Untangling the Web: Legal and Policy Tools to Restrict Online Cigar Advertisement

By Patricia A. Davidson & Christopher N. Banthin*

The proliferation of cigar advertising and the rise in cigar smoking, particularly among young Americans, has captured nationwide attention of public policy-makers. In 1997, the first study of teenage cigar smoking in the United States revealed that cigars have become popular with adolescents. Although cigar sales began flattening in 1998, youth cigar smoking remains a serious public health problem in the United States.

Cigar advertising and promotion on the Internet is both accessible and attractive to adolescents. A recent study suggests that the Internet was the most prevalent source of smoking information for youth.

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Internet is providing the cigar industry with significant access to underage users. The Internet is readily available to the young, reaching them at school, during their recreation and leisure time, and in their homes. The tobacco industry's history of targeting underage users through various media warrants some consumer protection legislation or regulation of cigar advertisements on the Internet.

This Article identifies and analyzes the legal tools for restricting cigar advertising on the Internet. Part I reviews the growth and unique features of the World Wide Web ("Web"), cigar advertising and sales on the Web, adolescent cigar smoking, and existing technology to restrict youth access to online cigar advertisements. Part II analyzes several possible sources of federal authority for regulating Internet cigar advertising and briefly examines related past and pending federal legislation. Part II asserts that the jurisdiction of the Federal Communications Commission ("FCC") to oversee the statutory ban on advertising of certain products through any electronic medium should be extended to include cigars. Part III considers the potential for state regulation of cigar advertising on the Internet, concluding that a federal solution is preferable. Finally, Part IV discusses the First Amendment "free speech" issues raised by a restriction on Internet cigar advertising and suggests that a law limited to commercial speech should withstand a constitutional challenge. This Article concludes that there are viable alternatives for regulation of cigar advertising on the Internet, and any one of them should withstand a constitutional challenge if developed carefully.

I. Cigar Promotion and Sales on the Internet

A. History and Technology of the Internet

The extraordinary growth of the Internet to date is evidence of the expanded role it has come to play in the lives of many Americans. In only six years, the number of Americans online has risen from 1.3 million to an estimated 80 million in 1999. Not only are the potential numbers of different users important, but the new communication products that will be offered over the Internet's infrastructure are also

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important. Few can doubt that, in the years to come, the ubiquity and versatility of the Internet will dominate communication throughout our lives.

Rooted in a United States defense project begun in the late 1960s called ARPANET, the Internet has since become a collection of publicly and privately owned networks. Data is automatically routed through this array of networks without direct human monitoring. The Internet is also non-centralized; if a pathway fails, data merely travels an alternate course to its intended destination. The flow of data is not controlled by geographical boundaries, no matter what path is taken to reach the data's destination.

From the user's vantage point, the Internet is a versatile tool that provides direct communication among end users. Either through individual connections or organizations, such as universities or businesses, end users send and receive information. The information is divided into packets, each of which is guided through various physical networks to its destination by "routers," which "examine [a] packet's address information and determine where to send it next." Local networks, known as Internet Service Providers ("ISPs"), link end users


6. See *Reno v. ACLU*, 521 U.S. 844, 849–50 (1997). The Internet began as a military communication project in 1969 called ARPANET. See Werbach, *supra* note 5, at 13. It allowed the military, some defense contractors, and certain universities to share information through redundant, non-centralized networks, which the Department of Defense hoped would remain viable even if partially destroyed. See id. Later, universities developed similar networks, and in the mid-1980s, the National Science Foundation ("NSF") established the NSFNET, a major communication pathway that continues to carry much of the Internet's data. See id. In the early 1990s, commercial entities began to create other major communication pathways, and, on April 30, 1995, the NSF stopped funding NSFNET and placed it in private hands. See id.


8. See id. at 26.

9. See id.


to "backbone providers," who lease or own main fiber optic or copper lines that connect major population centers.14

Linking the various physical networks, the Internet Protocols create one seamless network.15 Internet Protocol technologies allow users to communicate directly across sometimes vastly different physical networks and to employ a range of communication products.16 The most common vehicles for data on the Internet have been grouped into six product categories: "one-to-one messaging (such as 'e-mail'); one-to-many messaging (such as 'listserv'); distributed message databases (such as USENET newsgroups); real time communication (such as 'Internet Relay Chat'); real time remote computer utilization (such as 'Telnet'); and remote information retrieval (such as 'ftp,' 'gopher' and the 'World Wide Web')."17

B. Commercialization of the World Wide Web

One of the most popular categories of communication offered over the Internet is the World Wide Web.18 It consists of a "vast number of documents stored in different computers all over the world."19 More elaborate documents known as Web pages, or sites, often include graphics, video, and audio. Web pages can also incorporate other Internet services such as chat rooms and hyperlinks. Chat rooms facilitate virtual conversations between users; hyperlinks allow users to visit other Web documents or sites.20

The versatility of the Web has drawn an increasing number of commercial interests to use this communications medium. Retailers and manufacturers know "[t]he Web is attractive to consumers of all ages because a wide array of products and services are offered in an environment which [ostensibly] attempts to provide those consumers with full information."21 Low entry costs, combined with accessibility to

14. See Werbach, supra note 5, at 12. The Internet also includes satellite and wireless networks at both the local and backbone provider levels. See FCC, Connecting the Globe, a Regulator's Guide to Building a Global Information Community (visited Mar. 7, 2000) <http://www.fcc.gov/connetglobe/sec9.html>. Backbone providers can also act as ISPs, enabling end users to directly connect to a backbone network. See id.
15. See Weinberg, supra note 5, at 215.
16. See Werbach, supra note 5, at 17–19.
19. Id.
20. See id.
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virtually any demographic area or market, has triggered an explosion of commercial Web sites.\(^{22}\) Approximately one-third of the 3.5 million Web sites currently in existence are commercial sites intended to generate a profit.\(^{23}\) “Commercial activity on the Internet in this country, estimated to be over 100 billion dollars by the end of [1999], is expected to more than double [in the year 2000].”\(^{24}\) By the year 2003, it is estimated that the Internet will generate e-commerce revenues of between 1.4 to 3 trillion dollars.\(^{25}\)

C. Cigar Advertisements on the World Wide Web

Cigar manufacturers, importers, promoters, and retailers (collectively, “cigar industry” or “industry”), like other companies, are following the trend toward commercial exploitation of products over the Internet. In 1998, concerned with the recent surge in cigar consumption and new health information, the Federal Trade Commission (“FTC”) ordered the five leading domestic cigar manufacturers to submit detailed information on the industry’s advertising and promotion expenditures for 1996 and 1997.\(^{26}\) The data revealed that industry expenditures on Internet advertising of cigars had increased by 180% over this period.\(^{27}\) The FTC cautioned that its report substantially underestimated the actual increase in cigar advertising on the Internet because the report failed to include indirect cigar advertising, such as online magazines like *Cigar Aficionado*.\(^{28}\) Additionally, the report only reflected expenditures by leading manufacturers, and not advertising run independently by tobacco retailers.\(^{29}\) The relatively low cost and widespread availability of Web site software\(^{30}\) suggests retailers comprise a large percentage of actual cigar advertising on the Internet. Furthermore, online cigar retailers—other than the seven cigar manu-

\(^{22}\) See id. at 486.
\(^{23}\) See id.
\(^{24}\) Oxman, supra note 4, at 4.
\(^{25}\) See Reno, 31 F. Supp. 2d at 486.
\(^{27}\) See id. at 4.
\(^{28}\) See id. Furthermore, recently proposed Consent Orders—entered into by the FTC—requiring cigar manufacturers, importers, and promoters to put warnings on certain cigar packaging and advertising would not cover Internet advertising unless it is paid for, at least in part, by one of the named parties. The proposed Consent Orders are discussed in depth infra Part II.A.
\(^{29}\) See FTC 1996–97 Report, supra note 26, at 2, 5.
\(^{30}\) See Reno, 31 F. Supp. 2d at 486.
facturers named in a Consent Order recently adopted by the FTC requiring health warnings to be displayed on cigar packages and advertisements— are not required to include the FTC's cigar health warnings in their online advertisements.

Like other e-commerce companies, the cigar industry uses Web sites as the primary Internet tool to promote its products. Cigar Web sites collectively provide a forum for the tobacco industry to continue its use of persuasive, yet uninformative, advertising. As with Phillip Morris's Marlboro Man, cigar-oriented Web sites seek to promote a smoking lifestyle. Many Web sites convey an implicit message that cigar smoking is "cool," through advice sections such as a "Guide to Looking Cool When You Smoke," photos of celebrities smoking cigars, and reviews of movies that feature cigar smoking. Often cigar Web sites employ advertising tools, such as cartoons, moving images, and music or sportswear sales, all of which appeal particularly to minors. In an egregious example, a Web site displayed a popular television cartoon character smoking a cigar. Another site showed a child modeling a promotional shirt for a cigar retailer.

Health warnings are notably absent from most cigar industry Web sites. A recent survey conducted by Ruth E. Malone and Lisa A. Bero ("Malone-Bero Survey") found that only 3.5% of cigar-related Web sites post health warnings. One such warning stated, "Cigars are

31. See discussion infra Part II.A.2.
33. See Malone & Bero, supra note 3, at 790.
36. Id.
37. See Malone & Bero, supra note 3, at 791. Approximately one-third of cigar Web sites used cartoons, moving images, music, and sportswear. See id.
38. See id.
39. See id.
41. See Malone & Bero, supra note 3.
42. See id. at 791. Ruth E. Malone, Ph.D. R.N., and Lisa A. Bero, Ph.D., are both with the Institute for Health Policy Studies, School of Medicine, and Department of Clinical Pharmacy, School of Pharmacy, at the University of California, San Francisco. See id. at 790.
known to the State of California to be bad for you and cause great discomfort to the political correctness and lifestyle police." This message is a far cry from the direct warnings the federal government currently requires for advertisements of cigarettes and smokeless tobacco products. Instead, the tone of the cigar Web site's purported warning may undermine important health information and could even link smoking with rebellious behavior, which appeals to many young people.

A second Internet tool, which the cigar industry has also embraced to promote cigar use, is the hyperlink. A hyperlink typically consists of text or images, often in the form of a banner advertisement, with direct access to another Web document or site where the user may obtain related information. Like billboards, hyperlinks are not restricted to adult-oriented Web sites. In March 2000, Cubancigars.com, Inc., an e-commerce cigar company, bought advertising space and placed banners on Microsoft's Internet network, MSN, one of the most popular Internet services in the United States. Six months earlier, the Havana Group, Inc. purchased a direct link to its Web site through Yahoo! Shopping. The willingness to buy advertising space on these heavily traveled Web sites reflects the importance to the cigar industry of using hyperlinks to promote cigar use.

Cigar industry hyperlinks present additional concerns regarding the exposure of young people to cigar advertisements. First, Web sites like MSN and Yahoo! provide a starting point, or portal, to the Web. Advertisements on such Web sites have the first crack at attracting prospective customers to their sites. Additionally, hyperlinks eliminate almost all search steps normally used to locate Web sites on a particular topic. The user simply clicks on the banner to enter another Web site of related information. In light of such technology, it is unclear who

43. Id. at 791.
actually controls what one views on the Web. The passive user, the uninitiated, or the impressionable youth is essentially steered toward certain Web sites.

D. Cigar Sales on the World Wide Web

The cigar industry, like the entire tobacco industry, has done little to prohibit or even dissuade minors from purchasing its products over the Internet.48 Many of the hundreds of Web sites that promote cigar smoking sell cigars either directly online, or by providing a telephone number that users can call to purchase cigars.49 As state and local tobacco control laws restrict youth access to local cigar retailers, many buyers and sellers will turn to the Internet.50

The Malone-Bero Survey identified several factors that lead to online cigar sales to minors.51 First, the survey revealed that 32% of cigar industry Web sites provided the purchaser with the option of paying by cash-on-delivery or by money order.52 In contrast, most e-commerce Web sites request that consumers pay for items with a credit card.53 While not a fail-safe determinate of age, minors are less likely to have access to a credit card and, if they do, there is at least a record of the purchase.54 The cigar industry’s practice of accepting payment either by cash-on-delivery or a money order eliminates even this partial protection.

Additionally, the Malone-Bero Survey revealed that a user is rarely required to provide his or her age. Fewer than 10% of cigar-

49. See Malone & Bero, supra note 3, at 790.
50. Jurisprudence under the Commerce Clause of the United States Constitution has frustrated efforts to apply local tobacco control laws to the Internet. See Lorillard Tobacco Co. v. Reilly, 84 F. Supp. 2d 180, 202 (D. Mass. 2000) (noting the court would have “grave [Commerce Clause] concerns” if state cigar regulations were found to apply to the Internet). State and local tobacco control laws are incredibly important. Internet sales, however, add a new wrinkle that necessitates federal legislation to avoid Commerce Clause issues. Such issues are further addressed later in this Article. See discussion infra Part III.A.
51. See discussion supra Part I.C.
52. See Malone & Bero, supra note 3, at 790.
54. Requiring a credit card especially in conjunction with an image of a driver’s license provides at least some extra protection against youth access. See Carole Said, Online Sale of Tobacco Drawing A Fight: Critics Say Tax, Age Laws Must Apply to Web Market, S.F. Chron., May 29, 2000, at Al. R.J. Reynolds, which offers to sell almost all of its products online, requires online consumers to verify that they are smokers and over 21, to provide a credit card, and to submit personal data. See id.
related Web sites require users to communicate their age affirmatively to the Web site's proprietor by clicking on a box, typing in their age, or by some other technique.\textsuperscript{55} Approximately 25\% of cigar-related Web sites contained a less effective "passive" statement about the legal smoking age. For example:

We believe that smoking is an adult pleasure. The appreciation of our premium products is a mature reward won over time, as is true of all things in life in which only an adult can discern the potential for pleasure. Freedom of choice is an inherent American value and the decision to smoke is an exercise of that freedom. Also, inherent is our responsibility \textsuperscript{sic} to properly restrict those not mature enough \textsuperscript{sic} to make these choices . . . . We therefore ask you to . . . be aware . . . that we specifically require an "adult signature" \textsuperscript{sic} upon delivery.\textsuperscript{56}

This warning's tone seems well calculated to entice adolescents to take up smoking as a sign of independence and maturity.

Although there is no comprehensive data on Internet cigar sales to minors, law enforcement agents have responded, at least partially, to the online sale of some tobacco products. In December 1999, the Attorney General for the State of Washington, in partnership with sixteen other states' attorneys general, caught five online tobacco retailers who were selling to minors.\textsuperscript{57} Cease and desist orders were issued after seventeen and twelve year old operatives ordered the hand-rolled, flavored tobacco product called bidis\textsuperscript{58} over the Internet without having to verify their ages.\textsuperscript{59} The products were purchased both online and using a telephone number posted on a Web site and were delivered without a request for an adult signature.\textsuperscript{60} Only one of the retailers, all of which were located within the United States, asked for the purchaser's age.\textsuperscript{61}

There can be little doubt that the Internet provides the cigar industry with a powerful marketing and sales tool. The Internet gives the cigar industry access to virtually any demographic market. While

\begin{itemize}
\item \textsuperscript{55} See Malone & Bero, \textit{supra} note 3, at 790.
\item \textsuperscript{56} \textit{Id.} at 791 (quoting \textit{Nat Sherman: Tobacconist to the World Since 1930} <http://www.natsherman.com>).
\item \textsuperscript{57} \textit{See In re Ziggy's Tobacco \& Novelty, No. 14.8 TPLR 2.492} (Wash. State Liquor Control Board, Dec. 21, 1999) (Order to Cease and Desist Internet Sales of Tobacco to Minors) \textit{[hereinafter Ziggy's Order]}.
\item \textsuperscript{58} Bidis are manufactured in India and sold in the United States. They are produced in a variety of flavors, including chocolate, vanilla, strawberry, and mango. See Lucio Guerro, \textit{Movement Grows to Ban Bidi Cigarettes}, \textit{Chi. Sun Times}, Apr. 12, 2000, at 24.
\item \textsuperscript{59} \textit{See Ziggy's Order, supra note 57, at 1–2.}
\item \textsuperscript{60} \textit{See id.} at 2.
\item \textsuperscript{61} \textit{See id.} The retailer did not request any supporting information. \textit{See id.}
\end{itemize}
E. Youth Cigar Smoking

Cigar smoking in the United States increased sharply throughout much of the 1990s, reversing a thirty-year decline.62 This increase followed a period of intensive and apparently successful marketing and promotion by the cigar industry.63 The new cigar smokers include those of adolescent age, and even younger children.64

In 1997, the Centers for Disease Control & Protection ("CDC") documented surprisingly high cigar smoking rates among underage teenagers.65 Indeed, one well-known tobacco researcher opined, in response to the information about teen cigar smoking, that "[e]veryone's been caught napping."66 The CDC reported similarly high rates of youth cigar smoking nationally again in 1998.67 Some state studies in 1997 and 1998 revealed that cigar smoking among youths began as early as sixth grade and increased markedly by the eighth grade and high school.68

While cigar smoking appears to have dipped slightly among adolescents in 1999,69 teenage cigar smoking—along with the use of

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62. See National Cancer Inst. Monograph, supra note 1, at 19. The period from 1993 to 1998 were apparently the peak years, with sales of at least large premium cigars starting to flatten in 1998. See id. While recent data indicates that cigar sales have plateaued, there are still more cigar smokers today than there were before the boom began. See Mya Frazier, Cigar Craze Now More Ash Than Smoke, Cincinnati Bus. Courier, Feb. 7, 2000, at I.

63. See National Cancer Inst. Monograph, supra note 1, at 14–17, 195–219. This report of the National Cancer Institute notes that the multi-faceted promotional campaign featured: placement of cigars in popular films; media coverage of cigar use emphasizing glamour and ignoring health concerns; publication of new cigar lifestyle magazines, such as Cigar Aficionado, peppered with celebrity appearances; establishment of cigar bars in trendy neighborhoods and cigar clubs on college campuses; and cigar advertising and promotion on the Internet. See id.

64. See id. at 42.

65. See CDC 1996 Report, supra note 1, at 434. Nearly 27% of United States high school students and 28.1% of Massachusetts high school students reported smoking at least one cigar in 1996, and 13–15% of ninth graders in two New York counties smoked cigars during the month preceding the survey. See id. at 434.

66. Sheryl Gay Stolberg, Cigar Fad Reported to be Recruiting Legions of Teen-Agers, N.Y. Times, May 23, 1997, at A24 (quoting Dr. John Pierce, Director of Cancer Prevention at the University of California, San Diego).

67. See CDC 1997 Report, supra note 2, at 229.

68. See id. at 229 (reporting Massachusetts survey results); National Cancer Inst. Monograph, supra note 1, at 19 (same); see also Bob LaMendola & Glenn Singer, Teen Cigar Smoking Is on the Rise, Sun-Sentinel (Ft. Lauderdale), Jan. 26, 1999, at 6B.

69. See CDC 1999 Report, supra note 2, at 49.
other alternative tobacco products such as bidis—remains a significant public health problem and challenge to tobacco control.\textsuperscript{70} Results of a teen focus group study of American adolescent cigar use revealed that teens believe cigar use is increasing among their peers,\textsuperscript{71} an ominous indicator that social norms of the young support underage cigar smoking. The growth in teen cigar smoking, and in its apparent social acceptability,\textsuperscript{72} is likely related to the glamorization and promotion of cigar use.\textsuperscript{73}

F. Mechanisms to Block Youth Access to Cigar Web Sites

The lack of an effective mechanism to determine the age of an Internet user is a key obstacle to restricting young people’s access to Web sites selling or advertising cigars. This was one of the main reasons the United States Supreme Court concluded that a federal law attempting to prevent minors from viewing indecent material online violated the First Amendment, in \textit{Reno v. ACLU}.\textsuperscript{74}

While users can be asked their age when they visit a Web site, there is no reliable way to verify this information. Moreover, as revealed in the Malone-Bero Survey, efforts to screen out or discourage minors are tepid at best.\textsuperscript{75} Indeed, many of the age-related messages on cigar sites may actually be designed to entice young people to smoke cigars.\textsuperscript{76}

Credit cards are often required for online shopping or, in the case of online pornographic sites, as a method of blocking underage

\textsuperscript{70} Cigar smoking causes oral, esophageal, laryngeal, and lung cancer. \textit{See National Cancer Inst. Monograph, supra note 1}, at 19. A serious risk of coronary disease has also been associated with cigar smoking. \textit{See id.; see also Eric J. Jacobs et al., Cigar Smoking and Death From Coronary Heart Disease in a Prospective Study of U.S. Men, 159 Archives Int. Med. 2413 (1999); Carlos Iribarren et al., Effect of Cigar Smoking on the Risk of Cardiovascular Disease, Chronic Obstructive Pulmonary Disease, and Cancer in Men, 340 N. Eng. J. Med. 1773 (1999). To date, however, all of the cigar health studies have been limited to adult male subjects who regularly smoke cigars. \textit{See id.} “Regular cigar smoking is generally defined to mean daily smoking.” \textit{Id.} Rigorous scientific studies of the health effects of occasional cigar smoking and cigar smoking of all types among women and adolescents are needed.


\textsuperscript{72} A startling 55\% of teens from the focus group reported that adults permit teens to smoke cigars. \textit{See id.} at 16.

\textsuperscript{73} The 1999 teen focus group study reported, for example, that teen participants were able to recall 26 different television shows depicting cigar smoking. \textit{See id.} at 12.

\textsuperscript{74} 521 U.S. 844, 855–57 (1997). \textit{See discussion infra Part IV.}

\textsuperscript{75} \textit{See Malone & Bero, supra note 3, at 790–91. For example, only five sites provided health warning, and the warnings of two of those sites were merely “sarcastic messages.” Id. at 791.}

\textsuperscript{76} \textit{See discussion supra Part I.C.}
access. The Supreme Court in *Reno* was critical of these efforts because they place an economic burden on both senders and recipients of online speech.\(^\text{77}\) Furthermore, in *Reno*, the Justices pointed out that, ironically, a credit card requirement would shield commercial purveyors of pornography while leaving private "transmitters of indecent messages that have significant social or artistic value" vulnerable to criminal prosecution.\(^\text{78}\)

The merits and efficacy of relying on a credit card as a tool for verifying age over the Internet is certainly debatable. Furthermore, the Malone-Bero Survey revealed that surprisingly few of the Web sites selling cigars require credit cards to make an online purchase.\(^\text{79}\) It is possible that the policy of allowing cash-on-delivery purchases is designed to facilitate youth sales,\(^\text{80}\) particularly considering that many children and adolescents are at home alone after school, and are thus more readily in a position to accept delivery.

In *Reno*, where provisions of a federal law intended to protect minors from indecent online material were ruled unconstitutional, the United States Supreme Court relied heavily on the district court's 1996 findings of fact regarding the nature and capacity of the Internet. Due to the changing nature of Internet technology, at least some of the "facts" on which *Reno* was based might not be considered accurate today.\(^\text{81}\) For example, the Supreme Court accepted without question the prediction that filtering software would enable parents to effectively protect their minor children from viewing adult material on the Internet.\(^\text{82}\) It may have been reasonable in 1996 to make this assumption. Indeed, filtering software is now available to parents who seek to limit the content of material their children view on the Internet.\(^\text{83}\) However, filtering software has not yet proven to be as effec-

\(^{77}\) See *Reno*, 521 U.S. at 856.

\(^{78}\) Id. at 882 n.47.

\(^{79}\) See Malone & Bero, *supra* note 3, at 790. The study found that slightly less than half (49%) of the Web sites selling cigars required credit card payments. See id. Thirty-two percent expressly stated that they accepted cash-on-delivery or money orders, options that are likely to be popular with underage buyers. See id.

\(^{80}\) See id.

\(^{81}\) For a discussion of the degree of control a user has over what is viewed on the Internet, see *supra* Part I.C.

\(^{82}\) "[T]he evidence indicates 'a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available.'" *Reno*, 521 U.S. at 855 (quoting ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

\(^{83}\) A recent report, critiquing the options for filtering or screening tobacco and alcohol advertising on the Internet, summarizes product categories and mechanisms for screening and filtering. See CME YOUTH ACCESS REPORT, *supra* note 35, at 11. The report
tive as its proponents may have hoped. Further, such software has a demonstrably poor record for blocking access by minors to tobacco-or alcohol-related sites on the Web.

In 1999, the Center for Media Education ("CME") released a follow-up report to its earlier study revealing the prevalence of youth-oriented Web sites promoting tobacco (especially cigars) and alcohol use. The latest CME report examined six filtering software programs. In its study, the CME found that only one program (Surf Watch) blocked access to more than half of the identified sites promoting tobacco and alcohol. One program (X-Stop) failed to block any of the tobacco and alcohol sites and another (Net Nanny) only blocked one of the sites tested.

The 1999 CME Youth Access Report points out that links between advertising and youth consumption of tobacco have long been established. Moreover, it asserts that the Web is a particularly appealing advertising medium for targeting children and teenagers, who are drawn to and proficient with its interactive features (such as games, drawings, and contests). In addition to revealing the flaws of alcohol and tobacco Web site filtering programs, the CME report states that interviews with software developers suggest "screening of alcohol and tobacco sites has not been a priority." The report hypothesizes that software developers believe parents are more concerned about screening pornography and "protecting children from pedophiles or 'life-threatening' experiences," and devote most of their resources to these areas. Without disputing the importance of blocking such content, the report urges the public health community, private companies, the government, and parents to make the development, implementation,
and enforcement of effective tobacco and alcohol screening devices on the Internet a high priority.\(^{94}\)

Unfortunately, these recommendations have not yet been heeded. Today, there are no effective mechanisms for blocking children or teenagers from viewing cigar or tobacco advertising and promotional Web sites on the Internet, or even from purchasing tobacco products (especially cigars) online. In light of the market's failure to supply mechanisms needed to aid parents in restricting youth access, certain federal agencies or Congress should enact relevant consumer protection laws.

II. Federal Regulation of Cigar Advertising and Promotion on the Internet

There are three potential sources of federal regulation of advertising and promotion of cigars over the Internet: the Federal Trade Commission, the Federal Communication Commission, and the Food and Drug Administration ("FDA"). The FTC is charged with enforcement of "a variety of consumer protection laws,"\(^ {95}\) and is perhaps the best candidate to lead a concerted effort to limit the cigar industry's online marketing campaign. In June 2000, the FTC entered into Consent Orders with the seven leading cigar manufacturers, importers, and marketers requiring health warnings on cigar packaging and on advertising, including some Internet advertising.\(^ {96}\)

Alternatively, an existing ban by the FCC against tobacco advertisement on "any medium of electronic commerce subject to the jurisdiction of the [FCC]"\(^ {97}\) could be extended to include cigars, which is more consistent with current federal marketing restrictions. Although it espouses a non-regulatory approach to the Internet, the FCC has asserted jurisdiction over the Internet.\(^ {98}\)

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94. See id. at 44.
96. The Consent Orders contain other marketing restrictions. See discussion infra Part II.A.2.
97. 15 U.S.C. §§ 1335, 4402(f) (1994). Section 1335 restricts cigarette and little cigars advertisements on mediums under FCC's jurisdiction, see id. § 1335, while § 4402(f) restricts smokeless tobacco advertisements on mediums under FCC's jurisdiction, see id. § 4402(f).
In addition to regulation by the FTC and the FCC, there is potential for the FDA to regulate tobacco products. Alternatively, a new and as yet unnamed Internet-specific federal agency could be established to regulate Internet cigar advertising. It is also important to note congressional attempts to prohibit or limit cigar advertising and sales on the Internet.

A. The FTC Authority to Regulate Tobacco Advertisement on the Internet

The FTC has declared that “electronic commerce and commercial activity on the Internet fall squarely within the scope of [its] statutory mandate” to protect consumers. In August 1998, the FTC reiterated its goal of monitoring commercial activity on the Internet in its manual, Advertising and Marketing on the Internet. The manual warned e-commerce businesses that the FTC’s authority extends to their online conduct. As of April 2000, the FTC brought more than one hundred federal law enforcement actions against purveyors of fraud on the Internet, such as credit card scams.

1. Section Five Authority of the Federal Trade Commission Act

The FTC is given authority to assert jurisdiction over the online marketplace under Section Five of the Federal Trade Commission Act. This cornerstone of federal consumer protection law provides the FTC with broad authority to stop “deceptive” and “unfair” advertisements. An advertisement is “deceptive” if it contains or omits information “likely to mislead consumers acting reasonably under the circumstances,” and if the offending information is “material” to the

99. See FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291 (2000). While, under Brown & Williamson, the FDA was stripped of its asserted authority to regulate tobacco products, it would be possible for Congress to amend the FDA’s mandate to include the regulation of tobacco products, including cigars. See id. at 1303.
101. Id.
102. See id.
103. See FTC, Dot Com Disclosures (visited May 3, 2000) <http://www.ftc.gov/bcp/con-line/pubs/buspubs/dotcom/index.htm>; see also, FTC v. Sabal, 32 F. Supp. 2d 1004, 1009 (N.D. Ill. 1998) (noting that the FTC would likely succeed on the merits of finding advertisements deceptive, such as the defendant’s Web site, which indicated scientific studies proved the defendant’s product would quickly and permanently improve hair growth).
105. See id.
decision to buy or use the product.\textsuperscript{106} When advertisements target the
"elderly, children, terminally ill, or other like audience," the FTC will
adjust the reasonable consumer standard "to reflect [the] vulnerabil-
ity of that group."\textsuperscript{107} Additionally, the FTC will presume that advertise-
ments that mix truths and lies mislead consumers.\textsuperscript{108}

An advertisement is "unfair" if it "causes or is likely to cause sub-
stantial injury to consumers which is not reasonably avoidable by con-
sumers themselves and not outweighed by countervailing benefits to
consumers or to competition."\textsuperscript{109} "Substantial consumer injury" can
include either a "relatively small harm . . . inflicted upon a large num-
ber of consumers or . . . a greater harm . . . inflicted on even a small
number of consumers."\textsuperscript{110} Additionally, the harm must be concrete,
such as economic harm or an unwarranted health and safety risk.\textsuperscript{111}
The FTC will then carry out investigations to balance the benefits and
costs of regulating a specific act or practice against taking no action at
all.\textsuperscript{112}

2. Recent Agreements with the Seven Leading Cigar
Manufacturers, Importers, and Marketers to Require
Health Warnings

The FTC has used its Section Five authority to scrutinize the mar-
keting of tobacco products.\textsuperscript{113} Most recently, in June 2000, the FTC

\textsuperscript{107} Id.
\textsuperscript{108} See id.
\textsuperscript{110} Alan N. Greenspan, Internet Advertising Laws and Regulations, 547 PLI/Pat. 325, 335
(1999).
\textsuperscript{111} See id.
\textsuperscript{112} See id. at 336.
\textsuperscript{113} The FTC ordered changes to cigarette advertisements of R.J. Reynolds when it
displayed phrases such as "no additives" on its cigarette packages and advertisements. See In
re R.J. Reynolds Tobacco Co., No. 992-3025, Agreement Containing Consent Order (FTC
alleged R.J. Reynolds deceived consumers by implying through its advertising that Winston
cigarettes were less hazardous than otherwise comparable cigarettes because they con-
tained no additives. See id. at 3. R.J. Reynolds eventually consented to include warnings on
its Winston cigarette packages and advertisements, including Internet advertisements,
which indicate that additive-free cigarettes "does not mean safer" cigarettes, in exchange
for not filing the complaint. Id. at 2-3. In another case, applying its "unfair" Section Five
test in the controversial "Joe Camel" cartoon advertising campaign, the FTC alleged R.J.
Reynolds "unfairly" targeted children and adolescents through use of cartoon characters.
See In re R.J. Reynolds Tobacco Co., No. 9285, Complaint (FTC May 28, 1997), available at
The highly effective campaign resulted in the largest proportion of Camel smokers being
under the age of 18 and increased overall market share. See id. at 1-2. In January 1999,
used its Section Five authority to require the seven largest cigar manufacturers, importers, and marketers\(^{114}\) to display health warnings on cigar packages and advertisements,\(^{115}\) Draft complaints, which the FTC used to achieve settlements, alleged that the respondent cigar companies failed to disclose certain health information that materially affected consumer decisions to use cigars.\(^{116}\) Additionally, the draft complaints alleged that the respondents’ failure to disclose these facts “[has] caused or [was] likely to cause substantial and ongoing injury to the health and safety of children and adolescents under the age of 18 that is not offset by any countervailing benefits and is not reasonably avoidable by these consumers.”\(^{117}\) Based on these allegations, the draft complaints concluded that the cigar companies violated Section Five by committing “unfair or deceptive acts or practices.”\(^{118}\)

The Consent Orders specifically address cigar advertisements on the Internet.\(^{119}\) Pursuant to the Orders, respondent cigar companies must conspicuously display one of the five following health warnings on advertisements on the Internet, subject to certain exemptions:\(^{120}\)

**SURGEON GENERAL WARNING:** Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

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114. The respondents are Swisher Int’l, Inc. (No. 002-3199); Consolidated Cigar Corp. (No. 002-3200); Havatampa, Inc. (No. 002-3204); General Cigar Holdings, Inc. (No. 002-3202); John Middleton, Inc. (No. 002-3205); Lane Ltd. (No. 002-3203); and Swedish Match N. Am., Inc. (No. 002-3201). An index linking to all the agreements containing the proposed consent orders for each of these companies can be found at [http://www.ftc.gov/os/2000/06/index.htm]. The proposed consent orders, which are virtually identical, are hereinafter cited as “Consent Orders.”
116. See, e.g., Reynolds Complaint, supra note 113.
117. Id. at ¶ 13.
118. Id.
119. See id. at V.
120. These seemingly detailed electronic advertising restrictions are more lax than controls the FTC recommended in its 1999 report, under which FTC stated the overarching goal should be that the federal government regulate cigars in a manner consistent with present regulation of other tobacco products. See FTC 1996–97 Report, supra note 26, at 2. To that end, the FTC specifically recommended extending the ban on tobacco advertising on any electronic medium under the FCC’s jurisdiction to include cigars. See id. at 12. Not only do the Consent Orders fail to achieve this goal, the Orders specifically allow cigar advertising on television and radio, in retreat from its explicit statements the previous year. See Consent Orders, supra note 114, at V. The reach of the electronic advertising ban (and proposed expansion to include cigars) is discussed in the following section on the FCC’s jurisdiction over the Internet. See infra Part II.B.
In Internet advertising, these warnings “shall be superimposed on the screen in black print on a white background enclosed in a black rectangular box” in a size and for a duration sufficient to allow an ordinary consumer to read and comprehend them. Additionally, the warnings “shall be presented in an unavoidable manner on every Web page, online service page, or other electronic page, and shall not be accessed or displayed through hyperlinks, pop-ups, interstitials, or other similar means.” The Consent Orders do not indicate whether warnings shall be posted on other Internet products, such as e-mails, hyperlink banners, or listservs.

Despite detailed warning requirements, the FTC Consent Orders fail to address other concerns surrounding the marketing of cigars on the Internet. First, as indicated in Part I of this Article, there is a dearth of adequate safeguards to prevent the sale of cigars to underage users. The Consent Orders fail to even encourage the use of age-verification technology or other techniques designed to identify a consumer’s age.

Second, although the Consent Orders purport to create a “uniform national system of health warnings,” the scope of each Order is limited to advertisements “made by or on behalf of [the] respondents.” Thus, Internet cigar advertising paid for by anyone other than the seven respondents need not carry health warnings. While the

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121. Consent Orders, supra note 114, at I.
122. Id. at V.
123. Id. at V.
124. See discussion supra Part I.
respondents supply 95% of the United States cigar market, the exact percentage of online cigar advertisements attributable to the respondents—"made by or on behalf of" the respondents—remains unclear.

The 1999 FTC report to Congress, examining the increase in cigar advertisements on the Internet (and other media) for the years 1996 and 1997, provides a starting point to assess the reach of the Consent Orders. After collecting marketing data from the five largest domestic cigar manufacturers, the FTC found that expenditures on Internet advertisements had risen 180% between 1996 and 1997. The Consent Orders certainly would include these and subsequent online advertisements paid for (directly and indirectly) by the respondents.

However, the FTC cautioned that the cigar industry's actual presence on the Internet was "substantially greater" than represented by the five leading manufacturers in the 1999 report, even though those manufacturers supplied 90% of the market in 1996 and 1997. The FTC's report indicated a substantial portion of Internet advertising was comprised of indirect advertisers, such as online magazines and chat rooms established by cigar organizations. Additionally, the report only reflected expenditures by the leading manufacturers, and did not include independent advertising by tobacco retailers. Given the ease and low cost of establishing a Web site, independent retailers probably account for a large percentage of online cigar advertisements. Since the Consent Orders will not bind these members of the cigar industry, they are then free to advertise and sell cigars without any health warnings.

Instead of attacking unfair or deceptive cigar advertisements member-by-member, the FTC could establish trade regulations requir-
ing all cigar advertisements to include warnings.\textsuperscript{134} Such regulations would meet more effectively the FTC's goal of creating a "comprehensive national system of simple and direct warnings," particularly on the Internet.\textsuperscript{135} Additionally, an industry-wide rule avoids the potential for inconsistent health warnings voluntarily posted by members of the industry who are not bound by the Consent Orders, a contingency which the FTC noted might confuse consumers or "undercut the saliency" of warnings.\textsuperscript{136}

B. The FCC's Jurisdictional Reach and the Federal Ban (and Proposed Ban) on Electronic Advertisements for Tobacco Products

1. The Scope of the Electronic Advertising Ban and Its Proposed Extension to Cover All Cigars

In its 1999 report, the FTC proposed an alternative to the Internet warnings required by the Consent Orders, namely, that the existing ban on "advertising on any medium of electronic communication subject to the jurisdiction of the [FCC]" of certain tobacco products be extended to include cigars.\textsuperscript{137} Supporting this recommendation, the FTC analogized the current trends in cigar promotion and consumption to those surrounding the history of a previous cigar advertisement ban,\textsuperscript{138} the Little Cigar Act of 1973.\textsuperscript{139}

Prior to the Little Cigar Act, the ban on electronic advertising, which was enacted in 1970 and enforced on the first day of 1971, only included cigarettes.\textsuperscript{140} Exploiting the limited scope of the ban, retailers and manufacturers began to advertise little cigars—a cigarette-like cigar—on television, which resulted in a 254% jump in consumption of little cigars from 1971 to 1972.\textsuperscript{141} In 1973, Congress responded by

\textsuperscript{134} See 15 U.S.C. § 57a (1994) (noting that the FTC may promulgate industry-wide rules to prevent unfair and deceptive acts or practices when certain criteria are present).

\textsuperscript{135} FTC, Analysis of Proposed Consent Orders To Aid Public Comment 4 (June 2000) <http://www.ftc.gov/os/2000/06/cigarsanalysis.htm> [hereinafter FTC Analysis].

\textsuperscript{136} Id. at 4.

\textsuperscript{137} Id. at 12.

\textsuperscript{138} See id.


\textsuperscript{141} See FTC Analysis, supra note 135, at 12.
extending the ban to include little cigars by enacting the Little Cigar Act, leading to a steady drop in their sales.

The recent increases in cigar promotion and consumption indicate members of the cigar industry are exploiting the same loophole that little cigar promoters exploited in 1971 and 1972. Cigars are heavily advertised on the Internet which, under the language of the existing ban, is a practice from which almost all advertisers of other tobacco products are plainly excluded. As the Internet grows in popularity, the promotion—and most likely consumption—of cigars will increase, unless the ban is expanded to include cigars.

2. The FCC's Jurisdiction Over the Internet

Communication takes place over the Internet via telephone lines, radio and digital frequencies, and other electronic communication pathways under the FCC's jurisdiction. Thus, advertising certain tobacco products on the Internet would seem to be prohibited under the FCC's electronic ban. The FCC's non-regulatory approach to the Internet, however, calls into question whether the wording of the FCC's ban—"any electronic medium under the jurisdiction of the [FCC]"—actually includes the Internet. Through a series of regulatory findings, information bulletins, and speeches, the FCC has maintained that it has no authority to regulate content on the

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143. See CDC 1999 REPORT, supra note 2, at 12.

144. See 15 U.S.C. §§ 1335, 4402(f) (1994). Section 1335 restricts cigarette and little cigars advertisements on media under FCC's jurisdiction, see id. § 1335, while § 4402(f) restricts smokeless tobacco advertisements on media under FCC's jurisdiction, see id. § 4402(f).

145. See Greenspan, supra note 110, at 549.


147. See, e.g., FCC, Parents, Kids & Communications: Helping Children Benefit From Positive Communications Tools (visited Jan. 25, 2000) <http://www.fcc.gov/parents_information> (noting that "the FCC does not have jurisdiction over the content of Internet pages nor over the content of e-mail sent over the Internet").

148. On March 25, 1999, addressing the FCC's role in regulating the content of advertising on electronic media, Susan Ness stated:

We have a continuing role to regulate the terms and conditions of certain parts of what are commonly thought of as "telephone networks." I'd like to take this opportunity to answer any questions about the desire or intention of the Commission to "regulate the Internet." The answer to that question is "No." The long answer is "Hell, no!"

Internet. To establish that the ban on electronic advertising includes the Internet despite the FCC’s hands-off policy, it is important to examine briefly its statutory mandate and some of its administrative findings.

Against the background of the FCC’s reticence to regulate the Internet, the United States Supreme Court has found that the FCC has broad jurisdiction over the new communication technology. In United States v. Southwestern Cable Co., the Supreme Court reviewed the Communication Act of 1934 to determine whether the FCC’s jurisdiction included cable television. At that time, cable television was a new communication technology. Based on the Act’s language, its legislative history, and the historical context, the Court concluded that the FCC had broad jurisdiction. The Court found:

The Act’s provisions are explicitly applicable to “all interstate and foreign communication by wire and radio . . . .” The [FCC] was expected [by Congress] to serve as “the single Governmental agency” with “unified jurisdiction” and “regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.”

The Court went on to find that “[n]othing in the language of [the Act, its] history, or [its] purpose limits the Commission’s authority to those activities and forms of communication that are specifically described by the [Act].” Indeed, the Court recognized that Congress charged the FCC with the responsibility of regulating unforeseen electronic communication media.

Let me start by listing some of the things we haven’t done. We haven’t required Internet service providers to pay per-minute “access charges” that are imposed on long-distance carriers. We haven’t subjected ISPs to any of the other regulatory requirements that the Communication Act places on carriers—such as price regulation or tariff filing or universal service requirements. We haven’t barred providers of software for Internet telephony from selling their products. And we haven’t applied any or our rules governing content in broadcasting to the Internet.


151. See Southwestern Cable, 392 U.S. at 167. The exact communication technologies in question included cable transmission by wire and microwave spectrum. See id. at 163–64.
152. See Werbach, supra note 5, at 28.
153. See Southwestern Cable, 392 U.S. at 167.
154. Id. at 167–68 (citations omitted).
155. Id. at 172.
156. See id.
From late 1966 to 1971, in regulatory findings known as "Computer I," the FCC began to confront the marriage between its traditional role of regulating the wire and telecommunication industry and the data processing services (computers). Unsure how to apply traditional common carrier regulations, the FCC decided to proceed on a case-by-case basis, applying common carrier regulations over "computer-controlled transmission of messages, between two or more points, via communications facilities, wherein the content of the message remains unaltered." The FCC decided, however, that other data processing technology would remain unregulated.

Despite these extensive findings, the FCC found its Computer I rules were nearly technologically obsolete even during implementation in 1973. Additionally, the FCC failed to define its jurisdictional scope over computer use in this country's communication infrastructure. Three years after the implementation of the Computer I rules, the FCC began a second round of regulatory findings, culminating in the foundation of much of the FCC's current regulatory scheme.

In 1980, under a report entitled "Computer Inquiry II," the FCC asserted jurisdiction over communication services called "enhanced services," which included the Internet. Relying on the Supreme Court's broad reading of the FCC's statutory mandate in Southwestern Cable, the FCC concluded it had "ancillary jurisdiction" pursuant to sections 152 and 153 of the Communication Act. The Com-

157. See Oxman, supra note 4, at 6.
159. See id. at 296.
160. See id.; see also Computer II Final Order, supra note 98, at 391-92.
162. See Computer II Final Order, supra note 98, at 431-35, 450-52. The FCC created a new distinction between "basic" and "enhanced services." See id. at 418-19. "Basic services" include "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." Id. at 420. "Enhanced services" include any other communication service and are defined as "computer processing applications that are used to act on the content, code, protocol, and other similar aspects of the subscriber's information, and provide the subscriber with additional, different, or restructured information, or involve subscriber interaction with stored information." Id. at 420-21.
163. 47 U.S.C. § 152 (1994). Section 152 states that the FCC has jurisdiction over "all interstate and foreign communication by wire and radios." Id.
164. Id. § 153. Section 153 defines communication by wire as "the transmission of writing, signs, signals, pictures and sounds of all kinds . . . incidental to such transmission." Id.
puter II findings and rules were later sustained by the Court of Appeals for the District of Columbia.\textsuperscript{166}

Given that the FCC was both deemed to have and has asserted jurisdiction over the Internet, its authority to extend the electronic ban to include cigars—thus prohibiting advertisement of cigars on the Internet—must be considered.\textsuperscript{167} The FCC has general rule-making authority under its enabling statute of the Communication Act.\textsuperscript{168} Section 303(r) of the Act provides:

\begin{quote}
The Commission [shall] from time-to-time, as public convenience, interest, or necessity shall require . . . make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.\textsuperscript{169}
\end{quote}

This statutory language seems to provide the FCC with broad authority to address new forms of communication, such as the Internet, that appear to fall within its objective to facilitate “interstate and foreign commerce in communication.”\textsuperscript{170} In Southwestern Cable, the Supreme Court found that the FCC could have used section 303(r) to make or amend rules to address the then-novel communication medium of cable television.\textsuperscript{171} The FCC had initially sought legislation to obtain authority to regulate the cable industry.\textsuperscript{172} After Congress failed to respond, the FCC adopted, and the Supreme Court upheld, a series of rules for the cable industry that were “reasonably ancillary to the effective performance of the Commission’s various responsibilities.”\textsuperscript{173} The Supreme Court’s broad reading of section 303(r) suggests that the Communication Act empowers the FCC with rulemaking authority to address problems in novel electronic communication beyond what Congress initially expected. Thus, the FCC could extend the electronic ban to include cigar advertising on the Internet.

\begin{footnotes}
\item[166] See Computer and Communications Indus. Ass’n v. FCC, 693 F.2d 198, 202 (D.C. Cir. 1982). Ironically, the FCC asserted jurisdiction to ensure the Internet could develop in a non-regulatory environment. The FCC specifically found the market for enhanced services was “truly competitive” and as such would protect the public interest in reasonable rates and availability of enhanced services. See id. at 207. The FCC deemed necessary the preemption of some state regulation to insulate a non-regulatory environment for the growth of enhanced services. See id. at 205.
\item[167] For a discussion of congressional bills to expand the ban, see infra Part II.E.2.
\item[169] Id.
\item[172] See id. at 164.
\item[173] Id. at 178.
\end{footnotes}
3. **Enforcement of the Ban on Electronic Advertising**

The FTC has authority to enforce the ban on the advertisement of smokeless tobacco on "any medium of electronic communication subject to the jurisdiction of the [FCC]."174 Under the Comprehensive Smokeless Tobacco Health Education Act of 1986,175 Congress provided that the FTC shall consider any such advertisement a violation of Section Five of the Federal Trade Commission Act.176 Additionally, the FTC should use its Section Five authority to enforce the ban on electronic advertisements of cigarettes. The Federal Cigarette Labeling and Advertising Act177 ("FCLAA") which includes the ban, specifically provides that no part of the Act "shall be construed to limit, restrict, expand, or otherwise affect" the FTC's Section Five authority.178

Alternatively, the Department of Justice ("DOJ") has authority to enforce a ban by either Congress or the FTC.179 "[U]pon the application of the Attorney General of the United States acting through the several United States attorneys in their several districts," injunctions may be sought "to prevent and restrain violations of [the ban]."180 The FCC has stated it will refer potential violations to the Office of Consumer Litigation of the Civil Division of the DOJ.181

If expanded to cigar advertising on the Internet, the ban would effectively stem the increasing presence of cigar advertisements on the Internet. Indeed, various lawmakers have proposed expanding the ban. Several bills introduced in the 106th Congress brought cigar advertising within the scope of the ban.182 Additionally, as indicated above, the FTC proposed expanding the ban in its 1999 report to Congress.183 Lastly, although it presently maintains a hands-off policy over the Internet, in February 1969, the FCC, on its own initiative,

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176. See id. § 4402(f).
178. Id. § 1336.
179. See id. § 1339; see also Action for Children's Television v. FCC, 999 F.2d 19, 21 (1st Cir. 1993) (finding in a civil suit brought to force the FCC to apply the electronic ban to alleged product placement that the DOJ was charged with enforcement of the ban).
183. But see generally Consent Orders, supra note 114.
promulgated a rule to ban electronic advertising of cigarettes prior to Congress’s enactment of the original ban.184

C. Regulation by the Food & Drug Administration

Theoretically, the Food and Drug Administration could be empowered by Congress to regulate cigar (tobacco) advertising over the Internet and via other media. But a recent United States Supreme Court decision dealt a deathblow to the FDA’s authority to regulate tobacco products.185 After years of challenges to agency rules intended to curb consumption by young people of cigarettes and smokeless tobacco,186 the Supreme Court, in FDA v. Brown & Williamson,187 invalidated the regulations, holding “Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products.”188 Ironically, the majority in Brown & Williamson reasoned that Congress did not intend for the FDA to regulate tobacco products; otherwise, it would be required to remove tobacco products from the market since the FDA has concluded that tobacco products are not safe for any use.189

Thus, unlike the FTC and FCC, which arguably have some existing authority to regulate cigar advertising over the Internet, the FDA is currently devoid of any such power. It is quite possible that Congress will respond to the Supreme Court’s ruling by adopting, or at least considering, legislation carving out a role for the FDA to regulate tobacco products.190 Shortly before the Brown & Williamson deci—


186. Cigarettes and Smokeless Tobacco, 21 C.F.R. § 897 (1999). The regulations would have strengthened age-verification requirements; established new limits on youth access (for example, limits on vending machines, self-service displays, and a ban on free sampling); and restricted certain forms of tobacco advertising and promotion, including, inter alia, outdoor advertising, promotional items, sponsorships, and print advertising in youth-oriented publications. See id.

187. 120 S. Ct. 1291 (2000).

188. Id. at 1297.

189. The Court was nearly evenly divided in its opinion, with five justices joining the majority decision to strike the regulations based on this interpretation of the FDA’s authority and four justices dissenting. See id. at 1303.

190. A number of bills granting the FDA express authority to regulate tobacco products were filed in both the House and Senate shortly after the Supreme Court invalidated
sion was issued, at least one cigarette maker announced that it might be ready to accept some form of FDA product regulation. However, it is unclear how much FDA regulation the industry would be willing to accept, especially now that it has won a Supreme Court challenge to the FDA’s regulations of tobacco sales and advertising.

Furthermore, the history of federal tobacco legislation suggests any tobacco legislation that is deemed acceptable by the industry will likely be designed to protect it from lawsuits. The industry may be particularly unlikely to make any advertising concessions, given that it can argue it already did so when it settled the lawsuits brought by the states’ attorneys general.

Finally, the FDA’s authority to regulate, challenged in Brown & Williamson, did not include restrictions on cigars or Internet advertising. Neither of those areas is likely to be part of new legislation, unless public health and tobacco-control advocates press for inclusion of such regulations. The cigar industry would surely oppose any such proposals. In 1997, when the cigar industry feared being swept into the relatively comprehensive tobacco control legislation before Congress, the President of the Cigar Association testified before a Cong-

the FDA regulations. See, e.g., The FDA Tobacco Authority Amendments Act, H.R. 4207, 106th Cong. (2000); The Child Tobacco Use Prevention Act of 2000, H.R. 4041, 106th Cong. (2000); The Tobacco Regulatory Fairness Act of 2000, S. 2333, 106th Cong. (2000). Most of the bills would grant the FDA authority to regulate a wide range of tobacco products, including cigars. See, e.g., S. 2333, 106th Cong. § 3 (2000); H.R. 4041, 106th Cong., § 102(c) (2000); H.R. 4207, 106th Cong. § 3(c) (2000). However, the bills vary in the scope of authority granted to the FDA; and thus, in potential to grant the FDA power to regulate the sale or advertising of cigars over the Internet. House Bill 4207 clarifies that the FDA’s authority to restrict sales and distributions of tobacco includes restrictions on advertising and promotion, making Internet restrictions at least theoretically possible. See H.R. 4207, 106th Cong. § 4(b)(3)(A) (2000). House Bill 4041 would go further by authorizing restrictions on advertising and promotion, see H.R. 4041, 106th Cong. § 102 (2000), validating the FDA regulations recently struck down by the United States Supreme Court, see id. § 104, and requiring the Secretary to add the marketing access and advertising restrictions set forth in Titles IA and IC of the 1997 proposed global settlement, except if such inclusion would violate the First Amendment, see id. § 105. This last provision would include the Internet advertising ban contemplated by the 1997 global settlement. See discussion infra Part II.E.1. On the other hand, Senate Bill 2333 appears to vest authority to regulate advertising of tobacco products with the FTC. See S. 2333, 106th Cong. § 1005(a) (2000); see also id. § 1000(b) (granting the FDA authority to regulate the manufacture, distribution, and sale of tobacco products but does not expressly include advertising).


193. While the advertising restrictions contained in the Master Settlement Agreement were greeted with much fanfare, they are far more modest than those on the table in 1997, when the industry agreed to the 1997 proposed national settlement.
gressional Committee against federal cigar regulation.\footnote{See Telecommunications, Trade and Consumer Protection Subcomm. of the House Commerce Comm., 105th Cong. 40 (1998) (statement of Norman F. Sharp, on behalf of the Cigar Ass’n of America, Inc. and the Pipe Tobacco Council, Inc.).} He relied heavily on the FDA “decision” in 1995 to leave cigars and pipe tobacco out of its regulatory scheme, asserting, in part, that the FDA chose not to regulate cigars and pipe tobacco “because it found no credible evidence that children and adolescents use these products to any significant degree.”\footnote{Id.}

Data revealing high rates of underage cigar smoking emerged in 1997, after the 1995 FDA declaration of jurisdiction over cigarettes and smokeless tobacco.\footnote{See discussion of youth cigar use, supra Part I.E.} If this data had been available to the agency in 1995, it is likely the FDA might have decided to include cigars in its youth sales and advertising restrictions.\footnote{The FDA would also have needed evidence that cigars are drug delivery devices, a requirement that might arguably be met today based on new data regarding the health effects and nicotine contents of cigars. See National Cancer Inst. Monograph, supra note 1, at n.1.} However, since the FDA currently lacks authority to regulate tobacco products and the pending legislation appears unlikely to move forward in the near future, the FDA is probably not the best choice for regulating cigar advertising currently on the Internet.

D. New Internet Federal Agency

None of the existing federal agencies discussed in the preceding sections possess any particular expertise about the Internet or e-commerce. Although extending the existing electronic ban on tobacco advertising to cover all cigars may be the most efficient option, the creation of a new federal “Internet agency” is another alternative for regulating cigar advertising and promotion in the rapidly changing Internet environment.

At least one First Amendment scholar suggests creating a new federal agency charged with regulating the Internet in the wake of \textit{Reno}.\footnote{See Praveen Goyal, Congress Fumbles with the Internet: Reno v. ACLU, 117 S. Ct. 2329 (1997), 21 Harv. J.L. \\& Pub. Pol’y 637, 654 (1998).} The scholar reasons that the changing nature of Internet technology and the lack of a clear judicial standard for restricting In-
ternet speech make it unlikely that either the courts or Congress will regulate this new media effectively.200

A more promising model would be a regulatory model similar to the one in [FCC v.] Pacifica. There, an “expert agency” was responsible for the determination of when a particular indecent content could be broadcast. In Pacifica, the Court took a watchdog posture over the agency (rather than over Congress), to ensure that the speech-cost of agency regulations did not become too great. In the Internet context, such an expert agency would be less likely than Congress to draw inapt analogies to vastly different regulatory media or to irrelevant constitutional standards.201

Such a suggestion will surely inspire opposition, particularly among those who regard the unregulated nature of the Internet as one of its most precious attributes. Nonetheless, even Professor Lawrence Lessig, one of the most expert of such commentators—who has expressed serious misgivings about Internet government regulation—has conceded that a zoning-type regulation is neither impossible nor unlikely.202 Professor Lessig notably discusses the present technological barriers to identifying and screening Internet users, and other distinctions between the boundaries of communication in physical space and cyberspace.203 Lessig eloquently describes the genesis of cyberspace and its configuration in 1996 as it applies to the potential of zoning cyberspace as a means of restricting advertisements of tobacco products to areas not frequented by children.204 However, while Les-

199. Goyal's prediction that Congress could continue to fumble with the First Amendment in its legitimate attempts to protect minors from harmful material on the Internet appears to be correct. See id. at 654; see also ACLU v. Reno, 521 U.S. 844 (1997) (striking down the Child Online Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified as amended at 47 U.S.C. § 231 (Supp. 1998)), which the Court termed "Congress's second attempt to regulate dissemination to minors of indecent material on the Web/Internet").

200. See Goyal, supra note 198, at 654.

201. Id. (citing FCC v. Pacifica, 438 U.S. 726 (1978)).


203. See generally id.

204. Lessig stated:

I have belabored this commonplace about real-space zoning because it is central to understanding a crucial difference between real space and cyberspace, as it is now. For in the most general sense, zoning is not the architecture of cyberspace. Indeed, zoning is just what cyberspace is, or at least was, against . . . [It is just this feature of cyberspace that cybersmut fanatics are so concerned about.

Id. at 887–88.
sig clearly values the currently borderless world of cyberspace, he asserts that this feature is not immutable or uncontrollable, stating:

> If c[yber]-world is now, or just was, unzoned, there is nothing in its nature that says it must forever remain so. Cyberspace has no permanent nature, save the nature of a place of unlimited plasticity. We don’t find cyberspace, we build it . . . . And how we build it depends first upon the kind of place we want to make.\(^{205}\)

There is a need for regulation to block the unfettered access children and adolescents have to cigar (and other tobacco) advertising and promotional and sales information on the Internet. If policy-makers choose to limit Internet access to cigar promotion, the government has a potentially important role in establishing, monitoring, and enforcing limits. As Lessig noted, referring to private efforts to zone cyberspace, in 1996, cyberspace was changing “from a relatively unzoned place to a universe that is extraordinarily well zoned” without any government issued mandate.\(^{206}\) “The point is the trend: zoning is coming to cyberspace, with an efficiency unmatched in real space.”\(^{207}\)

Lessig, however, apparently does not view private and government efforts as mutually exclusive or inherently contradictory. For example, he juxtaposes the failed Communications Decency Act of 1996\(^{208}\) (“CDA”) and a “White Paper”\(^{209}\) calling for privatization of copyright: “Both [the CDA and the White Paper] represent not a conflict between ‘the Net’ and the government, but a union between the government and commercial interests on the Net, against the interests of the Net as more traditionally understood.”\(^{210}\) Lessig further sug-

\(^{205}\) Id. at 888.
\(^{206}\) Id. at 888–89.
\(^{207}\) Id. at 889.
\(^{209}\) INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE (1995) [hereinafter WHITE PAPER]. For a description of the WHITE PAPER, see Lessig, supra note 202, at 889 n.62.
\(^{210}\) Lessig, supra note 202, at 892–93. Lessig explains his views further:

> The divide is not between regulation and no regulation, the divide is between a Net where regulation as zoning is facilitated and a Net where it is not. The question this should raise is not the narrow question of smut on the Net, but the broader question of whether government has this power to domesticate the Net. The question we should be asking is not whether the First Amendment bars this one dimension of zoning; the real question should be whether cyberspace should be free of these zonings of real space.

Id. at 893.
gests technological fixes, which would make it both physically and constitutionally possible to zone cyberspace.211

Questions about the technological options for zoning cyberspace—or other technologies to block access to adult sites by minors, including but not limited to cigar Web sites—would be best considered by an administrative agency with the capacity to consider relevant factors and to change rules relatively quickly in the constantly evolving Internet environment. For those reasons, the Internet presents lawmakers with the classic situation, where responses can be proactive, with which regulatory agencies—as opposed to legislatures or courts—are best suited to deal.212 Indeed, in striking down provisions of the CDA that limited Internet content and distinguishing it from FCC v. Pacifica,213 the United States Supreme Court noted, inter alia, that the statute’s “broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet.”214

Developing and enforcing sound regulations for the Internet will require the active participation of experts in the Internet business as well as the industries affected by Internet regulation, such as the cigar industry. A government agency with Internet technical expertise might be the best candidate to develop and enforce youth access restrictions online;215 such an agency would also be able to fine-tune the scope of the regulated community. For example, any business or individual who economically benefits from cigar promotion on the Internet (manufacturers, retailers, wholesalers, advertisers, and potentially even dues-paying associations of cigar smokers) should be

211. See id. at 892–94. Among such fixes Lessig proposed a chip, analogous to the V-chip for television, which distinguishes content as a means to zone the Internet. See id. “And while the constitutional question here will be quite complex, at least to the extent that such a system is seen as a 'truth in labeling' law, I don't believe it will raise any substantial constitutional concerns.” Id. at 894.

212. Courts have shown a growing willingness to defer decisions on policy matters and statutory interpretation to administrative agencies. See, e.g., Chevron, U.S.A., Inc. v. National Resources Defense Counsel, 467 U.S. 837, 864–66 (1984); see also Susan K. Golpen, Judicial Deference to Administrative Agencies’ Legal Interpretations after Lechmere, Inc. v. NLRB, 68 WASH. L. REV. 207, 207 (1993) (explaining there are three principle reasons for the prevalence of such judicial deference: agency expertise, agency flexibility, and political accountability).


215. Its charge may not be limited to restricting cigar (tobacco) advertising.
covered by regulations designed to block minors' access to cigar sales, advertising, or promotion sites.216

However, given the vast, uncharted territory an Internet agency would face, the creation of a new federal agency—even one simply charged with applying existing laws to and designing new laws for the Internet—might not be an ideal solution. Considering both the time and political will necessary to establish such an agency, as well as the many competing demands with which the agency would likely be charged, this approach will not likely be a speedy solution to regulating cigar advertising on the Internet.

E. Recent Federal Legislative Activity

1. 1997 Proposed National Tobacco Settlement Bills

Several bills have recently been introduced into Congress seeking to limit or even prohibit the advertisement and sale of tobacco products on the Internet. A total ban on Internet advertising of tobacco products217 was featured in the 1997 proposed national settlement of the lawsuits brought by the states' attorneys general against the tobacco industry.218 Congress ultimately rejected the settlement, proposing numerous changes to federal law and granting the tobacco industry immunity, primarily because the industry withdrew its support and instead actively campaigned against federal legislation.219 Later, in November 1998, the states reached an industry-led settlement which was a significantly scaled down version of the 1997 proposed settlement, and failed altogether to address Internet advertising.220 Although the 1997 proposed settlement and various legislative attempts to implement it were ultimately defeated, a brief discussion of the approaches to establishing a ban on Internet tobacco advertisements is instructive.

216. While we would leave the details to the administrative agency, our proposed regulatory scheme would not reach adults who sell cigars over the Internet exclusively to adults or who discuss their use or enjoyment of cigars with other adults online.

217. This section of the proposed settlement did not define the term "tobacco products." However, it is unlikely that the drafter intended to include cigars, which were not part of the litigation underlying the settlement. See discussion of the bills purporting to implement the 1997 proposed settlement, supra note 190.


219. See Kelder, supra note 184, at 7 (describing $40 million campaign waged to destroy settlement bills).


On November 7, 1997, several months after the proposed national settlement was announced, Senator John McCain introduced Senate Bill 1415. \(^{221}\) McCain's bill "sought, in part, to embody many aspects of the proposed national settlement [of smoking-related lawsuits] in the form of the [c]ongressional legislation necessary to give it the force of law." \(^{222}\) Although failing to encompass most cigar products,\(^{223}\) the activity surrounding Senate Bill 1415 evinced a serious congressional effort to ban tobacco-related advertisements on the Internet.

Senate Bill 1415 would have forced the tobacco industry to advertise on Web sites that are inaccessible to minors. In exchange for immunity from certain suits, Senate Bill 1415 also required members of the tobacco industry who were parties to the settlement to enter into a marketing protocol, providing specific rules and directions for acceptable forms of promotion and sale of tobacco products. \(^{224}\) The protocol provided, in part:

No tobacco product [of a member of the protocol] will be sold or distributed in the United States unless advertising . . . do[es] not appear on the international computer network of both federal and non-federal interoperable packet switches data networks (the "Internet"), unless such advertising is designed to be inaccessible in or from the United States to all individuals under the age of 18 years. \(^{225}\)

Other 1997 national settlement legislation contained similar bans on Internet advertisements as part of their protocols. \(^{226}\)

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\(^{221}\) S. 1415, 105th Cong. (1997).

\(^{222}\) Kelder, supra note 184, at 5.

\(^{223}\) See S. 1415, 105th Cong. § 6(7) (1997) (defining tobacco products subject to regulation under the bill as "cigarettes, cigarette tobacco, smokeless tobacco, little cigars, roll-your-own tobacco, and fine cut").

\(^{224}\) See id. § 1401(a).

\(^{225}\) Id. § 1404(a)(1)(F).

\(^{226}\) See S. 1530, 105th Cong. §§ 201(a), 212(c) (1997) (providing to be eligible to enjoy protection from liability from suit, participating manufacturers must enter into a protocol with the United States Attorney General, the governor of each state, and others, which, in part, shall state "[n]o manufacturer, distributor, or retailer may use the Internet to advertise tobacco products unless such advertisement is inaccessible in or from the United States"); see also S. 1638, 105th Cong. §§ 721, 726 (1998) (mandating eligibility for suit protection is contingent upon entering into a contract with United States Attorney General, state attorneys general, the FTC, and other relevant parties regarding advertising protocol, which must include a complete ban on Internet advertisements accessible in or from the United States); id. at §§ 721(a), 726(c) (requiring manufacturers to enter into protocol, which, in part, bars advertising on the Internet that is accessible in or from the United States, in order to receive protection from some suits); S. 1414, 105th Cong. §§ 101(c), 156(a)(1) (1997) (mandating ban on Internet advertising, which the Secretary of Health and Human Services may assess penalties for non-compliance).
With access to the lucrative United States market as a reward, the protocol would have been a catalyst for developing reliable age-verification technology for almost all e-tobacconists. Furthermore, because geographic location does not restrict data traveling the Internet, other countries would have benefited from the effects of the protocol, inasmuch as foreign e-tobacconists and manufacturers who also wanted to sell in the United States.\textsuperscript{227} Under this clause of the protocol, manufacturers or importers would have had two options to maintain their access to the United States market. First, they could have developed reliable age-verification technology and required any person selling their product on the Internet to use this technology. Second, they could have prohibited any retailer from advertising on the Internet, an option few manufacturers or importers were likely to have supported.

The apparent willingness of the tobacco industry to submit to a ban on Internet advertising, by entering into the Proposed Resolution and tolerating potential enactment of comprehensive federal legislation, may not have been entirely based on a desire for protection from lawsuits. Questions arose during the debate on the merits of the proposed 1997 settlement about whether the tobacco industry and other interested parties, including Internet vendors, could subsequently object to marketing restrictions contained in the protocols on First Amendment grounds.\textsuperscript{228} Some members of Congress apparently felt that by obtaining the consent of certain members of the tobacco industry to adhere the protocol, the legislation's marketing restraints would go unchallenged under the First Amendment.\textsuperscript{229} This belief was and remains flawed for at least two reasons. First, even after consenting, the tobacco industry could subsequently attack the protocol under the "unconstitutional conditions" doctrine.\textsuperscript{230} The

\textsuperscript{227} The majority of the bills empowered various protocol members to enforce bans on Internet advertising. Senate Bill 1530, introduced by Senator Hatch, authorized the Attorney General of the United States, see S. 1530, 105th Cong. § 231(a) (1997), state attorneys general after serving notice to the United States Attorney General and waiting a certain period, see id. § 232, and even participating manufacturers, see id. § 233, to enforce the protocol. Senate Bill 1638, introduced by Senator Conrad, allowed any person to enforce the protocol, regardless of membership in the protocol. See S. 1638, 105th Cong. § 733(b) (1998).


\textsuperscript{229} See id. at 171.

\textsuperscript{230} See id. at 171–72. The unconstitutional doctrine posits that agreements to submit to unconstitutional restraints may not be premised on certain conditions. See Speiser v. Randall, 357 U.S. 513, 518–19 (1958). This doctrine has been called into question. See, e.g.,
second and more important flaw stems from the limited breadth of the protocol as a consent decree. It is well settled law that any interested party may collaterally attack the constitutionality of a consent decree. Thus, Internet vendors and the like could have attacked the protocol's marketing restrictions under the First Amendment even if other members of the industry, such as manufacturers, accepted the agreement.

Even assuming the protocol mechanism was selected to avoid or mitigate First Amendment concerns, it also had enforcement limits. Senate Bill 1415, as well as the other 1997 national settlement bills, only extended to signatories to the protocol. Manufacturers of tobacco products who were not members of the marketing protocols—most notably cigar manufacturers—could have continued to advertise their products on the Internet.

Despite the limited breadth of the marketing protocols contained in the 1997 settlement legislation, a future Congress would be well served by using the preconditioning requirement, limiting Internet advertisements that sell products in United States markets. Precondition language transfers the enforcement responsibility to the party who has the greatest financial stake in placing tobacco products into United States commerce. If a future Congress applied precondition language to all cigar products, such action would quickly stem the flood of online cigar advertisements until proper age-verification technology could be developed.

2. Senate Bill 2125 and Related Federal Bills of the 106th Congress

Several cigar control bills were introduced to Congress in the wake of the 1999 FTC report on cigar sales and consumption. The bills reveal insights regarding how Congress may act in the future to regulate cigar advertisements and sales over the Internet.

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Rust v. Sullivan, 500 U.S. 173 (1991) (denying claim that Government coerces agreement by offering benefit that can be accepted or declined).

231. See 1997 Global Settlement Hearings, supra note 228, at 171 (citing Martin v. Wilks, 490 U.S. 755 (1989)).

232. See id.


Senate Bill 2125,\textsuperscript{235} which is intended to replace the Federal Cigarette Labeling and Advertising Act\textsuperscript{236} and the Comprehensive Smokeless Tobacco Health Education Act,\textsuperscript{237} contains the most extensive warning requirements of all cigar control bills. \textsuperscript{238} Senate Bill 2125 provides: "It shall be unlawful for any manufacturer, packager, importer, distributor, or retailer of . . . cigars . . . to advertise or cause to be advertised within the United States any such product unless its advertising bears" the prescribed warnings.\textsuperscript{239} In accordance with strict formatting requirements, the warnings are mandatory on almost every conceivable cigar advertisement, including "all . . . written . . . material used for promoting the sale or consumption of tobacco products to consumers, and advertising at an Internet site."\textsuperscript{240} The phrase "advertising at an Internet site" is not defined, which leaves open the question of whether one could sell cigars through a Web site without being subject to the bill's advertising requirements. Furthermore, Senate Bill 2125 expands the present FCC ban on tobacco product advertisement "on any medium of electronic communications subject to the jurisdiction of the [FCC]" to include cigar advertisements.\textsuperscript{241} Based on the FCC's broad jurisdiction over the Internet, such a ban would exclude any cigar advertisements on the Internet. These contradictory provisions suggest that either Senate Bill 2125 is intended to limit the FCC's jurisdiction over the Internet—a bold move in light of the FCC's statutory mandate—or to draw a distinction between advertising and selling cigars on the Internet.

Senate Bill 2125 also provides the most extensive enforcement mechanisms of the cigar control bills. The bill grants authority to nonprofit organizations that specialize in tobacco control "to sue any manufacturer, packager, importer, distributor, or retailer of . . . cigars to enforce compliance."\textsuperscript{242} If the nonprofit organization "substantially prevails," it may recover reasonable attorney fees at the discretion of the court.\textsuperscript{243} Alternatively, Senate Bill 2125 directs the Secretary of

\begin{itemize}
  \item \textsuperscript{235} S. 2125, 106th Cong. (2000).
  \item \textsuperscript{236} 15 U.S.C. §§ 1331-1340 (1994).
  \item \textsuperscript{238} See S. 2125 § 4(a), 106th Cong. (2000).
  \item \textsuperscript{239} Id. § 4(a)-(b). The warnings state: "WARNING: Cigar smoke causes mouth cancer. WARNING: Cigar smoke causes throat cancer. WARNING: Cigar smoke causes lung cancer. WARNING: Cigars are not a safe alternative to cigarettes. WARNING: Cigar smoke can harm your children." Id. § 4(a)(1)(B).
  \item \textsuperscript{240} Id. § 2(1).
  \item \textsuperscript{241} Id. § 4(d).
  \item \textsuperscript{242} Id. § 7(b)(2).
  \item \textsuperscript{243} See id. § 7(b)(1).
\end{itemize}
Human Health and Services to monitor compliance and recommend enforcement actions to the Attorney General when necessary.  Civil penalties, of up to $100,000 per day, are available, but only the Attorney General may enforce this sanction.

Senate Bill 1421 and House Bill 2579 also introduced in the 106th Congressional Session, impose the greatest restriction on Internet advertising and sales of cigars. Both bills would prohibit the advertisement of cigars on “any medium of electronic communications subject to the jurisdiction of the [FCC].” Additionally, both bills provide that “a cigar retailer may sell cigars to the ultimate consumer only in a direct, face-to-face exchange.” These bills suggest that at least some members of Congress equate Internet sales of cigars with vending machines and self-service displays, which are notorious for the distribution of cigarettes to underage smokers. The lack of adequate age-verification technology described in Part I supports this belief.

The federal government, while best equipped to confront the Internet media campaign launched by the cigar industry, has been vulnerable to the tobacco industry lobby. Past efforts by the FTC and FCC to pass tobacco control rules have been thwarted by this lobby. Based on the strength of the tobacco lobby at the federal level, citizens can turn to state lawmakers to protect children from cigar (and other tobacco product) advertising on the Internet, but not without serious constitutional roadblocks.

III. State Restrictions on Internet Cigar Advertising

In the absence of federal regulation of Internet cigar advertisements and sales, states might consider imposing their own restrictions. Some of the Internet’s unique features suggest state and local regulations of such advertisements might be particularly vulnerable to legal

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244. See id. § 7(a)(3)-(4).
245. See id. § 7(c).
248. S. 1421 § 3(b)(2); H.R. 2579 § 3(c)(2).
249. S. 1421 § 3(a)(3); H.R. 2579 § 3(a)(3).
250. See S. 1421 § 3(a)(3); H.R. 2579 § 3(a)(3).
252. See id.
challenge under the Commerce Clause.\textsuperscript{253} State regulation of Internet sales, however, appears to avoid many of the Commerce Clause concerns that plague state advertising restrictions.\textsuperscript{254}

Part A of this section considers a state’s ability to regulate advertising on the Internet, concluding that the Commerce Clause has, and likely will, prohibit any attempt to do so. A recent First Circuit Court of Appeals decision\textsuperscript{255} illustrates how courts might view state and local attempts to restrict Internet tobacco advertising. That decision invalidated state cigar warning regulations, in part, because the court concluded that the warnings were required to appear on Internet advertisements. Part B of this section briefly examines the viability of state regulation of Internet cigar sales. Finally, this section concludes that courts would likely uphold the extension of the traditional role of a state in regulating the distribution of tobacco products to include cigar (and other tobacco product) sales over the Internet. Additionally, any state’s role in regulating tobacco sales on the Internet merits further analysis.

A. Commerce Clause Limits on State Regulation of the Internet

1. Commerce Clause Tests

The Federal Government’s authority “to regulate Commerce . . . among the several States”\textsuperscript{256} under the Commerce Clause of the United States Constitution casts a broad shadow under which individual states may not tread.\textsuperscript{257} Nevertheless, the Commerce Clause allows some leeway for states to protect their citizenry through consumer protection laws.\textsuperscript{258} The Supreme Court has developed three tests to review Commerce Clause challenges to state regulation.

The first test addresses state legislation that facially discriminates against interstate commerce, or legislation motivated by a discriminatory purpose.\textsuperscript{259} In such cases, courts will strictly scrutinize the law.\textsuperscript{260}

\begin{itemize}
\item \textsuperscript{253} U.S. Const. art. I, § 8, cl. 3.
\item \textsuperscript{254} First Amendment concerns, which would also arise through state or local regulation, are addressed infra Part IV.
\item \textsuperscript{255} See Consolidated Cigar Corp. v. Reilly, 218 F.3d 30 (1st Cir. 2000).
\item \textsuperscript{256} U.S. Const. art. I, § 8, cl. 3.
\item \textsuperscript{257} See Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 290 (1921) (noting the Commerce Clause impliedly prohibits state regulation of interstate activity, which often includes activity not directly related to the movement of commercial goods among states).
\item \textsuperscript{258} See Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443–44 (1960) (noting the Commerce Clause was not intended to prohibit states from regulating in areas relating to “the health, life, and safety of their citizens” even though such regulations may affect interstate commerce).
\item \textsuperscript{259} See, \textit{e.g.}, City of Philadelphia v. New Jersey, 437 U.S. 617, 628–29 (1978).
\end{itemize}
usually invalidating the law as a per se violation of the Commerce Clause.\textsuperscript{261} To determine whether to apply the per se rule under the so-called \textit{Pike} test,\textsuperscript{262} courts initially ask whether the state law is "basically [an economic] protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."\textsuperscript{263}

The second Commerce Clause test is applied when a state law "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on inter-state commerce are only incidental."\textsuperscript{264} In such cases, the state law "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."\textsuperscript{265} This comparison is not static. "[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."\textsuperscript{266}

The third Commerce Clause test, developed in \textit{Southern Pacific Co. v. Arizona}\textsuperscript{267} and rarely invoked,\textsuperscript{268} seeks to identify "phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority."\textsuperscript{269} This test only applies "when a lack of national uniformity would impede the flow of interstate goods."\textsuperscript{270} The test focuses more on the type of commerce rather than on the particular state law. Even

\textsuperscript{260} See Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) (noting that the "strictest scrutiny" shall apply to review discriminatory state laws).
\textsuperscript{261} See City of Philadelphia, 437 U.S. at 624.
\textsuperscript{263} City of Philadelphia, 437 U.S. at 624. The United States Supreme Court identified protectionist measures as laws that "discriminat[e] against articles of commerce coming from outside the State" which are no different from articles in-state except for their origin.\textsuperscript{Id.} at 626–27. There is a narrow exception to the per se rule. The Supreme Court has allowed protectionist laws to stand based on the "noxious" character of an article in commerce.\textsuperscript{See id.} at 628–29. An article of commerce is noxious if "[its] very movement endangers health."\textsuperscript{Id.} at 629.
\textsuperscript{264} Pike, 397 U.S. at 142. The Supreme Court has chosen not to draw a clear distinction between when this test applies, and when the stricter per se rule applies. See Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 578–79 (1986).
\textsuperscript{265} Pike, 397 U.S. at 142.
\textsuperscript{266} Id.
\textsuperscript{267} 325 U.S. 761, 767 (1945).
\textsuperscript{268} See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 128 (1978) (finding that "rarely" does the Commerce Clause preempt an entire field from state regulation).
\textsuperscript{269} Southern Pacific, 325 U.S. at 767.
\textsuperscript{270} Exxon, 437 U.S. at 128. The Supreme Court has used this test to strike down a state law regarding the amount of cars in a train, see Southern Pacific, 325 U.S. at 761, and the contours of mudguards on trucks, see Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).
if one type of commerce is arguably more deserving of a national regulatory scheme, state laws that vary little from a national trend can withstand Commerce Clause review under this test because national uniformity substantially exists. 271

In one of the first applications of dormant Commerce Clause doctrine to the Internet, a federal district court found that a New York state law criminalizing the use of a computer to disseminate obscene material to minors failed all three Commerce Clause tests, in American Libraries Ass’n v. Pataki. 272 First, the court held that the per se rule applied because New York’s regulation of the Internet directly interfered with interstate commerce, despite the dearth of any economic protectionism in the legislative means or end. 273 In what is best described as a broad reading of the per se rule, the court found that New York directly imposed its domestic policies on other states based on the extra-territorial nature of the Internet. 274

In applying the second test, the district court said that “the burdens [New York’s law] impose[d] on interstate commerce are excessive in relation to the local benefits it confers.” 275 The court found that New York’s law “chilled” art and commerce on the Internet because users might be afraid of prosecution and because the costs of compliance were excessive. 276 Furthermore, the district court held that the local benefits were not “overwhelming” because nearly half the Internet communications originate from outside the United States, and because New York would have difficulty enforcing the law. 277

272. 969 F. Supp. 160, 169 (S.D.N.Y. 1997). One year later, the Federal District Court of New Mexico addressed a challenge to a similar state law. See ACLU v. Johnson, 4 F. Supp. 2d 1029 (D.N.M. 1998). The court enjoined enforcement of a state law, following, inter alia, the same analysis employed in American Libraries. See id. at 1033.
273. See American Libraries, 969 F. Supp. at 173. The court arguably overextended application of the per se rule in this case. The New York law had no preference for in-state Internet users either in the law’s legislative means or ends. See id. at 171. Moreover, the law had no economic underpinnings. See id. at 172. To apply jurisprudence which is traditionally based on economic protectionism is questionable.
274. See id. at 174–75. The court relied on Edgar v. MITE Corp., 457 U.S. 624, 641–43 (1982), in which a plurality applied the per se rule and the Pike test to find Illinois violated the Commerce Clause. See Edgar, 457 U.S. at 640. The state law in question regulated tender offers for securities of a corporation in which Illinois citizens had some vested interest, a distinctly economic article of commerce. See id. at 642.
276. See id. at 179–80.
277. See id. at 178–79.
Finally, the court in *American Libraries* invalidated New York's law based on the third Commerce Clause test developed in *Southern Pacific*. The district court viewed the Internet as analogous to national railway and highway infrastructures, and thus reasoned it warranted a "cohesive national scheme of regulation." The court went on to find that "even were all 50 states to enact laws that were verbatim copies of the New York Act, Internet users would still be subject to discordant responsibilities" based on the lack of a clear definition of "obscene" and other similar terms likely to be employed in such laws.

However, in at least one instance, the application of state consumer protection laws to the Internet survived a Commerce Clause legal challenge. Upholding charges of fraud brought against a local Internet user, a New York state court, in *New York v. Lipsitz*, noted that, despite the national nature of the Internet, the state consumer law was "not . . . aimed at regulating conduct outside [the state's] borders," because the law only targeted users who posted Internet material while in the state of New York.

2. Internet Cigar Advertising Regulations in Massachusetts

In *Consolidated Cigar Corp. v. Reilly*, the First Circuit Court of Appeals recently considered the constitutionality of regulation of cigar advertising on the Internet, in a case challenging a series of tobacco regulations promulgated by the Attorney General for the Commonwealth of Massachusetts. At trial, the district court was asked to rule, *inter alia*, on the validity of state-based cigar warning requirements on cigar advertising.

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278. *See id.* at 177.
279. *Id.* at 182.
280. *Id.*
283. *Id.* at 475. At least one commentator has also observed that state consumer protection laws have not been viewed as triggering dormant Commerce Clause problems. *See* Bruce Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 579 PLI/ Pat 227, 255 (Nov.-Dec. 1999).
286. *Id.* at 183. The relevant portion of the regulations provided: "It shall be an unfair or deceptive act or practice for any person to advertise or cause to be advertised within Massachusetts any cigar or little cigar unless the advertising bears one of the warning statements . . . rotated in accordance with" these regulations. *Mass. Regs. Code* tit. 940, § 22.05(1) (2000). The regulations broadly defined advertising as "any oral, written,
In the underlying case of *Lorillard Tobacco Co. v. Reilly*, the district court focused primarily on the Commerce Clause in examining the validity and scope of the warning requirements. While the lower court upheld the basic warning requirements for cigar advertising, it specifically exempted cigar advertising on the Internet and in national magazines. In fact, during oral argument, the Massachusetts Attorney General acknowledged "the uncertainty of the application of the Regulations to the Internet." Later, the Commonwealth attempted to persuade the district court that while the general warnings applied to Internet cigar ads, the regulations specifying size and format requirements did not.

Noting that this interpretation was not part of the formal rule-making process, the district court interpreted the warning regulations narrowly to avoid applying them to Internet advertising. Although it upheld the advertising warnings, the lower court was clearly concerned about the practical and legal problems raised by state regulation of Internet-based advertising. According to the court, "Internet-based advertising is targeted at no state in particular, but at all states in general."

In *Consolidated Cigar*, the First Circuit rejected the lower court’s approach and found that the advertising warning regulation was “not fairly susceptible to the narrowing construction.” Refusing to impute exceptions for the Internet or national magazines, the appellate court concluded that the Massachusetts cigar advertising warnings

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Cigar packaging was also subject to warning requirements. See id. § 22.04. The appellate court overturned these warning requirements on Commerce Clause grounds. See *Consolidated Cigar*, 218 F.3d at 57.


288. See id. at 198-204; *Consolidated Cigar*, 218 F.3d at 55-58. Both the lower and appellate courts ruled that the warning requirements passed muster under the First Amendment. See *Lorillard*, 84 F. Supp. 2d at 196-98; *Consolidated Cigar*, 218 F.3d at 54-55. Notably, the First Circuit found that all of the tobacco regulations, including, *inter alia*, those restricting the location of outdoor cigar advertising and height of indoor cigar advertising, satisfied the First Amendment. See *Consolidated Cigar*, 218 F.3d at 54-55.

289. See *Lorillard*, 84 F. Supp. 2d at 204.

290. Id. at 203 (citing Transcript of Hearing on Motions for Summary Judgment at 11 (Dec. 2, 1999)).

291. See id. (citing Letter from the Attorney General’s Office to Young, C.J. at 2 (Dec. 23, 1999)).

292. See id. at 204.

293. Id. at 203.

duly burdened interstate commerce. The court found under the *Pike* test that the burden on interstate commerce was “clearly excessive” in relation to the legitimate goal of informing Massachusetts consumers of the deleterious health effects of cigar smoking.

B. State Regulation of Tobacco Sales on the Internet

To date, Massachusetts appears to be the only state that has flirted with regulating cigar advertising on the Internet. Other states, however, are trying to curtail sales of tobacco products to minors over the Internet.

Rhode Island recently enacted legislation intended to reduce young people’s ability to purchase tobacco products, including cigars, via the Internet. This legislation places the burden on the Internet retailer to establish that its tobacco customers are of legal age. Prior to shipping any tobacco product into Rhode Island, an Internet retailer must verify that the customer is at least eighteen years of age, through attaining and attesting that the customer’s photo identification correctly identifies the purchaser and provides his or her address. In addition, the Internet retailer must deliver the tobacco product by a postal or package delivery service which either limits delivery to that purchaser, requiring that he or she provide a signature personally to receive the delivery, or which requires an adult signature at the purchaser’s address to receive the package.

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295. *See id.* at 55–56 (quoting the lower court’s reasoning, in creating exceptions for Internet and national magazine advertising, in support of its conclusion that that the state’s interest in informing consumers of the health risk of cigar smoking is outweighed by the burden placed on interstate commerce).

296. *See id.*

297. In addition to the state legislation discussed herein, the Washington State Liquor Control Board has used its enforcement authority to issue a “cease and desist” order to several tobacco manufacturers and retailers requiring them to stop selling cigarettes, bidis, and other tobacco products to minors over the Internet in the State of Washington. *See Ziggy’s Order, supra* note 57, at 1. The cease and desist order arose after several minors, who were apparently participating in a sting operation, ordered and obtained cartons of bidis over the Internet. *See id.* at 1–2. Four of the five minors were not asked to provide any age-related information. *See id.* at 2. One teenaged purchaser was asked her age when she placed the online order, but not her date of birth. *See id.* The bidis ordered by the minors were all flavored products, some of which were ordered from a cigar manufacturer and a cigar retailer (for example, Uptown Cigar Co. and Calabash Habana Cigar Café). *See id.* For further discussion of the ease with which minors obtain cigars online, see *supra* Part I.


299. *See id.*

300. *See id.*

301. *See id.*
The New York legislature recently approved an act that requires shippers to deliver Internet cigarette purchases to a licensed cigarette retailer.\footnote{See S. 8177, 23rd Leg. § 2 (N.Y. 1999).} New York Governor George Pataki is expected to sign the bill in the fall of 2000.\footnote{See James M. Odato, Cigarette Bill Opposition Growing, THE TIMES UNION, July 17, 2000, at A1.} Under this law, a customer would be required to present a valid photo identification and pay the state cigarette tax to the retailer in order to receive tobacco products purchased over the Internet.\footnote{See S. 8177, 23rd Leg. §§ 1–2 (N.Y. 1999).} This legislation is intended to both reduce the number of minors purchasing tobacco over the Internet, and ensure that individuals purchasing tobacco products via the Internet pay the state cigarette tax.\footnote{See Regulating Cyber-Smokes, THE BUFFALO NEWS, July 4, 2000, at 2B.} Interestingly, the New York regulation places liability for non-compliance on both the shipper and the retailer.\footnote{See S. 8177, 23rd Leg. § 2 (N.Y. 1999).} Problems arise, however, from the extension of liability to the shipping agent.\footnote{See Agnes Palazzetti, Battle Shifts Over Cigarette Sales on Internet, THE BUFFALO NEWS, June 30, 2000, at 1C, 6C; see also Odato, supra note 303, at A1; Regulating Cyber-Smokes, supra note 305, at 2B.} The carrier liability provision is weakened because the state cannot regulate deliveries by the United States Postal Service.\footnote{See Palazzetti, supra note 307, at 6C; Odato, supra note 303, at A1.} This loophole effectively negates the effect of the carrier liability provisions of the legislation.\footnote{See Palazzetti, supra note 307, at 1C; Odato, supra note 303, at A1.} Further, it is expected that Federal Express, United Parcel Service, and the New York State Motor Truck Association will challenge the legality of the carrier provisions on grounds of state interference with interstate commerce as well as the creation of an unfair competitive advantage.\footnote{See Odato, supra note 303, at A1.} Fortunately, New York legislators had the foresight to include a severability clause in this act.\footnote{See S. 8177, 23rd Leg. § 12 (N.Y. 1999).} Thus, if the courts were to strike down the carrier liability provisions, the Internet retailer liability provisions would still stand.\footnote{See id.}
In order to prevent the purchase of tobacco products by minors, it is undoubtedly more effective to require a purchaser to present his or her identification to a retailer in person, than to allow the purchaser to send a scanned copy over the Internet. States adopting Internet tobacco sales laws should therefore require any individual purchasing tobacco products via the Internet to present a valid photo identification at a licensed tobacco retailer in order to receive his or her purchases. Carrier liability provisions would be highly ineffective, considering states cannot regulate the United States Postal Service (and such provisions are prone to legal attack by non-government parcel carriers). Thus, states should not include carrier liability provisions in such legislation. Rather, Internet retailers should be required to ship tobacco products purchased over the Internet to licensed retailers, which have adequate safeguards to ensure that minors are not receiving these products.

State regulation of the sale of cigars on the Internet avoids Commerce Clause concerns surrounding state regulation of advertisements. Unlike merely posting an advertisement on the Web, completing a sale entails the gathering of personal information about the purchaser, such as his or her age or residence. A purchaser’s residence is particularly important because it identifies the exact state, county, and town for which the retailer should determine the applicable consumer protection laws, regulations, and ordinances. In the case of cigar sales over the Internet, a municipality or its board of health could merely restrict all tobacco sales to direct, face-to-face exchanges. Thus, Internet sales of tobacco products in that municipality would be prohibited.

Applying the *Pike* balancing test, the burden on national tobacco sales over the Internet would not seem to outweigh the local benefits. Restricting the sale of tobacco products to direct, face-to-face exchanges would benefit the local interest of reducing youth access to tobacco products. Equipped with a database of local tobacco control laws, retailers could easily identify whether they should complete a sale after they identify their customer’s residence. The tobacco retailer is no longer burdened with not knowing when and to which specific consumer protection laws it should adhere.

IV. **First Amendment Barriers to Restricting Cigar Advertising on the Internet**

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech"
While the framers of the Constitution probably did not foresee that an explosion of communications technology would create a myriad of new forms of speech, they clearly intended the freedom of speech to endure.

The right to free speech is not absolute. Some forms of speech, including obscenity, child pornography, libel, and "fighting words," are not entitled to protection under the First Amendment. Even when speech is clearly sheltered by the First Amendment, a government restriction on speech will not necessarily fail if legally challenged. The outcome of a First Amendment challenge often depends on which standard of review the court applies, generally determined by the type of speech restriction in dispute. A thorough analysis of the various rules courts use to review speech restrictions is beyond the scope of this article. For our purposes, examining the

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313. U.S. CONST. amend. I. The First Amendment applies to all branches of the federal and state governments via the Due Process Clause of the Fourteenth Amendment, as well as to Congress. See Gitlow v. New York, 268 U.S. 652, 664–66 (1925). The full text of the First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

314. See Frohwerk v. United States, 249 U.S. 204, 206 (1919) (holding that the First Amendment "obviously was not intended to give immunity for every possible use of language").

315. See Miller v. California, 413 U.S. 15, 24 (1973) (defining speech as obscene and unprotected by the First Amendment when it: (1) appeals to the prurient interest according to community standards; (2) describes sexual conduct in a patently offensive way; and (3) lacks serious literary, artistic, political, or scientific value).


320. For an overview of the complex array of issues raised by judicial review of speech under the First Amendment, see LAURENCE H. TRIBE, Rights of Communication and Expression, in AMERICAN CONSTITUTIONAL LAW 576–736 (2d ed. 1988). There are many analytical distinctions beyond the commercial versus political standards. For example, a speech restriction which is content neutral, but limits the time, place, or manner of protected speech is subject to a different standard of review. See, e.g., Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding a ban on sound trucks); Frisby v. Schultz, 487 U.S. 474, 480 (1988) (upholding a ban on picketing in front of certain residences). Such restrictions on time, place, and manner must further a significant government interest through a narrowly tailored means. See Frisby, 487 U.S. at 484–88. The time, place, and manner doctrine, however, is not applicable to restrictions on tobacco advertising. Cf. Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore, 63 F.3d 1318 (4th Cir. 1995), modified and adhered to, 101 F.3d 332 (4th Cir. 1996) wherein the Fourth Circuit treated outdoor tobacco advertising regulations as a location instead of a message limit for preemption (but not First Amendment) purposes. See discussion infra pages 49.
distinction between commercial speech and political or artistic speech will suffice.

A. Commercial Versus Political Speech

Generally, advertising restrictions are not subject to strict scrutiny. Rather, courts apply the less rigorous standard of review for commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission.* Under the four-part test in *Central Hudson*, the court examines whether: (1) the speech is misleading or concerns unlawful activity; (2) the government has a substantial interest in regulating the speech; (3) the restriction directly (and materially) advances the government’s interest; and (4) the regulation “is not more extensive than is necessary to serve that interest.”

The *Central Hudson* test should be applied to regulations limiting Internet tobacco advertising, insuring that a well-tailored restriction intended to deter illegal tobacco sales to minors will satisfy First Amendment concerns. This Article examines advertising restrictions on the Internet, a relatively new and unregulated electronic medium. The United States Supreme Court has also made some distinctions concerning different media in reviewing First Amendment challenges. Accordingly, it is necessary to discuss briefly some media-specific rules and a recent Supreme Court decision striking down a non-commercial Internet speech restriction.

Content restrictions on protected speech, like those challenged in *Reno*, receive the highest form of First Amendment protection. In such cases, the government must prove it has a compelling interest in limiting the speech, and that it has chosen a narrowly tailored means to achieve that goal, otherwise the restriction will be invalid. Satisfying the “narrowly tailored” requirement is extremely difficult,

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323. *Central Hudson*, 477 U.S. at 566.

324. See discussion infra Part IV.B.


327. See *Reno*, 521 U.S. at 854.
particularly if the regulation arguably sweeps too broadly.\textsuperscript{328} Indeed, speech restrictions intended to protect children are often struck down as overbroad because judges reason that they might chill protected adult speech.\textsuperscript{329}

In \textit{Reno}, the United States Supreme Court struck down provisions of the CDA, a federal law that criminalized the act of "knowingly" transmitting obscene or indecent messages to minors.\textsuperscript{330} The Court was "persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech."\textsuperscript{331} While agreeing that the goal of protecting minors from potentially harmful speech is laudable, the Court reasoned that the law would impermissibly burden speech which adults otherwise have a right to send and receive.\textsuperscript{332} Indeed, the Court cited other First Amendment cases where adult free-speech rights trumped the government's interest in protecting minors.\textsuperscript{333} However, both the result and reasoning in \textit{Reno} are easily distinguished from restrictions on youth access to cigar advertising on the Internet. As the Supreme Court recognized in \textit{Reno}:

[U]nlike the regulations upheld in \textit{Ginzberg} and \textit{Pacifica}, the scope of the CDA is not limited to commercial speech or commercial entities. Its open-ended prohibitions embrace all non-profit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors.\textsuperscript{334}

There are no First Amendment rulings on cigar (or tobacco) advertising on the Internet.\textsuperscript{335} Outdoor tobacco advertising restrictions, however, have withstood First Amendment legal challenges in two

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\textsuperscript{328} See Broadrick v. Oklahoma, 413 U.S. 601 (1973).
\textsuperscript{330} See \textit{Reno}, 521 U.S. at 858–60, 874.
\textsuperscript{331} \textit{Id.} at 874.
\textsuperscript{332} \textit{See id.}
\textsuperscript{333} First, the Court acknowledged that "we have repeatedly recognized the governmental interest in protecting children from harmful materials." \textit{Id.} at 875 n.40 (citations omitted). However, it then explained: "The Government may not 'reduce the adult population' . . . to . . . only what is fit for children." \textit{Id.} at 875 (citing Denver Area Educ. Telecomm., Inc. v. FCC, 518 U.S. 727, 759 (1996)). Reaching back to yet another First Amendment decision, the Court added: "[R]egardless of the strength of the government's interest in protecting children, '[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.'" \textit{Id.} (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74–75 (1983)) (alteration in original).
\textsuperscript{334} \textit{Id.} at 877.
\textsuperscript{335} For a discussion relating to the Massachusetts federal district court decision in \textit{Lorillard} (concluding that cigar advertising regulations, requiring health warning on cigar advertisement in Massachusetts, do not apply to Internet advertising), and the First Circuit Court of Appeals opinion in \textit{Consolidated Cigar} (reversing and concluding that the
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In the first case, *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore,* the Fourth Circuit Court of Appeals upheld a local law restricting the location of outdoor tobacco billboards under the *Central Hudson* test for commercial speech. A key challenge in the case was persuading the court that the purpose of the regulation was to thwart illegal tobacco sales to minors. Indeed, the court in *Penn Advertising* upheld the ordinance protecting children from intrusive tobacco advertising, while recognizing that the limit would also affect adults. *Penn Advertising* is distinguishable from *Reno* because, in *Penn Advertising,* only commercial speech was restricted and thus the challenged regulation was reviewed under a lower standard of review. This is the appropriate standard of review for a regulation limiting tobacco advertising on the Internet that appeals to or targets minors.

In *Lorillard,* recently upheld in *Consolidated Cigar,* the tobacco industry challenged, *inter alia,* state restrictions on cigarette, smokeless tobacco, and cigar advertising. A United States District Court in Massachusetts, applying the *Central Hudson* test, rejected the tobacco industry’s argument that the court should strictly scrutinize the tobacco regulations. The court noted that the first prong of the *Cen-

challenged warning regulations include Internet (and national magazine) cigar advertising and thus fail the *Pike Commerce Clause* test), see discussion supra Part III.A.2.

336. See *Consolidated Cigar Corp. v. Reilly,* 218 F.3d 30 (1st Cir. 2000) (upholding outdoor and indoor advertising restrictions for cigars as well as cigarettes and smokeless tobacco); see also *Penn Adver., Inc. v. Mayor of Baltimore,* 63 F.3d 1318 (4th Cir. 1995), modified and adhered to, 101 F.3d 332 (4th Cir. 1996).

One lower court struck down similar tobacco advertising regulations on both preemption and First Amendment grounds. See *Rockwood v. City of Burlington,* 21 F. Supp. 2d 411 (D. Vt. 1998); see also *Missouri Retailers Ass’n v. City of St. Louis,* No. 98CV1514 ERW (E.D. Mo. 1999) (challenging similar tobacco advertising restrictions after the ordinance was struck down because it potentially regulated noncommercial speech).

Currently, two federal courts are considering on remand whether similar outdoor tobacco advertising restrictions comport with the First Amendment. See *Federation of Adver. Indus. Representatives, Inc. v. City of Chicago,* 189 F.3d 633 (7th Cir. 1999); *Greater N.Y. Metro. Food Council, Inc. v. Giuliani,* 195 F.3d 100 (2d Cir. 1999).

337. 63 F.3d 1318 (4th Cir. 1995).

338. See *id.* at 1318.

339. See *id.* at 1321. Offering this rationale was also critical to rebutting the industry’s claim that the ordinance was preempted by the FCLAA. See *id.* at 1321–23. Ironically, because cigars have largely escaped federal regulation, FCLAA preemption does not apply to cigars. See *Consolidated Cigar Corp. v. Reilly,* 218 F.3d 30, 38 n.3 (1st Cir. 2000) (noting that “the FCLAA applies only to cigarettes” and not smokeless tobacco, or, by inference, cigars).

340. See *Penn Advertising,* 63 F.3d at 1325.


342. See *Lorillard,* 84 F. Supp. at 184–85. Specifically, the lower court rejected the tobacco companies attempt to analogize the case to *Carey v. Population Servs. Int’l,* 431 U.S.
tral Hudson test, which requires the speech be neither misleading nor concerning illegal activity, was uncontested. The nature of the government's interest—to reduce underage smoking—was also undisputed, although the industry questioned whether it was substantial enough to satisfy Central Hudson.

The district court then concluded that the state had shown that the advertising restriction "would substantially advance its interest in curtailing underage smoking." Finally, the court examined the fit between the advertising regulation and the state government's goal, and asked whether the restriction was more extensive than necessary. This inquiry did not require the speech regulation to be the least restrictive alternative available.

678 (1977), which involved advertising of contraceptives, thereby implicating the fundamental right to privacy and triggering strict scrutiny. See Lorillard, 84 F. Supp. 2d at 184–85. The court likened tobacco advertising to pornography in the first heading of its opinion:

I. CIGARETTE ADVERTISING IS FUNCTIONAL PORNOGRAPHY. The metaphor is apt. Both are entirely legal. Both are spawned by and supported by multi-billion-dollar industries generating significant economic activity. While ostensibly clucking in disapproval, millions of adult Americans support each industry with considerable cash outlays yet seek to have the government teach our children to avoid that which so many of us eagerly purchase.

Id. at 182. The comparison is particularly interesting considering the reluctance other courts have expressed to uphold restrictions on pornography (which is treated as content restriction) intended to shield children, if adult access might also be chilled. See, e.g., ACLU v. Reno, 521 U.S. 844 (1997); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989).

343. See Lorillard, 84 F. Supp. 2d at 185–86. Notably, however, the Massachusetts Attorney General did "not concede that the targeted advertising qualifies for protection, since it might be seen to induce illegal activity." Id. Commentators have also suggested that certain tobacco advertising targeting minors could be viewed as illegal activity, unprotected by the First Amendment. See Edward O. Correia, State and Local Regulation of Cigarette Advertising, 23 Notre Dame L.J. of Leg. 1, 27 (1997). To date this argument has not been pursued in litigation.

344. See Lorillard, 84 F. Supp. 2d at 186.

345. See id. The federal district court in Lorillard relied on the reasoning in Penn Advertising to reject this position. The court also rejected the industry's attempt to analogize the case to 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996), which held that Rhode Island's complete ban on price advertising for alcoholic beverages violated the First Amendment. Lorillard, 84 F. Supp. 2d at 186. The court in Lorillard noted that the Commonwealth of Massachusetts intends to "target the prevalence of an illegal activity—underage smoking—not to restrict information from reaching adult smokers or to place a 'vice' label on smoking." Id.

346. Lorillard, 84 F. Supp. 2d at 189.


348. See id. at 189 (citing Board of Trustees of the State of New York v. Fox, 492 U.S. 469, 475 (1989)); see also Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore, 63 F.3d 1318, 1323 (4th Cir. 1995), modified and adhered to, 101 F.3d 392 (4th Cir. 1996). The Massachusetts federal district court noted that the fourth prong of the Central Hudson test is
Rather, the court essentially asked whether the fit was "reasonable."^349

Thus, the court in *Lorillard* examined the particulars of the challenged location restrictions. It found sufficient basis to uphold the ban on outdoor tobacco advertising within 1,000 feet of specified areas where children congregate (schools and playing fields, for example), but struck down the under-five-foot height limitation for indoor advertising.\(^{350}\) On appeal, the First Circuit upheld the district court's approval of the outdoor advertising restrictions and reversed the lower court's invalidation of the indoor advertising height restrictions.\(^{351}\)

The district court equated cigars with cigarettes for First Amendment purposes and rejected the cigar manufacturers' and retailers' arguments that their products were materially different.\(^{352}\) "As this [c]ourt rules that cigars and cigarettes are indistinguishable for the purposes of First Amendment advertising protection, the *Central Hudson* analysis is the same as that for cigarettes."\(^{353}\) The appeals court, however, did not embrace the district court's approach, noting that "we have some difficulty accepting the Attorney General's suggestion that 'what is good for cigarettes is good for cigars,' at least in the First Amendment context."\(^{354}\) The First Circuit concluded, however, that the Attorney General had presented sufficient product-specific information to conclude that restricting the locations of advertising for cigarettes, smokeless tobacco, and cigars would "directly advance" the State's interests in curtailing youth tobacco use and tobacco sales to minors.\(^{355}\)

The appellate court in *Consolidated Cigar* specifically concluded that the Attorney General "sufficiently demonstrated that cigar use

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\(^{349}\) See *Lorillard*, 84 F. Supp. 2d at 189.  
\(^{350}\) See *Lorillard*, 84 F. Supp. 2d at 193. The lower court rejected indoor advertising limit (commonly known as a point of sale restriction) because the State articulated no specific rationale for the numerical height limit on indoor advertising. See *id*. By contrast, the court found the State's reliance on the FDA's finding and challenged regulation restricting outdoor advertising sufficient to support the outdoor restrictions. See *id*. at 192.  
\(^{351}\) See *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 36–37 (1st Cir. 2000).  
\(^{352}\) See *Lorillard*, 84 F. Supp. 2d at 195.  
\(^{353}\) *Id.*  
\(^{354}\) *Consolidated Cigar*, 218 F.3d at 45.  
\(^{355}\) *Id.* at 49. This was part of the court's analysis under the third prong of *Central Hudson*. 
among minors poses a real danger in Massachusetts.\textsuperscript{356} Moreover, in considering whether the cigar advertising restrictions "would alleviate the cited harms to a material degree"—another requirement under \textit{Central Hudson}—the court rejected the cigar industry's claim that its relatively low level of spending on outdoor advertising meant the regulations could not reasonably be expected to reduce in-state cigar consumption.\textsuperscript{357} "Although fewer children will be affected by cigar advertising, simply because there is much less of it, the relative lack of cigar advertising also means that the burden imposed on cigar advertisers is correspondingly small."\textsuperscript{358}

Emphasizing that Massachusetts need not choose the "least restrictive means,"\textsuperscript{359} the First Circuit, reversing the district court's findings, concluded that the fourth prong of the \textit{Central Hudson} test was satisfied for all of the tobacco product advertising regulations including indoor advertising restrictions, and did not violate the First Amendment.\textsuperscript{360} Although the First Circuit expressed some reservation about the effectiveness of the five-foot minimum height requirement for certain indoor advertising, it concluded the regulation was "within the range of reasonableness in which the Attorney General is best suited to pass judgment."\textsuperscript{361}

While the \textit{Consolidated Cigar} case involved different and arguably distinguishable advertising media, the appellate court's decision to uphold both indoor and outdoor cigar advertising restrictions under the First Amendment is a significant precedent.

\textbf{B. Media-Specific Rules}

In addition to carving out a special rule for commercial speech, the United States Supreme Court has taken a media-specific approach to speech restrictions, in particular electronic fora for communication, such as radio,\textsuperscript{362} telephone,\textsuperscript{363} and television.\textsuperscript{364} Arguably, the Internet could be analogized to, or distinguished from, one or more of these particular media and the relevant rule would be applied. If,

\begin{itemize}
  \item \textsuperscript{356} \textit{Id.} at 47.
  \item \textsuperscript{357} \textit{Id.} at 47–49.
  \item \textsuperscript{358} \textit{Id.} at 49.
  \item \textsuperscript{359} \textit{See id.} at 49–50.
  \item \textsuperscript{360} \textit{See id.} at 50.
  \item \textsuperscript{361} \textit{Id.} at 51.
  \item \textsuperscript{362} \textit{See} FCC v. Pacifica Foundation, 438 U.S. 726 (1978).
  \item \textsuperscript{363} \textit{See} Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989).
\end{itemize}
for example, the Internet was treated like a radio broadcast, a speech restriction intended to protect children might pass First Amendment scrutiny, even if it also limited adult access to speech. The Supreme Court decision concerning radio broadcast in *FCC v. Pacifica* is particularly noteworthy because it involved protected, non-commercial speech, and the government action was intended to protect children.

In *Pacifica*, the United States Supreme Court applied a lower standard of review because it viewed radio broadcasting as distinct from other communication media. The Court, in finding that the regulations did not violate the First Amendment, relied in part on radio's pervasive nature and easy access to children. These two features are also characteristics of the Internet, particularly in view of its ubiquitous presence in modern American homes and the ease with which many children navigate the World Wide Web.

While a radio listener is arguably more passive than a computer user, the two forms of media are not so far apart. A radio listener may have less control over the messages he hears than a computer user has with the content she or he sees. With, however, the increasing commercialization of the Web and the intrusiveness of unsolicited commercial messages, today's computer user may readily stumble across unwanted material while surfing the Web or even while accessing e-mail. At best, the United States Supreme Court's characterization in *Reno* of the degree of control an Internet user has over what appears on his screen may be both outdated and overly optimistic.

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365. *See Pacifica*, 438 U.S. at 732 (holding that the FCC has the power to regulate the time of an indecent radio broadcast).


367. The speech in issue was indecent but not obscene. *See id.* at 729.

368. *See id.* at 748–49.

369. *See id.* at 748.

370. *See id.* at 749.

371. The authors regularly receive solicitation messages when accessing their e-mail thorough America On Line (“AOL”). This is a relatively new, involuntary feature of AOL’s e-mail service which requires the user to take affirmative action to by-pass the commercial message before reading her incoming mail.

372. The district court's findings of fact pertaining to the Internet were made in 1996. For example, at that time the court held, in Finding No. 73, that “[d]espite its limitations, currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available.” ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996), aff'd, 521 U.S. 844 (1997). The court also expressly held, in Finding No. 88, that Internet communication does not appear by accident on computer screens. *See id.* at 844. *Cf.* CME YOUTH ACCESS REPORT, *supra* note
Although the Supreme Court declined in *Reno* to create an Internet-specific First Amendment standard,\textsuperscript{373} the nature of this relatively new media and judicial reluctance to interfere in its development were clearly at work. Furthermore, the Court has not been eager to apply *Pacifica*'s lower standard of review to other electronic media, reasoning, for example, that neither telephones\textsuperscript{374} nor televisions\textsuperscript{375} share the unique characteristics that distinguish radio broadcasts for First Amendment purposes. In *Sable Communications of California, Inc. v. FCC*,\textsuperscript{376} the Supreme Court struck down a law intended to protect children from accessing commercial “dial-a-porn” messages over the telephone.\textsuperscript{377} The Court distinguished “dial-a-porn” from the radio broadcast in *Pacifica*, reasoning that indecent telephone communications are not as pervasive or as accessible to children as radio, or even television, broadcasts might be.\textsuperscript{378}

A comparison of the three media (radio, television, and the Internet) and the degree of user control over the content viewed or heard is instructive. Internet images and messages—including those which are either commercial in nature (such as tobacco advertising) or indecent—are arguably not as invasive as the indecent radio broadcast in *Pacifica*, which caught by surprise an unsuspecting parent listening to the car radio while chauffeuring his son. However, the chance that a child might stumble upon adult material on the Internet is certainly greater than the chance a child might mistakenly dial a pornographic telephone service.

The Supreme Court’s decisions since *Pacifica* appear to be a deliberate move away from a media-driven\textsuperscript{379} First Amendment inquiry, and toward a focus primarily on the type of speech being restricted. The commercial nature of tobacco advertising on the Internet dictates

\textsuperscript{35} at 3 (concluding that stand-alone filters do not effectively block alcohol and tobacco content on the Web). See also discussion of filtering devices supra Part I.F.

\textsuperscript{373} See ACLU v. Reno, 521 U.S. 844, 867–68 (1997) (agreeing with the district court’s conclusion “that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium”; rather, the Court applied the strict scrutiny standard, viewing the CDA as a content based regulation of protected speech).

\textsuperscript{374} See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989).


\textsuperscript{376} 492 U.S. 115 (1989).

\textsuperscript{377} See Sable, 492 U.S. at 127–28.

\textsuperscript{378} See id.

\textsuperscript{379} The predictable application of a media-specific rules to speech restrictions is also complicated by the developing convergence of the Internet (which involves computer and telephone lines) with television and radio. See Eric Schmuckler, *The Bandwidth Blues*, *Forbes*, May 22, 2000, at 32; see also discussion supra Part I.
that the *Central Hudson* intermediate standard of review would apply to online cigar advertising. Strict scrutiny would not apply simply because tobacco promotional material appears on the Internet instead of a billboard.\(^{380}\)

**Conclusion**

Cigar consumption among the young, and the ubiquitous nature of Internet cigar promotion, suggests that cigar advertising restrictions could be an important public health tool. Currently, cigar advertising on the Internet, as with virtually all forms of Internet advertising, is unregulated.

Two federal agencies, the FTC and FCC, potentially have the legal authority to limit cigar advertising on the Internet. Recently, the FTC considered proposed Consent Orders which, if accepted, would require seven major cigar manufacturers to carry health warnings on certain cigar packages and advertising. The warning requirement, however, would only extend to Internet cigar advertising of the seven respondent companies.

Extending the FCC's statutory ban on electronic tobacco advertising to encompass all cigar products, as the FTC recommended in its 1999 cigar report to Congress, would be the most efficient tool for banning cigar advertising on the Internet. Indeed, a commitment to enforce an expanded ban could eliminate most tobacco advertising on the Internet.

A newly reconstituted FDA or the creation of a new Internet federal agency are other possibilities, both of which would require new legislation. State and local regulation of Internet tobacco advertising, while not impossible, also presents significant legal obstacles. A federal approach appears to be preferable.

Any attempt to regulate Internet cigar advertising will probably be subject to a First Amendment challenge. However, a carefully targeted approach restricting youth access to cigar advertising could satisfy the First Amendment requirements for commercial speech. Given the novel technical issues presented by the Internet, and the

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\(^{380}\) Cf. ACLU v. Reno, 521 U.S. 844 (1997). See also Consolidated Cigar Corp. v. Reilly, 218 F.3d 30 (1st Cir. 2000) (distinguishing *Reno* and *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878 (2000), where the Supreme Court considered another government attempt to restrict speech to protect children, because those cases involved "expressive speech, rather than commercial speech, and therefore the government applied a 'strict scrutiny' standard to invalidate the laws, rather than the intermediate scrutiny applicable to commercial speech cases").
lack of reliable methods for limiting youth access to Internet Web sites, a properly empowered federal agency would likely be in a better position than Congress to craft legally defensible regulations to limit youth access to cigar sites. Extending the FCC ban on electronic advertising to all cigars, and enforcing that ban across the board, could side-step many, if not all, of these potential obstacles.