax Rule, which also required senders of solicited fax advertisements to include opt-out notices.¹¹⁵ As a result, senders who had permission to fax advertisements also faced potential class action suits and millions of dollars in damages for omitting an opt-out notice, even though the recipient technically had already opted in.¹¹⁶

The Solicited Fax Rule did not live long. In *Bais Yaakov of Spring Valley v. Federal Communications Commission*, the D.C. Circuit not only invalidated the Rule,¹¹⁷ but it also stripped the FCC of its authority to require senders to include opt-out notices in solicited faxes.¹¹⁸ The current regulations affecting junk fax, requiring senders to include an opt-out notice,¹¹⁹ apply only to

B2B actually faxed 4,849 advertisements to Indiana, Illinois, and Ohio, and Bridgeview Health Care Center sued Clark for violation of the TCPA. *Id.* On appeal, the Seventh Circuit conducted a three-step agency analysis, focusing on whether Clark conferred express actual authority on B2B or whether B2B had implied actual authority or apparent authority. *Id.* at 938–39. It held that B2B did not have any kind of authority. *Id.* Instead, B2B “made an independent decision to blast faxes across multiple state lines,” and the court concluded “that Clark was not liable for faxes sent outside the 20-mile radius” that he had expressly authorized. *Id.*

113. *Siding and Insulation Co.*, 822 F.3d at 899. Siding sued Alco for sending unsolicited fax advertisements through a vendor called B2B. *Id.* at 888. Alco alleged that B2B did not specify the number of faxes it would send, when, and to whom, and B2B did not ask Alco for specific businesses to which it wanted to advertise. *Id.* at 889. Alco received letters from attorneys whose clients had received unsolicited faxes but referred these complaints to B2B, which responded that Alco was “solely responsible for the contents and destination of [the] faxes.” *Id.* at 889–90. Siding and Alco disagreed over the correct standard of review: Siding argued strict liability, while Alco argued vicarious liability. *Id.* at 891. The Sixth Circuit held that the on-whose-behalf standard applied, meaning that “the party on whose behalf a solicitation is made bears ultimate responsibility for any violations.” *Id.* at 897–98 (citation omitted). This is a legal term of art that considers agency principles and policy considerations. *Id.* at 899.

114. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,972 (May 3, 2006) (codified at 47 C.F.R. § 64.1200(a)(4)(iv) (2018)).

115. *Id.* at 25,971–72.

116. See *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1081 (2017).

117. *Id.* at 1082; see 47 C.F.R. § 64.1200(a)(4)(iv).

118. *Bais Yaakov*, 852 F.3d at 1082 (“Nor does the Act grant the FCC authority to require opt-out notices on solicited fax advertisements.”).

119. *In re Junk Mail Prevention Act of 2005*, CG Docket No. 05-338, Report and Order,

unsolicited fax advertisements.¹²⁰ As of March 31, 2017, solicited faxes no longer need to include an opt-out notice.¹²¹

D. 1990s–Early 2000s: Unsolicited Commercial E-mail (UCE)

In the late 1980s, a British computer scientist and software engineer, Sir Tim Berners-Lee, aspired to streamline information-sharing across multiple platforms and teams.¹²² While employed at CERN, a Swiss physics laboratory, he noticed that “there was different information on different computers, but [everyone] had to log on to different computers to get at it . . . and sometimes you had to learn a different program on each computer.”¹²³ In 1989, he began working on a solution that eventually evolved into the World Wide Web.¹²⁴ The decentralized system prevented any central authority from controlling the content posted online.¹²⁵ More importantly, it eliminated the need to seek a recipient’s consent, unlike fax advertisements.¹²⁶ The goal was to connect everyone around the world and facilitate information-sharing at literally the click of a button.¹²⁷ Ultimately, Sir Berners-Lee hoped to provide universal information access to anyone, anywhere, and at any time.¹²⁸

By the mid-1990s, the World Wide Web had emerged as “a commercial tool . . . [that] signaled a change in the landscape.”¹²⁹ In particular, e-mail presented businesses with the opportunity to market their products and services not only to “an actively interested audience” but also to “a relatively passive audience.”¹³⁰ No longer would businesses encounter limitations of the unsolicited-solicited dichotomy of regulations on junk mail and junk fax; commercial solicitation could reach audiences who did not consent to

21 FCC Rcd. 3787, 3788 (2006).

120. *Bais Yaakov*, 852 F.3d at 1083.

121. *Id.*

122. *See History of the Web*, WORLD WIDE WEB FOUND., <https://webfoundation.org/about/vision/history-of-the-web/> [<https://perma.cc/NM7V-HS8C>] (last visited Jan. 20, 2019).

123. Tim Berners-Lee, *Answers for Young People*, W3C, <https://www.w3.org/People/Berners-Lee/Kids.html> [<https://perma.cc/FZ95-X8EH>] (last visited Jan. 20, 2019).

124. *History of the Web*, *supra* note 122.

125. *Id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. Matthew E. Shames, *Congress Opts Out of Canning Spam*, 66 U. PITT. L. REV. 385, 385 (2004).

130. *Id.*

solicitation and do so at a much lower cost than rising postage rates or expensive and clunky fax machines.¹³¹

However, solicitation by email was actually an expensive solution. Lower monetary costs came at the expense of company reputation and consumer backlash against mushrooming inboxes.¹³² In addition, Internet Service Providers were forced to invest more time and money into expanding and strengthening their network infrastructure to tackle the increasing number of email transmissions between servers.¹³³ Furthermore, emails were often elusive and difficult to track down as senders substituted their real e-mail addresses with aliases to hide their identities.¹³⁴ As more companies discovered that they could use the Internet to market their products and services more efficiently and effectively, legal scholars observed a rise in the number of legal disputes related to unsolicited commercial emails, also known as UCEs.¹³⁵

Since then, UCEs have earned a more affectionate nickname: “spam.”¹³⁶ Some believe the name comes from the Monty Python movie scene in which the word “spam” repeatedly interrupts the actors’ dialogue.¹³⁷ The constant interruptions mirrored the annoying interference of workflow and communication as unsolicited commercial e-mails rapidly clogged up inboxes.¹³⁸ Others believe that to “spam” the Internet is the equivalent of “dropping a can of Spam into a fan and filling the surrounding space with meat.”¹³⁹ Whatever its origin, the moniker holds a negative connotation that appropriately captures the general consumer attitude towards UCEs.¹⁴⁰

Before 2003, regulation of UCEs was largely ineffective. State regulations could not constrict a universal communication tool

131. See discussion *supra* Sections II.B, II.C.

132. See Graydon, *supra* note 37, at 82, 89.

133. See Shames, *supra* note 129, at 391.

134. See Carrie Kirby, *Spam Keeps Coming Despite the New Law: You Can Complain to the FTC or State Attorney General, but It Might Not Resolve the Problem*, SFGATE (Jan. 19, 2004, 4:00 AM), <http://www.sfgate.com/business/article/Spam-keeps-coming-despite-the-new-law-You-can-2829076.php> [<https://perma.cc/3GRC-E7RA>] (“[S]enders of bulk junk mail often disguise their names, e-mail addresses and message routing information . . .”).

135. See Shames, *supra* note 129, at 391.

136. See zumpzump, *Monty Python—Spam*, YOUTUBE (Feb. 14, 2007), https://www.youtube.com/watch?time_continue=120&v=anwy2MPT5RE [<https://perma.cc/4ZAK-U3D2>].

137. *Id.*

138. See Shames, *supra* note 129, at 391.

139. Philip Elmer-Dewitt, *Battle for the Soul of the Internet*, TIME (June 24, 2001), <http://content.time.com/time/magazine/article/0,9171,164784,00.html> [<https://perma.cc/8E8FV-84QQ>].

140. See Graydon, *supra* note 37, at 81.

that crossed geographical lines or claimed jurisdiction over e-mail senders from outside the state, let alone the country.¹⁴¹ Moreover, state regulations contained inconsistent language that failed to provide spammers with clear guidance about compliance.¹⁴² Concurrently, a lack of uniformity among state regulations gave spammers more ammunition to escape prosecution as they took advantage of the lack of consistent standards across state lines.¹⁴³

Finally, in the last few months of 2003, Congress enacted the CAN-SPAM Act of 2003 and assigned enforcement authority to the Federal Trade Commission (FTC).¹⁴⁴ By 2003, UCEs represented half of all emails received by businesses and consumers.¹⁴⁵ CAN-SPAM resolved the state jurisdiction issue by establishing federal jurisdiction over spammers anywhere in the United States¹⁴⁶ and preempting state regulations.¹⁴⁷ CAN-SPAM also included an opt-out provision that required the creation and maintenance of a “Do Not E-Mail” database that keeps track of recipients’ email addresses requesting to opt out of receiving UCEs.¹⁴⁸

Perhaps surprisingly, the FTC pushed back against the requirement of a “Do Not E-mail” database, arguing that it was difficult and unwise to enforce.¹⁴⁹ The agency said it would struggle to identify the email senders because most of them hid their identities behind fake email addresses.¹⁵⁰ Furthermore, the FTC argued that spammers could find a way to hack the database and send UCEs to the email addresses inside.¹⁵¹ In addition, the FTC concluded that a Do Not E-mail Registry would “not have any beneficial impact on the spam problem,” deferring the responsibility

141. See Shames, *supra* note 129, at 389.

142. *Id.*

143. *Id.*

144. CAN-SPAM Act of 2003, Pub. L. 108-187, 117 Stat. 2699, 2711 (codified at 15 U.S.C. §§ 7701–13 (2012)); see 15 U.S.C. § 7706 (describing FTC’s enforcement authority).

145. 15 U.S.C. § 7701(a)(2).

146. See *id.* § 7706.

147. *Id.* § 7707(b)(1).

148. See Shames, *supra* note 129, at 406–07.

149. See FED. TRADE COMM’N, NATIONAL DO NOT EMAIL REGISTRY: A REPORT TO CONGRESS i (2004), <https://www.ftc.gov/sites/default/files/documents/reports/can-spam-act-2003-national-do-not-email-registry-federal-trade-commission-report-congress/report.pdf> [<https://perma.cc/U27L-BECQ>].

150. See Bill Husted et al., *Spam Wars: Can Deluge Be Stopped?*, ATL. J. CONST., Dec. 16, 2003, at F1.

151. See FED. TRADE COMM’N, *supra* note 149 (“[T]he Commission has determined that spammers would most likely use a Registry as a mechanism for verifying the validity of email addresses and, without authentication, the Commission would be largely powerless to identify those responsible for misusing the Registry.”).

of resolving this issue to the private market.¹⁵²

Other than criticism from the agency empowered to enforce it, CAN-SPAM manifested other weaknesses.¹⁵³ Key among them was the stark absence of a consent requirement similar to the one that helped curb unsolicited faxes.¹⁵⁴ This omission meant that the option of adding one's email address to the Do Not E-Mail registry became at most reactive rather than proactive because it guaranteed spammers at least one shot at legally sending UCEs before a recipient could require them to stop.¹⁵⁵ Moreover, the FTC's lack of faith in its ability to manage the database weakened its effective enforcement of the opt-out provision, leaving many UCE recipients reluctant to try the Do Not E-Mail registry for fear of exposing their email addresses to scavenging spammers.¹⁵⁶

E. Late 2000s–2012 (pre-smartphone): Cellphone Spam

Since the early 2000s, cell phones began to have the capacity to send and receive 160-character messages through Short Messaging Service (SMS), more popularly known as “text messaging.”¹⁵⁷ Businesses and spammers alike found texting more effective than email, despite the fact that recipients with no texting plan paid for every text received,¹⁵⁸ because of the lax regulations on cellphone spam.¹⁵⁹ Spammers could reach audiences faster through text message than email.¹⁶⁰ Whereas recipients had to connect to the Internet and open up a browser before they could see a UCE, they could open a text message virtually anywhere if they carried their phone wherever they went.¹⁶¹

Also known as “smishing,”¹⁶² unsolicited cell phone spam

152. *Id.* at 37.

153. *See* Shames, *supra* note 129, at 395–96.

154. *See supra* Section II.C.

155. *See* Shames, *supra* note 129, at 399.

156. *See id.* at 409.

157. *See* Waller et al., *supra* note 78, at 367.

158. *See, e.g.,* Sid Kirchheimer, *Stop Spam Text Messages*, AARP, <https://www.aarp.org/money/scams-fraud/info-10-2012/stop-spam-text-messages.html> [<https://perma.cc/RNB6-Z57C>] (last visited Jan. 20, 2019).

159. *See* Waller et al., *supra* note 78, at 352 (discussing how cell phone use and text message advertising has grown, showing the need for the FTC to issue guidelines).

160. *See* Kirchheimer, *supra* note 158.

161. *See id.*

162. *Emerging Threats: What Is Smishing?*, NORTON, <https://us.norton.com/internetsecurity-emerging-threats-what-is-smishing.html> [<https://perma.cc/75U3-V84G>] (last visited Jan. 20, 2019) (explaining that smishing is a fraudulent activity with the purpose of stealing personal information via text or SMS message).

began to increase in 2011 and 2012, and email spam rates started to fall.¹⁶³ In 2012, spam text messages going to cellphones in America tripled compared with 2011.¹⁶⁴ Within the same time frame, email spam decreased by over 80%.¹⁶⁵ The surge in mobile phone ownership has led to increased dependency on cell phones.¹⁶⁶ In 2002, 62% of U.S. adults owned a cell phone; by 2013, 91% owned a cell phone; today, 95% own a cell phone.¹⁶⁷ Dependency on the cell phone has also increased over time, meaning that users now carry their phones around with them most, if not all, of the time.¹⁶⁸

Although the TCPA was Congress's response to the onslaught of intrusive telemarketing calls in the late 1980s, it did not directly apply to text messaging until 2009.¹⁶⁹ That year, the Ninth Circuit considered a text message a "call" under the TCPA because "to call" meant "to communicate with . . . a person by telephone,"¹⁷⁰ regardless of whether it was by voice or text.¹⁷¹ The decision emphasized Congress's desire to use the TCPA to prevent invasions of privacy rather than only addressing specific types of telecommunication.¹⁷² Unsolicited text messaging, the Court held, presented as much of an invasion of privacy as telemarketing calls.¹⁷³ Because of the Ninth's Circuit decision, text spammers could no longer send unsolicited text message advertisements without first obtaining the recipient's permission in a signed writing,¹⁷⁴ similar to fax advertisement regulations after the JFPA.

F. Today: Facebook News Feeds

The smartphone broke through the telecommunication market in 2011 and, by 2013, had replaced traditional broadband

163. See Kirchheimer, *supra* note 158.

164. *Id.*

165. *Id.*

166. See *Mobile Fact Sheet*, PEW RES. CTR. INTERNET & TECH. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/mobile/> [<https://perma.cc/6UAR-8H3N>].

167. See *id.*

168. See *id.*; see also Kirchheimer, *supra* note 158.

169. See *Satterfield v. Simon & Schuster Inc.*, 569 F.3d 946, 949 (9th Cir. 2009) (holding that "it is reasonable to interpret 'call' under the TCPA to include both voice calls and text messages"). From 1981 to the enactment of the TCPA in 1991, total business expenses for telemarketing activities rose from \$1 billion to \$60 billion. Waller et al., *supra* note 78, at 352. By 1990, telemarketing was bringing in \$435 billion worth of annual sales, and over 18 million Americans received over 300,000 telemarketing calls a day. *Id.*

170. *Satterfield*, 569 F.3d at 954.

171. See *id.* at 952.

172. See *id.* at 954.

173. See *id.*

174. See Waller et al., *supra* note 78, at 367.

Internet service in many households.¹⁷⁵ Today, about 20% of American adults only access the Internet through their smartphones, in lieu of broadband service at home.¹⁷⁶ A glorified version of the cell-phone, the smartphone not only allowed users to receive calls and text messages, but it also offered the additional functions of a computer on-the-go.¹⁷⁷ The smartphone could work anywhere and find information at any time, as long as it had a data plan.¹⁷⁸

Social networks also increased in popularity as smartphone apps made social networking sites¹⁷⁹ even easier to access and use.¹⁸⁰ In fact, according to 2018 statistics, “[s]ocial networks are now so well established, that there is a core ‘top 5’ social networks that don’t change much from year-to-year”: Facebook, Instagram, Pinterest, LinkedIn, and Twitter.¹⁸¹ Facebook continues to be the most popular social network, boasting over two billion users worldwide, with majority market share and usage by 68% of online adults in the U.S.¹⁸² Facebook also seems to be the most engaging social network, measured by reach and average minutes per visitor, as well as the most addictive, measured by the number of times users access it on a daily basis.¹⁸³ On average, users access Facebook fifteen days per month and eight times per day, which is far beyond other social network platforms.¹⁸⁴

This level of access and engagement has turned Facebook into a stellar marketing tool, especially with usage of “clickbait”¹⁸⁵ or “engagement bait.”¹⁸⁶ Clickbait is “when a [Facebook user] posts a

175. See *Mobile Fact Sheet*, *supra* note 166.

176. *Id.*

177. Liane Cassavoy, *What Makes a Smartphone Smart?* LIFEWIRE (Aug. 28, 2018), <https://www.lifewire.com/what-makes-a-smartphone-smart-579597> [<https://perma.cc/39Q3-DZG7>].

178. *See id.*

179. *Social Networking*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/social%20networking> (last visited Jan. 20, 2019) (defining term as “the creation and maintenance of personal and business relationships especially online”).

180. See Dave Chaffey, *Global Social Media Research Summary 2018*, SMART INSIGHTS (Nov. 23, 2018), <https://www.smartinsights.com/social-media-marketing/social-media-strategy/new-global-social-media-research/> [<https://perma.cc/2E8E-YFA7>] (examining the growth of social network usage throughout the world).

181. *Id.*

182. *Id.*

183. *See id.*

184. *Id.*

185. Nicole Lee, *Facebook is Ramping up Its Fight Against Clickbait*, ENGADGET (Aug. 4, 2016), <https://www.engadget.com/2016/08/04/facebook-is-ramping-up-its-fight-against-clickbait/> [<https://perma.cc/E7BT-J53G>].

186. Katie Collins, *Facebook Cracks Down on “Like This If” Bait in Your News Feed*, CNET (Dec. 18, 2017, 6:00 AM), <https://www.cnet.com/news/facebook-cracks-down-on->

link with a headline that encourages people to click to see more, without telling them much information about what they will see.”¹⁸⁷ For example, a headline might say, “You’ll Never Believe Who Tripped and Fell on the Red Carpet . . .”¹⁸⁸ and, if a user clicks on it to see more, the user has taken the bait. Engagement bait operates as “a tactic to create Facebook posts that goad people into interacting, through likes, shares, comments, and other actions, in order to artificially boost engagement and get greater reach on News Feed.”¹⁸⁹ For instance, a scroll through the average user’s news feed will likely reveal an unsolicited post from a company or even a friend, encouraging the user to “LIKE this if you’re an Ar-ies!”¹⁹⁰ or “Share this for a chance to win a month’s supply of detergent!”¹⁹¹ Such posts are categorized into “react baiting,”¹⁹² “comment baiting,”¹⁹³ “share baiting,”¹⁹⁴ “tag baiting,”¹⁹⁵ and “vote baiting.”¹⁹⁶

Recently, however, Facebook announced that it was updating its news feeds Publisher Guidelines to discourage clickbait and engagement bait.¹⁹⁷ According to the new guidelines, “Posts and Pages that use this tactic will be demoted,” meaning that they would receive less visibility on news feeds.¹⁹⁸ The more “genuine” posts will be ranked higher in the news feed.¹⁹⁹ The goal, Facebook

engagement-bait-in-news-feeds/#ftag=COS-05-10aaa0i [https://perma.cc/D9V3-CX7X].

187. *Do Not Post Clickbait*, FACEBOOK BUS., <https://www.facebook.com/help/publisher/503640323442584> [https://perma.cc/533V-K4BJ] (last visited Jan. 20, 2019).

188. *Id.*

189. *Do Not Post Engagement Bait*, FACEBOOK BUS., <https://www.facebook.com/help/publisher/259911614709806> [https://perma.cc/33BS-PE7N] (last visited Jan. 20, 2019).

190. Henry Silverman & Lin Huang, *Fighting Engagement Bait on Facebook*, FACEBOOK NEWSROOM (Dec. 18, 2017), <https://newsroom.fb.com/news/2017/12/news-feed-fyi-fighting-engagement-bait-on-facebook/> [https://perma.cc/Y8X5-52TP].

191. *See* Collins, *supra* note 186.

192. *See Do Not Post Engagement Bait*, *supra* note 189 (“Asking people to react to the post (includes like, love, haha, wow, sad, and angry).”).

193. *Id.* (“Asking people to comment with specific answers (words, numbers, phrases, or emojis).”).

194. *Id.* (“Asking people to share the post with their friends.”).

195. *Id.* (“Asking people to tag their friends.”).

196. *Id.* (“Asking people to vote using reactions, comments, sharing, or other means of representing a vote.”).

197. *See* Colin Lecher, *Facebook Announces News Feed Guidelines for Publishers*, VERGE (Oct. 24, 2017, 11:09 AM), <https://www.theverge.com/2017/10/24/16523856/facebook-publishers-news-feed-guidelines> [https://perma.cc/34AV-2CMD]; Silverman & Huang, *supra* note 190.

198. *Do Not Post Engagement Bait*, *supra* note 189.

199. *Principle 2 Overview*, FACEBOOK BUS., <https://www.facebook.com/help/publisher/538391223253327> [https://perma.cc/2LWL-GEDU] (last visited Jan. 20, 2019).

asserted, was to maintain publication of “accurate, authentic content,” meaning posts that seek no monetary or personal gain because “[p]eople want to see reliable and credible information on Facebook.”²⁰⁰

Despite its efforts in regulating its news feed to encourage more genuine communication among its users, the weakness in Facebook’s updated guidelines is the absence of an opt-out function like the Do Not E-Mail registry or the requirement to obtain express permission for direct mail²⁰¹ and fax advertisements.²⁰² Consequently, users may still have to see such posts and pages on their news feed and manually hide those ads. In addition, the news feed algorithm that is supposed to demote engagement bait may not always work—as Facebook itself acknowledges.²⁰³ Facebook also faces a new class action lawsuit for sending unsolicited “Birthday Texts” to users or third parties, allegedly in violation of the TCPA.²⁰⁴ On October 3, 2017, plaintiff James Meyers filed a class action complaint, alleging that Facebook had invaded the privacy of its users through unsolicited text messages that the users had to pay for.²⁰⁵

The California Central District Court has yet to return a decision. As of December 15, 2017, the Court had filed a “Notice to Parties of Court-Directed ADR Program,”²⁰⁶ and the parties had jointly stipulated to transfer the case to the Northern District of California, San Francisco Division.²⁰⁷ Facebook may or may not attack engagement bait posts more aggressively as a result of this lawsuit, but that remains to be seen.

III. CURRENT METHODS FOR OPTING OUT

Currently, consumers and businesses have several ways to opt out of unsolicited mail, email, fax, text, and Facebook news feeds.²⁰⁸ An array of websites offer links and tips for decluttering

200. *Id.*

201. *See* discussion *supra* Sections II.B, II.D.

202. *See* discussion *supra* Section II.C.

203. *Do Not Post Engagement Bait*, *supra* note 189.

204. *See* Class Action Complaint at 1, *Meyers v. Facebook, Inc.*, No. 5:17-cv-2029 (C.D. Cal. Oct. 3, 2017), 2017 WL 4400457.

205. *Id.* at 4.

206. *See* Notice to Parties of Court-Directed ADR Program, *Meyers v. Facebook, Inc.*, No. 5:17-cv-2029 (C.D. Cal. Oct. 4, 2017), 2017 WL 4400457.

207. *See* Joint Stipulation to Transfer Case to Northern District of California, San Francisco Division, *Meyers v. Facebook, Inc.*, No. 5:17-cv-2029 (C.D. Cal. Dec. 8, 2017), 2017 WL 4400457.

208. *See, e.g.*, Brady Mower, *How to Opt Out of Spam, Junk Mail, and Unwanted*

one's mailbox or inbox.²⁰⁹ Different options are available for different methods of solicitation.²¹⁰

A. *Mail*

1. *Prescreened Credit Card and Insurance Offers.* The FTC's website gives consumers two options for opting out of receiving prescreened offers of credit cards and insurance: consumers can call a toll-free number or visit a website (www.optoutprescreen.com) to opt out for five years, or they can begin a permanent opt-out process through the same website.²¹¹ Both options, especially the latter, require consumers to invest a lot of time and to provide very personal information, including names, Social Security numbers, dates of birth, and home telephone numbers (leaving them vulnerable to telemarketing calls).²¹²

Despite the website's assurance that the information will be confidential, the Internet remains an open access platform where lax cybersecurity²¹³ makes it a prime hunting ground for hackers in search of personal information.²¹⁴ Consumers without access to the Internet may not need to worry as much about cybersecurity issues, but they must send separate written requests to permanently opt out of each of the credit reporting companies which costs additional time and money.²¹⁵ In addition, the consumer may not have access to the information on the FTC website if they do not

Marketing, BRADY MOWER (Aug. 28, 2015), <http://bradymower.com/opt-out-spam-junk-mail-telemarketing/> [<https://perma.cc/QVP6-EYFK>]; *Control What You See in News Feed*, FACEBOOK HELP CTR., <https://www.facebook.com/help/964154640320617> [<https://perma.cc/4ZBN-MKN5>] (last visited Jan. 20, 2019).

209. See, e.g., Rashed Isip, *5 Easy Ways to Declutter Your Email Inbox*, ORD. EXPERT, <https://www.theorderexpert.com/declutter-your-email-inbox/> [<https://perma.cc/P8BA-38WL>] (last visited Jan. 20, 2019).

210. *Id.*

211. *Stopping Unsolicited Mail, Phone Calls, and Email*, FTC: CONSUMER INFO., <https://www.consumer.ftc.gov/articles/0262-stopping-unsolicited-mail-phone-calls-and-email> [<https://perma.cc/2VYQ-SKDT>] (last visited Jan. 20, 2019).

212. See *id.*

213. See *These Were 2017's Biggest Hacks, Leaks, and Data Breaches*, ZDNET (Dec. 18, 2017), <http://www.zdnet.com/pictures/biggest-hacks-leaks-and-data-breaches-2017/> [<https://perma.cc/8WY3-ZNR4>] (showing widespread data compromises at various large companies and governmental agencies).

214. See, e.g., Colin Dwyer, *Hackers Accessed the Personal Data of 143 Million People, Equifax Says*, NPR (Sept. 7, 2017, 7:11 PM), <https://www.npr.org/sections/thetwo-way/2017/09/07/549296359/hackers-accessed-the-personal-data-of-143-million-people-equifax-says> [<https://perma.cc/JAR2-UZBB>] (giving an example of a large breach of personal information).

215. See *supra* note 211.

have Internet access in the first place.

2. *Catalogs and Yellow Pages.* Several websites include links, like www.catalogchoice.org and www.yellowpagesoptout.com, that help consumers “stop junk mail for good”²¹⁶ and customize or opt out of directory delivery.²¹⁷ Catalog Choice is a nonprofit organization that offers consumers a free service to opt out of receiving catalogs, coupons, credit card offers, and circulars and charges a fee for other opt-out services.²¹⁸ However, its website requires the consumer to cancel catalogs one by one by typing in the title and choosing from a drop-down list.²¹⁹ Some catalogs and magazines might not be in the drop-down list. In such cases, the consumer would be out of luck. For example, while the *Houston Chronicle* exists as a choice, *Houston Lifestyles & Homes Magazine* is not.²²⁰ Consumers must also sign up with an e-mail, name, and password, which means that the consumer would potentially stop unsolicited mail from specific catalogs but at the expense of receiving unsolicited emails.²²¹

A similar concern applies to the Yellow Pages opt-out website, which requires consumers to register with an email address before opting out of directories in the consumer’s zip code.²²² In addition, the website includes a disclaimer warning that opt-out requests related to phonebooks delivered by the United States Postal Service may be subject to “current USPS regulations [that] may preclude opting out of mail delivery in certain (mainly rural) areas. . . . In the event you receive a directory for which you opted out, please let us know by clicking on ‘Feedback’ below.”²²³ This means that even registering and risking clogging up one’s inbox may not be effective, as the consumer could still legally receive a

216. See, e.g., *Simplify Your Life*, CATALOG CHOICE, <https://www.catalogchoice.org/> [<https://perma.cc/LA9C-S5PA>] (last visited Jan. 20, 2019); *Consumer Choice and Opt-Out Site*, NAT’L YELLOW PAGES, <https://www.yellowpagesoptout.com> [<https://perma.cc/RA95-GVBQ>] (last visited Jan. 20, 2019).

217. See *supra* note 211.

218. *Simplify Your Life*, *supra* note 216; *Opt Out of Junk Mail & Cut Paper Waste*, CITYOFCANCOVER.US, https://www.cityofvancouver.us/sites/default/files/fileattachments/city_manager039s_office/page/1481/opt_out_of_junk_mail_paper_waste.pdf [<https://perma.cc/F45T-PSMB>] (last visited Jan. 20, 2019).

219. E.g., *Vanity Fair*, CATALOG CHOICE, <https://www.catalogchoice.org/catalogs/9037> [<https://perma.cc/V7ED-D9DF>] (last visited Jan. 20, 2019) (showing a drop-down link after typing in “V” and the website’s requirement to “Log In or Register to Create Your Request”).

220. *Simplify Your Life*, *supra* note 216 (showing that *Houston Chronicle* but not *Houston Lifestyle & Homes* is in the drop-down list after typing in “H”).

221. See *Vanity Fair*, *supra* note 219.

222. See *Consumer Choice and Opt-Out Site*, *supra* note 216.

223. *Id.*

directory or phonebook from which the consumer had opted out. And, neither the notice nor the website provides a timeframe or policy by which messages in “Feedback” will receive a response.²²⁴ In addition, the “Feedback” button is hidden at the very bottom of the webpage, making it more difficult for consumers to deliver feedback.²²⁵

3. *Marketing Mailing Lists.* Consumers whose names have landed in marketing mailing lists can ask to remove their names from those lists by contacting the Data & Marketing Association (DMA) via e-mail, a website portal “DMAchoice,” or by phone at a number that is not toll-free.²²⁶ Consumers must register either online or by mail and pay a processing fee of \$2 (or \$3 if they are mailing the registration).²²⁷ The website takes consumers through a step-by-step process in which they choose specific companies from which they would like to start or stop receiving mail. They can also select broad categories, such as Credit Offers, Catalogs, Magazine Offers, and Other Mail Offers.²²⁸ Despite the step-by-step process, the registration process requires the consumer’s name, full address, and email—private information that the consumer sought to protect in the first place.²²⁹ Other websites that do not require a processing fee may be available to consumers to stop junk mail.²³⁰

Perhaps most glaringly, the DMA promotes itself as “the leading global trade association for businesses and nonprofit organizations that send direct mail, represent[ing] nearly 3,600 companies worldwide.”²³¹ Providing one’s mailing address to a trade association for businesses that send junk mail may not be wise, even if the DMA website asserts that it wants to cultivate a “healthy relationship” between businesses and their customers by allowing customers to decide what they want to receive and not receive and by requiring member organizations and businesses to respect those requests.²³² Nowhere on the website does it mention the

224. *Id.*

225. *Id.*

226. *Get Started*, DMAchoice, <https://dmachoice.thedma.org/register.php> [<https://perma.cc/62DW-3BZS>] (last visited Jan. 20, 2019).

227. *About DMAchoice*, DMAchoice, https://dmachoice.thedma.org/static/about_dma.php [<https://perma.cc/E6G9-DZX8>] (last visited Jan. 20, 2019).

228. *Id.*

229. *See Get Started*, *supra* note 226.

230. *Opt Out of Junk Mail & Cut Paper Waste*, *supra* note 218.

231. Gateway Region Chamber of Commerce, *Where the Chamber Stands...*, 18 INSIDE BUS., no. 1, 2015, at 7.

232. *Id.*

consequences if a business does not respect the customers' requests, putting into doubt the DMA's ability to enforce its goals and undermining its credibility.²³³

4. *Sexually Explicit Material.* The United States Postal Service also offers a service that allows consumers to specifically prevent receipt of sexually oriented advertisements in the mail.²³⁴ Consumers must fill out a five-page "Application for Listing and/or Prohibitory Order," also known as the "PS Form 1500," at the local post office.²³⁵ The application for a Prohibitory Order must be filled out by the "person to whom the mail is addressed" which means that a person's spouse to whom the sexually oriented advertisement was not addressed would not be able to file a Prohibitory Order, but the spouse could apply to be added to the USPS Prohibitory Order Listing service to prevent receipt of sexually oriented advertisements to their home.²³⁶

B. Fax

For a communication tool that many people perceive as obsolete or simply annoying,²³⁷ stopping unsolicited fax advertisements is surprisingly much easier than stopping unsolicited junk mail.²³⁸ FCC instructions for opting out are available on its FAQs webpage in many languages, including traditional Chinese, Tagalog, Vietnamese, and Korean.²³⁹ Ironically, Japanese is not one of the languages available even though fax machines remain extremely popular and ubiquitous in Japan.²⁴⁰

Under the revised FCC rules, businesses cannot send junk fax unless the recipient has given them permission to do so or they obtained the recipient's phone number through their established

233. *Id.*

234. *Unwanted Junk: Mail, Calls, Emails, Texts, Faxes*, WIS. DEP'T OF AGRIC., TRADE & CONSUMER PROTECTION, <https://datcp.wi.gov/Documents/JunkMailUnwanted-Calls140.pdf> [<https://perma.cc/85RD-7ZKP>] (last revised Apr. 2018).

235. U.S. POSTAL SERV., PSN 7530-03-000-7374, APPLICATION FOR LISTING AND/OR PROHIBITORY ORDER, <http://about.usps.com/forms/ps1500.pdf> [<https://perma.cc/22KX-Z6GB>] (last visited Jan. 20, 2019).

236. *Id.*; *Unwanted Junk*, *supra* note 234.

237. See discussion *supra* Section II.C.

238. *DNfax: Do Not Fax*, DNCSOLUTION, <https://www.dncsolution.com/do-not-fax.asp> [<https://perma.cc/2FL8-56CL>] (last visited Jan. 20, 2019) ("The Telephone Consumer Protection Act (TCPA) and the Federal Communications Commission (FCC) rules generally prohibit most unsolicited fax advertisements.").

239. *FAQs About Junk Faxes*, FCC: CONSUMER GUIDES, <https://www.fcc.gov/consumers/guides/faqs-about-junk-faxes> [<https://perma.cc/AZ6H-ZSHR>] (last visited Jan. 20, 2019).

240. See Harlan, *supra* note 72.

business relationship with the recipient or through a directory.²⁴¹ Senders of unsolicited faxes are required to include a clear notice with instructions for opting out of future faxes.²⁴² Unlike some of the opt-out options for direct mail, the “opt-out information [for fax] must include a cost-free way to submit the opt-out request to the sender, such as a toll-free number, local phone number, web site address, or email . . . [and opt-out] options must be available 24 hours a day, seven days a week.”²⁴³

Senders are required to stop sending unsolicited fax advertisements “within the shortest reasonable time, not to exceed 30 days.”²⁴⁴ Although this sounds like a decent requirement, in substance it means that after legally sending an unsolicited fax advertisement, the sender has another thirty days before it must stop or face legal consequences. Nevertheless, unlike direct mail, recipients of unsolicited fax advertisements can file a complaint with the FCC through an online portal, by phone (toll-free), or by mail.²⁴⁵

C. *Email*

Email users can stop unsolicited commercial email, or spam, through the DMA website.²⁴⁶ They can also click on an “Unsubscribe” link, usually located in small font towards the bottom of the email.²⁴⁷ The CAN-SPAM Act requires an “Unsubscribe” link in all unsolicited commercial emails.²⁴⁸ There are also a number of independent companies and third-party anti-spam filters that offer products and services to help declutter inboxes.²⁴⁹

In addition to the filters within the email service itself, companies like Unroll.Me allow the user to see a list of all of their

241. *FAQs About Junk Faxes*, *supra* note 239.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. DMACHOICE, <https://dmachoice.thedma.org/register.php> [<https://perma.cc/3Q55-8CZ4>] (last visited Jan. 20, 2019).

247. *See* Mower, *supra* note 208.

248. 15 U.S.C. § 7704(a)(4) (2012); Dylan Love, *How to Declutter Your Inbox for Good*, MEN’S J., <https://www.mensjournal.com/gear/how-to-declutter-your-inbox-for-good-w443928/> (last visited Jan. 20, 2019).

249. Lincoln Spector, *5 Ways to Stop Spam from Invading Your Email*, PCWORLD (June 7, 2016, 3:00 AM), <https://www.pcmag.com/article/3072435/data-center-cloud/5-ways-to-stop-spam-from-invading-your-email.html> [<https://perma.cc/V9B7-J67L>] (citing AV-COMPARATIVES, ANTI-SPAM TEST 8 (2016), http://www.av-comparatives.org/wp-content/uploads/2017/03/avc_spam_201603_en.pdf [<https://perma.cc/Z5AM-DZH3>] (reporting capabilities of ten spam filter products available on the market)).

subscription emails and unsubscribe from the ones they dislike for free.²⁵⁰ The Mailstrom software, which allows the user to start using its service on a trial basis for free, “identifies bundles of related mail and makes it easy for [users] to act on them as a group.”²⁵¹ Sanebox is another paid service that organizes emails by leaving important emails in a user’s inbox while sorting other emails into useful categories.²⁵²

Consumers and businesses can also find a myriad of articles providing advice on how to manage email in response to overwhelming spam. Email management advice includes using one “master inbox” to check messages from multiple email addresses.²⁵³ Another piece of advice is to “[s]chedule dedicated email sessions” when a certain time of the day is selected to sort through email, return those that immediately require a response, and organize the rest.²⁵⁴ Other more drastic options include changing one’s email address²⁵⁵ or hiding it by using yet more products and services, such as Blur²⁵⁶ and Spamex.²⁵⁷ Developers can also preventatively use cross-platform artificial intelligence products, such as Mailshell, to integrate spam and anti-phishing filters into their own software programs.²⁵⁸

Although the world of technology continues to offer an increasing number of platforms to stop unsolicited commercial email, no solution thus far has been completely effective.²⁵⁹ There is an imbalance between actions required of the consumer-recipient and actions required of the sender-business. All of the articles, software, products, and services zoom in on the kaleidoscopic options for a consumer to opt-out *after* receiving unsolicited commercial e-mail, but virtually none focus on prevention of ever receiving

250. UNROLL.ME, <https://unroll.me/> [<https://perma.cc/B43L-R3JG>] (last visited Jan. 20, 2019).

251. MAILSTROM, <https://mailstrom.co/> [<https://perma.cc/3K34-BB6X>] (last visited Jan. 20, 2019).

252. SANEBOX, <https://www.sanebox.com/> [<https://perma.cc/2YV9-M4JC>] (last visited Jan. 20, 2019).

253. *E.g.*, Love, *supra* note 248.

254. *Id.*

255. *See* Spector, *supra* note 249.

256. ABINE, <https://www.abine.com/index.html> [<https://perma.cc/9NY7-8KYX>] (last visited Jan. 20, 2019) (describing Blur among other products).

257. SPAMEX, <http://www.spamex.com/> [<https://perma.cc/J5G6-HHKJ>] (last visited Dec. 24, 2017).

258. *Products*, MAILSHELL, <http://www.mailshell.com/ns/products.html#lf> [<https://perma.cc/V78M-UC9R>] (last visited Jan. 20, 2019).

259. *Fact Check: National Do Not E-Mail Registry*, SNOPEs, <https://www.snopes.com/computer/internet/unsub.asp> [<https://perma.cc/FB3V-3E8T>] (last visited Jan. 20, 2019).

them at all. The Do Not E-mail Registry that Congress had envisioned is now rather defunct, largely due to the FTC's reluctance and lack of faith in its ability to implement it.²⁶⁰ A sham site has also popped up pretending to be the Do Not E-mail Registry.²⁶¹ Even worse, the "Unsubscribe" button might actually help the sender receive even more information about the opting-out recipient.²⁶²

D. Text

The options for opting out of unsolicited spam text also place the burden on the recipient, rather than on the sender. The cell-phone user can text "STOP," "END," "QUIT," "UNSUBSCRIBE," or "HELP."²⁶³ They can try to identify the sender or learn how to identify the short code of the texting party to find its website and discover its contact information.²⁶⁴ Alternatively, cellphone users can call their cellphone provider and invite them to help with stopping the spam.²⁶⁵ The FCC warns consumers to "[b]e careful about giving out your mobile phone number or any other personal information," to "[r]ead through commercial web forms[,] check for a privacy policy when submitting your mobile phone number" and to "not respond to unwanted texts from questionable sources."²⁶⁶ This may be wise advice, but again it implies that the receipt and prevention of receipt of unsolicited text messages is largely the responsibility of the recipient. This is rather ironic given the fact that the word "unsolicited" means "not asked for or requested"²⁶⁷ or "given or done voluntarily"²⁶⁸ by the recipient. If the recipient did not voluntarily invite the text message, it seems rather

260. See discussion *supra* Section II.D.

261. See *Fact Check: National Do Not E-Mail Registry*, *supra* note 259.

262. Alan Zeichick, *5 Things You Should Know About Email Unsubscribe Links Before You Click*, SOPHOS: NAKED SECURITY (Sept. 4, 2014), <https://nakedsecurity.sophos.com/2014/09/04/5-things-you-should-know-about-email-unsubscribe-links-before-clicking/> [<https://perma.cc/2UJ6-XZGQ>].

263. Derek Johnson, *How to Stop Unwanted Text Messages*, MOBILE MARKETING WATCH (July 20, 2011), <https://mobilemarketingwatch.com/how-to-stop-unwanted-text-messages-17175/> [<https://perma.cc/MNU5-R4U9>].

264. *Id.*

265. *Id.*

266. *Stop Unwanted Robocalls and Texts*, FCC: CONSUMER GUIDES, <https://www.fcc.gov/consumers/guides/stop-unwanted-calls-and-texts> [<https://perma.cc/7A3V-9D33>] (last visited Jan. 20, 2019).

267. *Unsolicited*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/unsolicited> [<https://perma.cc/F579-JTPD>] (last visited Jan. 20, 2019).

268. *Unsolicited*, OXFORD U. PRESS, <https://en.oxforddictionaries.com/definition/unsolicited> [<https://perma.cc/PDZ6-UU8S>] (last visited Jan. 20, 2019).

counterintuitive to require the recipient to voluntarily or deliberately²⁶⁹ remind the sender that it had not requested the text message in the first place.

Another potential area of confusion is the fact that the opt-out options for cellphone spam are located on both the FCC website²⁷⁰ and the FTC website.²⁷¹ Even worse, the websites offer advice that differs and is not necessarily streamlined.²⁷² Recipients may miss one website, or mistake one for the other, or they may feel the pressure to follow instructions on both websites, demanding more of their time and energy.

E. Facebook News Feeds

Facebook allows users to control their preferences for what they see on their news feed without specific regulations from agencies like the FTC and the FCC.²⁷³ Users can prioritize whose posts or business pages appear at the top of their feed, and they can “unfollow” friends, pages, and groups that they would prefer not to see in their news feeds.²⁷⁴

Unlike the mail, fax, email, and texting communications tools, Facebook is a communication tool that is controlled by a private company. Yet, ironically, it offers perhaps the easiest opt-out method of them all with the click of a button. However, Facebook also fails at preventing unsolicited news feeds in the same manner as older communication tools (i.e., the user must *reactively* unfollow or demote the posts and pages that enter their news feeds).²⁷⁵ Facebook has no way of completely stopping people and businesses from posting because that would violate the concept of Facebook’s social media platform.²⁷⁶

269. *Voluntarily*, THESAURUS.COM, <http://www.thesaurus.com/browse/voluntarily> [https://perma.cc/5XV4-LZX4] (last visited Jan. 20, 2019).

270. *Stop Unwanted Robocalls and Texts*, FCC: CONSUMER GUIDES, <https://www.fcc.gov/consumers/guides/stop-unwanted-calls-and-texts> [https://perma.cc/9ZB4-5FXV] (last updated Nov. 8, 2018).

271. *Text Message Spam*, FTC: CONSUMER INFO., <https://www.consumer.ftc.gov/articles/0350-text-message-spam> [https://perma.cc/YM93-EU8R] (last visited Jan. 20, 2019).

272. Compare *supra* note 270, with note 271.

273. See *Control What You See in News Feed*, *supra* note 208 (explaining how Facebook users can adjust preferences directly through the website).

274. *Id.*

275. *Id.*

276. *Terms of Service*, FACEBOOK, <https://www.facebook.com/legal/terms/update> [https://perma.cc/SHW8-9GVZ] (last visited Jan. 20, 2019) (describing Facebook services as designed to facilitate the sharing and discovery of posted content).

IV. STREAMLINING THE LAW FOR CURRENT AND FUTURE TECHNOLOGY

Despite the long menu of options for stopping unsolicited mail, fax, email, texts, and news feeds, recipients continue to bear the burden of spending an inordinate amount of time and energy on opting out of something that they did not solicit in the first place.²⁷⁷ Furthermore, there is no single government agency that oversees the various forms of communication, which can cause confusion and frustration.²⁷⁸ A number of solutions could improve the current landscape of consumer protection with respect to unsolicited commercial advertising.

A. *Revamp Agency Governance*

Congress should consider streamlining the efforts of the FTC and the FCC to create a stronger front against unsolicited advertising. Both agencies bring different strengths to the table. The FTC's mission is "to protect consumers by preventing anticompetitive, deceptive, and unfair business practices, [and] enhancing informed consumer choice"²⁷⁹ The Commission accepts consumer complaints online and works to educate consumers on the market, business ideas, and the concept of competition.²⁸⁰ Meanwhile, the FCC "regulates interstate and international communications by radio, television, wire, satellite and cable in all 50 states."²⁸¹ Simply put, it is "responsible for implementing and enforcing America's communications law and regulations."²⁸² Unsolicited commercial solicitation straddles both Commissions, as it affects consumers and limits their choices and is also communication that is often, and increasingly, interstate and international.

277. See discussion *supra* Part III.

278. *Id.*

279. *About the FTC*, FTC, <https://www.ftc.gov/about-ftc> [<https://perma.cc/S5PD-MDET>] (last visited Jan. 20, 2019).

280. *Filing A Complaint*, FTC, <https://www.ftc.gov/news-events/media-resources/identity-theft-and-data-security/filing-complaint> [<https://perma.cc/XT63-YS9E>] (last visited Jan. 20, 2019); *FTC Fact Sheet: How Competition Works*, FTC, https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_How-Comp-Works.pdf [<https://perma.cc/WNR5-DYQR>] (last visited Jan. 20, 2019).

281. *What We Do*, FCC, <https://www.fcc.gov/about-fcc/what-we-do> [<https://perma.cc/FZ8G-39VH>] (last visited Jan. 20, 2019).

282. Press Release, Fed. Trade Comm'n & Fed. Commc'n Comm'n, FTC, FCC Outline Agreement to Coordinate Online Consumer Protection Efforts Following Adoption of the Restoring Internet Freedom Order, FTC (Dec. 11, 2017), <https://www.ftc.gov/news-events/press-releases/2017/12/ftc-fcc-outline-agreement-coordinate-online-consumer-protection> [<https://perma.cc/685J-7QKB>].

Recently, the FTC and FCC demonstrated the feasibility of a joint FTC-FCC collaboration. The two agencies signed a Memorandum of Understanding in which they agreed to “coordinate online consumer protection efforts following the adoption of the *Restoring Internet Freedom Order*.”²⁸³ The agencies agreed to cooperate to enforce rules and regulations that make the Internet a safer place for consumers and to “broadly share legal and technical expertise, including the secure sharing of informal complaints.”²⁸⁴ The FCC “will monitor the broadband market and identify market entry barriers,” while the FTC “will investigate and take enforcement action as appropriate.”²⁸⁵

In a similar fashion, the FTC and FCC could combine forces to monitor, investigate, and enforce rules regarding not only the Internet but all forms of communication, with special focus on unsolicited communication. If the two commissions have the capacity to agree to a Memorandum of Understanding to preserve consumers’ freedom in using the Internet, the next step is to preserve consumers’ freedom in using all forms of communication by expanding their jurisdiction and extending the application of relevant rules and regulations to current communication tools as well as to those that have yet to be invented in the future.

Alternatively, Congress could go one step further and create an entirely new agency or governing body to protect consumers from unwanted solicitations, similar to the Consumer Financial Protection Bureau (CFPB) created by the Dodd-Frank Wall Street Reform and Consumer Protection Act.²⁸⁶ Like the CFPB, this new governing body could have federal jurisdiction power and enforce comprehensive rules intended to protect consumers from unsolicited commercial junk through current and future communication tools.

B. Compose Technology-Agnostic Legislative Language

Congressional amendment of existing legislation is required to allocate burdens away from consumers who bear all the costs of

283. *Id.*

284. *Id.*

285. Restoring Internet Freedom: FCC-FTC Memorandum of Understanding 1 (Dec. 14, 2017), https://www.ftc.gov/system/files/documents/cooperation_agreements/fcc_ftc_mou_internet_freedom_order_1214_final_0.pdf [<https://perma.cc/Q98X-9FLV>].

286. *Creating the Consumer Bureau*, CONSUMER FIN. PROTECTION BUREAU, <https://www.consumerfinance.gov/about-us/the-bureau/creatingthebureau/> [<https://perma.cc/43GK-WA57>] (last visited Jan. 20, 2019) (describing congressional actions to create an accountable independent agency to promote consumer protection).

stopping unsolicited mail, fax, e-mail, texts and news feeds.²⁸⁷ Congress should consider making the language of the new or amended legislation more technology-agnostic, meaning “unbiased towards the use of different technology tools to solve different problems,” such that it is easily adaptable to all forms of text-based communication, whether currently existing or yet to be invented.²⁸⁸ From a pragmatic perspective, legislation that is medium-neutral saves time in the future and puts regulations ahead of technological advancement.

One suggestion for new language is to begin by combining the language in the TCPA,²⁸⁹ which applies to fax and text spam, with language from the CAN-SPAM Act,²⁹⁰ which applies to unsolicited commercial email, together with language from the Postal Revenue and Federal Salary Act, applicable to unsolicited paper mail.²⁹¹ Thus far, the analysis has shown that there are common strengths and weaknesses among all three pieces of legislation that can be synthesized in one place. For example, all three have language regarding options for opting out.²⁹² Even Facebook’s own news feed guidelines and policies offer users instructions on opting out of posts and genres they dislike, without calling it an “opt-out.”²⁹³

The recommended language and structure for the new legislation can build on the language and structure of the current TCPA.²⁹⁴ First, a new title would clarify the purpose of the legislation, even if it may not make a substantive difference.²⁹⁵ For example, the title could read “Restrictions on Unsolicited Commercial Text-Based Communication,” which is more technology-agnostic than the current title: “Restrictions on use of telephone

287. See Kenneth C. Amaditz, *Canning “Spam” in Virginia: Model Legislation to Control Junk E-mail*, 4 VA. J.L. & TECH. 4, ¶¶ 22–23 (1999) (proposing model anti-spam legislation and asserting that such legislation would pass constitutional scrutiny because of a state’s legal interest in shifting advertising costs).

288. Question Tray, *What Do You Mean By Technology Agnostic?*, YOUTUBE (Sept. 10, 2017), <https://www.youtube.com/watch?v=7BEO4XUUuNM> [<https://perma.cc/DU2Q-FWRW>].

289. 47 U.S.C. § 227 (2012).

290. 15 U.S.C. §§ 7701–7713 (2012).

291. Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, § 301, 81 Stat. 613, 645, *amended by* Postal Reorganization Act, ch. 30, Pub. L. No. 91-375, 84 Stat. 719, 748 (1970) (current version at 39 U.S.C. § 3008 (2012)).

292. See discussion *supra* Part III.

293. See *supra* note 273–75 and accompanying text.

294. 47 U.S.C. § 227.

295. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 462 (1892).

equipment.”²⁹⁶ Next, under the “Definitions” section, the definition of “unsolicited advertisement” should more specifically incorporate the other methods of unsolicited advertisements.²⁹⁷ While the last clause, “in writing or otherwise,”²⁹⁸ could be broad enough to include any form of unsolicited advertisement, additional language would clarify the applicability of this regulation to non-telephone junk. For instance, after “in writing or otherwise,” the definition could read, “including direct mail, facsimiles, text messages, and unsolicited commercial e-mail.” Alternatively, the Definitions section could add new provisions that separately define the terms “junk mail” and “unsolicited commercial e-mail” by using the same language from the Postal Revenue and Federal Salary Act and the CAN-SPAM Act, respectively. In addition, to make the legislation more technology-agnostic, the Definitions section should include a definition for the term “text-based communication tool” to cover future inventions that are not necessarily tangible, especially as global social media use escalates.²⁹⁹ Finally, this section should include a broad technology-agnostic definition of “solicitation” by replacing “telephone call or message” in Section (a)(4) of the TCPA with, for example, “the above forms of communication.”

Current TCPA language permits advertisers to send faxes to consumers and businesses with whom they have an “established business relationship.”³⁰⁰ A more technology-agnostic version of the TCPA would replace “facsimile” with “text-based communication tools” and apply the EBR rule to all text-based junk. This modified provision would mean that advertisers can only send unsolicited advertisements to those who “voluntarily agreed to make available [their address, email, phone number, or fax number] for public distribution.”³⁰¹ However, the current provision neither describes ways in which a recipient can voluntarily make their information available nor defines “voluntarily.” The new provision would need to address these issues to prevent advertisers from

296. 47 U.S.C. § 227.

297. *Id.* § 227(a)(5) (“The term ‘unsolicited advertisement’ means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.”).

298. *Id.*

299. We Are Social Singapore, *Digital in 2017 Global Overview*, LINKEDIN: SLIDESHARE (Jan. 24, 2017), <https://www.slideshare.net/wearesocialsg/digital-in-2017-global-overview> [<https://perma.cc/ABD6-R4VC>] (suggesting that social media use is increasing).

300. 47 U.S.C. § 227(b)(1)(C)(i).

301. *Id.* § 227(b)(1)(C)(ii)(II).

taking advantage of the loophole and sending unsolicited advertisements to contact information provided in the process of opting out or unsubscribing.³⁰² For example, in Section (b)(1)(C)(ii),³⁰³ “the number of the telephone facsimile machine” could instead read “the contact information for the text-based communication tool.” Additionally, the flush language of Section (b)(1)(C)(ii) could define “voluntarily” by excluding passive actions, such as providing one’s contact information in the process of opting out or unsubscribing.

C. *Launch Cost-Free One-Stop Shop*

Finally, the agency or bureau ultimately responsible for protecting consumers from unsolicited junk should consider creating a one-stop shop website that features cost-free opt-out instructions for all forms of unsolicited commercial solicitations. An opt-out website like this would be in line with the TCPA’s requirement that opt-out notices must include “a cost-free mechanism for a recipient to transmit a request [to opt out].”³⁰⁴ The DMA website is the closest to a one-stop shop because it allows consumers to opt out of direct mail and email on the same website.³⁰⁵ However, it is not cost-free,³⁰⁶ and its association with trade organizations undermines its impartiality and credibility.³⁰⁷ The one-stop shop could imitate the DMA website structure but add more options for opting out of text messages and fax advertisements. In addition, the one-stop shop website should allow consumers to permanently opt out of entire categories of text-based communication tools. If consumers are currently allowed to opt-out of entire categories of junk mail and e-mail, they should also have the option of opting out of the larger category of unsolicited commercial solicitations entirely. This option would reduce the amount of time consumers spend on visiting numerous websites and filling out numerous forms for different communication platforms.

V. CONCLUSION

Renowned journalist and author Jeff Jarvis, who has focused much of his reporting on the evolution of technology and big data,

302. See Shames, *supra* note 129, at 392.

303. 47 U.S.C. § 227(b)(1)(C)(ii).

304. *Id.* § 227(b)(2)(D)(iv)(II).

305. DMAchoice, *supra* note 246.

306. *About DMAchoice*, *supra* note 227.

307. See discussion *supra* Section III.A.3.

once asserted: “Technology . . . can be used for good or bad. It can improve things or it can make them worse. It’s up to us as to how we use them [sic].”³⁰⁸ Throughout the history and evolution of text-based communication tools—from paper mail and fax to emails, texts, and Facebook news feeds—technological advancements have undoubtedly helped businesses become more competitive, efficient, and cost-effective, and it has helped them multiply customer outreach exponentially for less cost.³⁰⁹ This phenomenon, however, has also manifested the human tendency to abuse great power³¹⁰ through the unscrupulous and wasteful use of unsolicited junk that takes advantage of lackluster enforcement and legislation splintered with glaring loopholes.³¹¹

In the summer of 2018, the world celebrated the tenth birthday of the “mobile app ecosystem,”³¹² an industry that captures more than 2.1 billion smartphone users worldwide.³¹³ This year, an estimated 2.5 billion people will be smartphone users.³¹⁴ The number of smartphone apps is also predicted to skyrocket, from 3.6 million in 2017 to 5.06 million by 2020—amounting to an average of 13,698 new apps per day.³¹⁵ As apps make life easier for consumers,³¹⁶ human dependency on technology will likely increase.³¹⁷ For advertisers, this means a greater incentive to reach

308. Big Think, *Jeff Jarvis: Technology is Agnostic*, YOUTUBE (May 17, 2012), <https://www.youtube.com/watch?v=r8yCt1z1sLg> [<https://perma.cc/GAV4-4D2H>].

309. See discussion *supra* Part II.

310. See, e.g., Andy Yap, *How Power and Powerless Corrupt*, COLUM. U. 5 (2013), <https://academiccommons.columbia.edu/doi/10.7916/D8M04CPN/download> [<https://perma.cc/K9X7-XCMP>] (observing that power can increase a leader’s likelihood of stealing and cheating).

311. See discussion *supra* Parts III and IV.

312. Artyom Dogtiev, *App Download and Usage Statistics (2018)*, BUS. APPS, <http://www.businessofapps.com/data/app-statistics/> [<https://perma.cc/46L3-5TD4>] (last updated Oct. 8, 2018).

313. *Number of Smartphone Users Worldwide from 2014 to 2020 (in Billions)*, STATISTA, <https://www.statista.com/statistics/330695/number-of-smartphone-users-worldwide/> [<https://perma.cc/HAH2-TGJJ>] (last visited Jan. 20, 2019).

314. *Id.*

315. Sarah Perez, *App Store to Reach 5 Million Apps by 2020, with Games Leading the Way*, TECHCRUNCH (Aug. 10, 2016), <https://techcrunch.com/2016/08/10/app-store-to-reach-5-million-apps-by-2020-with-games-leading-the-way/> [<https://perma.cc/5X6X-SUVC>].

316. Avery Hartmans, *19 Hidden Gems You Need to Add to Your Phone Right Now*, BUS. INSIDER (Sept. 2, 2017, 10:00 AM), <http://www.businessinsider.com/best-smartphone-apps-hidden-gems-comscore-2017-9> [<https://perma.cc/X67X-MJ4K>].

317. Jane E. Brody, *Hooked on Our Smartphones*, N.Y. TIMES (Jan. 9, 2017), <https://www.nytimes.com/2017/01/09/well/live/hooked-on-our-smartphones.html> [<https://perma.cc/RJP5-RS74>]; see also Norazah Mohd Suki, *Students’ Dependence on Smart Phones: The Influence of Social Needs, Social Influences and Convenience*, 30 CAMPUS-WIDE INFO. SYS. 124, 125 (2013).

consumers through the most popular apps at any given time.

While apps and other evolving communication tools may, like money, be merely neutral tools, the combination of fast app inventions and inherently slow legislative reform leaves consumers in a critically vulnerable position. It is an urgent time for Congress to consider what its “currency” will be and ask: “What defines our worth?”³¹⁸ A disorganized collection of consumer protection legislation strewn across multiple agencies that are falling behind technological growth? Or, more wisely, legislation that is clear, streamlined, technology-agnostic, and that effectively and consistently protects consumers from unsolicited text-based communication both today and tomorrow? Perhaps, most importantly, will this current Congress make the same mistake as its predecessors in proclaiming the virtues of democracy while undermining the foundations upon which it is based: the “consent” of the governed?

Y. Marianne Xu Standley

318. Julia Brewster, *What's Your Currency?: You Get to Decide What Defines Your Worth*, ODYSSEY (July 12, 2016), <https://www.theodysseyonline.com/whats-your-currency> [<https://perma.cc/7B4H-LDBP>].

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