

# REGULATING “SPYWARE”: THE LIMITATIONS OF STATE “LABORATORIES” AND THE CASE FOR FEDERAL PREEMPTION OF STATE UNFAIR COMPETITION LAWS

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## ABSTRACT

*Drawing on Justice Brandeis’s oft-cited observation that states can serve as “laboratories” of policy experimentation, this Article develops a framework for assessing the allocation of governance authority for regulating Internet activities. In particular, it focuses on whether states should be free to experiment with regulatory approaches or whether the federal government should have principal, if not exclusive (preemptive), regulatory authority over Internet-related activities. Using recent efforts to regulate spyware and adware as a case study, the analysis shows that the lack of harmonization of, and uncertainty surrounding, state unfair competition law produces costly, confusing, multi-district litigation and pushes enterprises to adhere to the limits of the most restrictive state. Such a governance regime unduly hinders innovation in Internet business models. On this basis, the Article favors a uniform federal regulatory system and preemption of state statutes and unfair competition common law as applied to spyware and adware. The final section of the Article extrapolates from this study of spyware and adware regulation to the larger context of Internet governance.*

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## I. INTRODUCTION

Like many technological breakthroughs, the Internet has brought about great economic and social advancement, but not without some undesirable consequences. Cybersquatting,<sup>1</sup> computer viruses,<sup>2</sup> denial of service at-

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1. Cybersquatting encompasses several problematic activities, most notably the registration of domain names based on the trademarks of others for purposes of diverting web surfers or extorting payments from the trademark holders. *See generally* P. Wayne Hale, *The Anticybersquatting Consumer Protection Act & Story's Farm L.L.C. v. Sportsman's Market, Inc.*, 16 BERKELEY TECH. L.J. 205 (2001); Ughetta Manzone, *Trademark: Domain Name: Dilution—Panavision International, L.P. v. Toepfen*, 13 BERKELEY TECH. L.J. 249 (1998).

2. *See* George Smith, *Billion-dollar Virus Economics*, THE REGISTER, Apr. 29, 2002, [http://www.theregister.co.uk/2002/04/29/billiondollar\\_virus\\_economics](http://www.theregister.co.uk/2002/04/29/billiondollar_virus_economics); Michael Lee et al., *Electronic Commerce, Hackers, and the Search for Legitimacy: A Regulatory*

tacks,<sup>3</sup> spam,<sup>4</sup> spIM,<sup>5</sup> phishing,<sup>6</sup> copyright infringement,<sup>7</sup> and spyware<sup>8</sup>

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*Proposal*, 14 BERKELEY TECH. L.J. 839 (1999); Eric J. Sinrod & William P. Reilly, *Cyber-Crimes: A Practical Approach to the Application of Federal Computer Crime Laws*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 177 (2000).

3. See *supra* note 2.

4. In its most expansive usage, spam refers to the sending of any unsolicited, inappropriate, or irrelevant messages through e-mail systems. It is often done on a mass scale and with a commercial purpose—such as attracting Internet users to websites offering pornography, “get rich” schemes, advertising, and fraudulent medical products. See Lily Zhang, *The CAN-SPAM Act: An Insufficient Response to the Growing Spam Problem*, 20 BERKELEY TECH. L.J. 301 (2005).

5. SpIM refers to the sending of unsolicited commercial messages through Instant Messaging systems. See Eric Zorn, *R U Ready For a Plague of Instant Messages?*, CHI. TRIB., August 5, 1999, at N1.

6. The term “phishing” refers to a form of identity theft. Phishing is the sending of e-mail messages falsely using the names of legitimate companies in order to entice recipients to visit fake webpages purporting to be operated by the company whose name is used in the message. The replica webpage solicits password, credit-card, or other private information. See Jennifer Lynch, *Identity Theft in Cyberspace: Crime Control Methods and their Effectiveness in Combating Phishing Attacks*, 20 BERKELEY TECH. L.J. 259 (2005).

7. See Justin Hughes, *On the Logic of Suing One’s Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENTMT’L L.J. 725 (2005); Peter S. Menell, *Envisioning Copyright Law’s Digital Future*, 46 N.Y.L. SCH. L. REV. 63 (2003).

8. The meaning and scope of the term “spyware” has evolved substantially over the past six years and is the subject of significant controversy. Prior to 1999, spyware referred to electronic surveillance equipment such as hidden cameras. See Sharon Wienbar, *The Spyware Inferno*, NEWS.COM, Aug. 13, 2004, [http://news.com.com/The+spyware+inferno/2010-1032\\_3-5307831.html](http://news.com.com/The+spyware+inferno/2010-1032_3-5307831.html). Since 1999, “spyware” has been increasingly used to refer to interactive software programs that record and report Internet user activities. Some in the industry use the term rather broadly “to encompass everything from marketing cookies, pop-ups, and adware downloaded with peer-to-peer file-sharing programs to malicious Trojans and keystroke loggers designed to steal personal data.” See *Business Strike Back at Spyware*, PCWORLD.COM, Aug. 16, 2004, <http://www.pcworld.com/news/article/0,aid,117384,00.asp>. Companies delivering pop-up advertisements with the consent of computer users oppose such a broad interpretation. These companies prefer the term “behavioral marketing” to describe their activities. Such software is also commonly referred to as “adware.” A growing consensus believes that spyware should not extend to software that has been obtained with the knowledge and consent of users. See Federal Trade Commission, *Monitoring Software on your PC: Spyware, Adware, and Other Software* at 2-4 (Mar. 2005), available at <http://www.ftc.gov/os/2005/03/050307spywarerpt.pdf> [hereinafter FTC Spyware Report]. But what constitutes valid consent remains a point of heated disagreement in legal and policy fora. See *id.* at 3-4; Paul Festa, *See You Later, Anti-Gators?*, CNET NEWS.COM, Oct. 22, 2003, [http://news.com.com/2100-1032\\_3-5095051.html](http://news.com.com/2100-1032_3-5095051.html) (discussing false advertising and trade libel lawsuits brought by Gator Corporation against pop-up blocking software companies that had referred to Gator’s products as “spyware”).

have dispelled an earlier cyber-libertarian hope that the Internet could adequately be governed through code or social norms (“netiquette”).<sup>9</sup> As the Internet has become an ever larger part of social, economic, and political life, various forces have pressed the courts, regulatory agencies (such as the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC)), and legislatures to address some of its undesirable effects. In some contexts, such efforts have worked relatively smoothly and effectively. For example, the World Intellectual Property Organization’s (WIPO) Uniform Dispute Resolution Policy (UDRP), in conjunction with the Anticybersquatting Consumer Protection Act of 1999, has largely addressed concerns relating to cybersquatting. Technological fixes, enhanced security, and user vigilance have partially quelled the spread of computer viruses, although not without substantial cost.<sup>10</sup> By contrast, private, state, and federal initiatives have yet to control spam or phishing effectively<sup>11</sup> and efforts to prevent unauthorized distribution of copyrighted works on peer-to-peer networks have proven to be of only limited success.<sup>12</sup>

This conference focuses on the growing concern with the use of software Internet tools to gain access to personal information of web users. In some cases, such technology serves salutary or at least benign purposes. Increasingly, however, unscrupulous entities have used such software for

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9. See James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 178 (1997) (“For a long time, the Internet’s enthusiasts have believed that it would be largely immune from state regulation.”); David R. Johnson & David Post, *Law And Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); George Black, *Call for Controls: The Internet Must Regulate Itself*, FIN. TIMES., Apr 1, 1998, pt. 4, at 12; Vinton G. Cerf, *Building an Internet Free of Barriers*, N.Y. TIMES, July 27, 1997, § 3, at 12; Thomas E. Weber, *The Internet (A Special Report): Debate: Does Anything Go? Limiting Free Speech on the Net*, WALL ST. J., Dec. 8, 1997. *But cf.* Jack Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998); Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257 (1998).

10. Robert Lemos, *Melissa’s Long Gone, But Lessons Remain*, CNET NEWS.COM, Mar. 29, 2005, [http://news.com.com/Melissas+long+gone%2C+but+lessons+remain/2100-7349\\_3-5643900.html](http://news.com.com/Melissas+long+gone%2C+but+lessons+remain/2100-7349_3-5643900.html); Kevin P. Kalinich & Kristina McGrath, *Identifying and Evaluating the Business Impact of Network Risks and Liabilities*, 33 W.T.R. Brief 18 (Winter 2004); FTC, SAFE AT ANY SPEED: HOW TO STAY SAFE ONLINE IF YOU USE HIGH-SPEED INTERNET ACCESS (Sept. 2002), available at <http://www.ftc.gov/bcp/online/pubs/online/safeonline.pdf>.

11. See Lynch, *supra* note 6.

12. See generally Kristina Groennings, *Costs and Benefits of the Recording Industry’s Litigation Against Individuals*, 20 BERKELEY TECH. L.J. 571 (2005); Hughes, *supra* note 7; Menell, *supra* note 7.

fraudulent and pernicious ends.<sup>13</sup> Spyware often operates in conjunction with other software that delivers advertisements (such as pop-up windows), harvests private information, or re-routes web traffic. Recent studies reveal that as many as ninety percent of home computers in the United States as well as many business computers are running automated programs that report users' personal information, many without the users' knowledge or consent.<sup>14</sup> Such software can slow intended computer processing, hijack storage capacity, distract computer users, and potentially lead to identity theft and other serious crimes.<sup>15</sup> The total cost to Internet users of such software—in terms of harm from misuse of personal information, lost productivity, computer repair, and installation of protective software—is large and growing.<sup>16</sup> Many consumers are unaware that spyware is running on their computers and mistakenly believe that their computers are malfunctioning. Even when computer users become aware of spyware, they often encounter difficulty deactivating or removing it.<sup>17</sup>

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13. See Robert Lemos, *Pop-up Program Reads Keystrokes, Steals Passwords*, CNET NEWS.COM, Jun. 29, 2004, [http://news.com.com/Pop-up+program+reads+keystrokes+%2C+steals+passwords/2100-7349\\_3-5251981.html](http://news.com.com/Pop-up+program+reads+keystrokes+%2C+steals+passwords/2100-7349_3-5251981.html) (describing software that can monitor a user's keystrokes when visiting various bank websites).

14. See John Borland, *Dell Backs Spyware Education Drive*, CNET NEWS.COM, Oct. 15, 2004, [http://news.com.com/Dell+backs+spyware+education+drive/2100-1032\\_3-5410568.html](http://news.com.com/Dell+backs+spyware+education+drive/2100-1032_3-5410568.html) (reporting findings of report from the Consumer Spyware Initiative, a joint project sponsored by Dell Computer and the Internet Education Foundation); John Borland, *Spike in "Spyware" Accelerates Arms Race*, CNET NEWS.COM, Feb. 24, 2003, [http://news.com.com/A+secret+war/2009-1023\\_3-985524.html?tag=st.rn](http://news.com.com/A+secret+war/2009-1023_3-985524.html?tag=st.rn).

15. See Dan Ilett, *Worst Spyware Queues Up*, CNET NEWS.COM, Dec. 21, 2004, [http://news.com.com/Worst+spyware+queues+up/2100-7349\\_3-5499609.html](http://news.com.com/Worst+spyware+queues+up/2100-7349_3-5499609.html) (quoting an anti-spyware executive characterizing CoolWebSearch as "probably one of the most vicious programs in terms of how nasty it is. It completely hijacks the browser so you can't do anything.").

16. See Declan McCullagh, *Few Solutions Pop Up at FTC Adware Workshop*, CNET NEWS.COM, Apr. 19, 2004, [http://news.com.com/Few+solutions+pop+up+at+FTC+adware+workshop/2100-1028\\_3-5195222.html](http://news.com.com/Few+solutions+pop+up+at+FTC+adware+workshop/2100-1028_3-5195222.html) (noting that spyware concerns have become the leading support problem for computer vendors and computer security companies); Stefanie Olsen, *Revenge of the Pop-ups*, CNET NEWS.COM, Oct. 14, 2004, [http://news.com.com/Revenge+of+the+pop-ups/2100-1024\\_3-5408453.html](http://news.com.com/Revenge+of+the+pop-ups/2100-1024_3-5408453.html) (characterizing the interplay between browser providers, who seek to block pop-up advertisements, and adware purveyors as a "cat-and-mouse game" in which one side continues to improve its blocking technology and content developers are constantly developing a way to get around the pop-up blockers).

17. See Ilett, *supra* note 15 (noting that spyware distributors "are gaining sophistication in their coding practices, as they attempt to evade detection and removal"); Stefanie Olsen, *Google Feels Spyware Strains*, CNET NEWS.COM, Jul. 28, 2004, [http://news.com.com/Google+feels+spyware+strains/2100-1024\\_3-5250383.html](http://news.com.com/Google+feels+spyware+strains/2100-1024_3-5250383.html) (describing software programs that reinstall even after a user removes it from their computer's

Regulating spyware is complicated by the fact that some programs that automatically report personal information can offer benefits to consumers, advertisers, and web publishers by improving the targeting of advertising “vehicles.”<sup>18</sup> Emerging “behavioral marketing” software-based business models<sup>19</sup> can be characterized as a more sophisticated form of traditional advertising—another business activity that has encountered adverse reactions over the years, but has become an accepted part of the free enterprise system.<sup>20</sup> Even this activity, however, is subject to a range of regulatory constraints.<sup>21</sup>

Advertising continues to support in whole or in part a large portion of the major entertainment and news media channels. Newspapers, magazines, television, radio, and Internet portals rely in varying degrees upon advertiser support to fund and disseminate content.<sup>22</sup> In at least some contexts, consumers value the advertisements themselves—for product or service information or, occasionally, for entertainment value. In many of

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registry). Some programs claiming to eliminate spyware actually install other forms of advertising software. See John Borland, *Spyware Cures May Cause More Harm than Good*, CNET NEWS.COM, Feb. 4, 2004, [http://news.com.com/Spyware+cures+may+cause+more+harm+than+good/2100-1032\\_3-5153485.html](http://news.com.com/Spyware+cures+may+cause+more+harm+than+good/2100-1032_3-5153485.html).

18. “The line between adware and spyware is fuzzy. But even critics of WhenU and Claria concede that those companies’ practices are nowhere near as objectionable as malevolent ware that surreptitiously infects a PC and uses it to send out spam or divulges a user’s credit card numbers.” Declan McCullagh, *Adware’s Going Mainstream, Report Says*, CNET NEWS.COM, Jun. 30, 2004, [http://news.com.com/Adwares+going+mainstream%2C+report+says/2100-1024\\_3-5253029.html](http://news.com.com/Adwares+going+mainstream%2C+report+says/2100-1024_3-5253029.html); see also Stefanie Olsen, *Catfight in the Spyware Corral*, CNET NEWS.COM, Feb. 8, 2005, [http://news.com.com/Catfight+in+the+spyware+corral/2100-1032\\_3-5567781.html](http://news.com.com/Catfight+in+the+spyware+corral/2100-1032_3-5567781.html) (observing that “[w]hile clear examples of legitimate and illegitimate behavior are easy to find, drawing a bright line between them has proven to be extremely difficult”).

19. See, e.g., D. Reed Freeman, Jr., *Privacy and the Future of Behavioral Marketing*, [http://www.claria.com/advertise/oas\\_archive/privacy.html?pub=imedia\\_module](http://www.claria.com/advertise/oas_archive/privacy.html?pub=imedia_module) (written by the Chief Privacy Officer for Claria Corporation).

20. See Charles K. Ramond, *How Advertising Became Respectable*, 28 J. MKTG. 1 (1964); cf. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948).

21. See PETER S. MENELL & SUZANNE SCOTCHMER, *Intellectual Property*, in HANDBOOK OF LAW AND ECONOMICS (A. Mitchell Polinsky & Steven Shavell eds., forthcoming 2005) (discussing the range of private and public institutions governing advertising).

22. See HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS 229 (6th ed. 2004) (characterizing television and radio programs as “scheduled interruptions of marketing bulletins”).

these market settings, however, consumers would prefer to receive content without the advertising.<sup>23</sup>

The traditional advertising model embodies a technological constraint of mass communication media—messages cannot be tailored to individual consumers. Rather, advertisers are constrained in targeting their advertisements to the distribution of demographic characteristics of consumers of particular newspapers, magazines, or broadcast media. For example, Nielsen Media Research can describe the range of television viewers for particular shows based on its surveys of families. But advertisements for traditional television programming cannot be targeted on a per viewer basis. The medium of traditional television distributes the same advertisement to all viewers in a particular market.<sup>24</sup> For this reason, makers of feminine hygiene products do not purchase advertising for football games because such programming appeals primarily to men. But women interested in feminine hygiene products surely watch football games, just as men watch some programming of particular interest to women. If advertisers could more accurately and easily reach better defined market segments, or ideally particular individuals, advertisers, consumers, and broadcasters would stand to gain. Advertisers would be willing to pay more in order to reach consumers in the market for particular classes of goods, and consumers would not have to endure nearly as much irrelevant advertising per hour of programming for broadcasters to be able to support such content. In addition, consumers would be more likely to gain valuable information through advertising.<sup>25</sup>

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23. “It’s a no-brainer that skipping commercials is one of the attractive features of a personal video recorder like TiVo or Sonicblue’s ReplayTV.” Katie Dean, *TiVo Loath to Admit Ad Skip Trick*, WIRED, Jan. 14, 2003, <http://www.wired.com/news/digiwood/0,1412,57178,00.html>. ReplayTV’s commercial skipping and file sharing capability led to contributory copyright infringement lawsuits by content owners and television networks which eventually pushed the company into bankruptcy. See Katie Dean, *Bankruptcy Blues for PVR Maker*, WIRED, Mar. 24, 2003, <http://www.wired.com/news/digiwood/0,1412,58160,00.html>.

24. See Lorne Manly, *The Future of the 30-Second Spot*, N.Y. TIMES, Mar. 27, 2005, § 3, at 1 (“The television commercial—a blunt instrument that often reaches as many disinterested people as desired ones—is beginning to behave like a smarter version of direct mail.”). As information technology advances, broadcasters hope to be able to better target and customize advertising. See Janet Whitman, *In the Crosshair—Viewers and Target Ads*, DOW JONES NEWSWIRE, Oct. 25, 2004, available at <http://medialit.med.sc.edu/crosshairs.htm> (predicting that advertisers will soon be able to deliver television ads customized for individual households).

25. See P. Nelson, *Advertising as Information*, 82 J. POL. ECON. 729 (1974); P. Nelson, *The Economic Consequences of Advertising*, 48 J. BUS. 213 (1975); George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

Behavioral marketing technology represents a quantum leap in the ability of advertisers to reach desired market segments at relatively low cost. Even limited and anonymous information about the class of goods that an Internet user seeks enables advertisers to provide highly relevant information. For example, a consumer who types “office supplies” into a search engine is likely in the market for office products. Such consumers would likely be receptive to getting advertisements, discount coupons, or other targeted marketing information about office supplies at that time. For this reason, behavioral marketing software yields relatively high “click through” rates—the percentage of consumers clicking on advertisements to learn more about what is being offered—than randomly targeted pop-up advertisements.<sup>26</sup> Such high click-through rates translate, at least roughly, into higher sales and brand recognition. Thus, behavioral marketing technology can enable advertisers to reach consumers much more effectively and efficiently.<sup>27</sup>

The use of such technology, however, raises numerous legal and policy questions relating to information privacy and adequacy of consent to load software onto a user’s computer and monitor their web-searching activity. It may also violate intellectual property rights: Does using a competitor’s trademark to trigger an advertisement infringe trademark rights? Does delivering a pop-up window over the webpage of another company implicate copyright law? Is alerting Internet users querying a particular manufacturer’s trademark or URL to a competitor’s website or discount offer a form of unfair competition? Unlike most of the other papers prepared for this conference, this Article does not seek to determine the optimal type of regulation to address spyware concerns.<sup>28</sup> Rather, it analyzes

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26. The effects of behavioral advertising on click-through rates for pop-up advertisements and actual purchasing behavior are speculative. One behavioral advertising company reports remarkable success in a campaign for a high-end cosmetics company targeting affluent, beauty-conscious mothers, achieving click-through rates of 24 percent, compared with the industry average of roughly 0.2 percent for general pop-up ads and roughly 0.01 percent for banners. See Rachel Konrad, *Reality Check: Does Adware Work?*, CNET NEWS.COM, June 26, 2002, [http://news.com.com/Reality+check+Does+adware+work/2009-1023\\_3-938263.html](http://news.com.com/Reality+check+Does+adware+work/2009-1023_3-938263.html); Adam L. Penenberg, *Ads That Annoy Also Succeed*, WIRED, Sept. 8, 2004, available at <http://www.wired.com/news/business/0,1367,64807,00.html> (quoting an interactive advertising professional: “Pop-ups generate roughly 5 to 10 times the response rate of standard banner units” because “people are more apt to notice them”).

27. Online advertising revenue surpassed \$8.4 billion in 2004 and is expected to exceed advertising spending in print magazines in the near future. See Penenberg, *supra* note 26.

28. See generally Kristen M. Beystehner, *See Ya Later, Gator: Assessing Whether Placing Pop-Up Advertisements on Another Company’s Website Violates Trademark*

the proper jurisdiction or governmental level for regulating such technology and activities. In particular, it focuses on whether state unfair competition law should regulate the use of spyware, or whether federal law should preempt such laws.<sup>29</sup>

At first blush, the use of decentralized state unfair competition law and specific legislation to regulate spyware might seem to be a natural application of Justice Brandeis's metaphorical observation that states can provide valuable "laboratories" of experimentation and innovation in areas of government policy where there may be disagreement about the best course of action. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>30</sup> As this paper explains, however, state experimentation in regulating Internet-related activities creates significant risks for the nation as a whole. Due to the ubiquity of the Internet and the relatively low threshold

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Law, 11 J. INTELL. PROP. L. 87 (2003); Michael A. Leon, *Unauthorized Pop-Up Advertising and the Copyright and Unfair Competition Implications*, 32 HOFSTRA L. REV. 953 (2004).

29. Most prior scholarship touching on federalism issues and the Internet have focused on jurisdiction and more abstract issues of governance. See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 323 (2002); Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095 (1996); Goldsmith, *supra* note 9; Johnson & Post, *supra* note 9; Joel R. Reidenberg, *Governing Networks and Rule-making in Cyberspace*, 45 EMORY L.J. 911 (1996). Professor Burk's article does suggest that the dormant Commerce Clause doctrine, a judge-made rule that prohibits states from burdening interstate commerce through the enactment of state or local regulations, provides a useful means of preventing fragmented and uncoordinated governance. See Burk, *supra*, at 1123-34. Professors Goldsmith and Sykes question the application of the dormant Commerce Clause doctrine to Internet activity. See Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785 (2001). This Article confronts this debate in the context of spyware regulation.

30. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Charles Fried, *Federalism—Why Should We Care?*, 6 HARV. J.L. & PUB. POL'Y 1, 2-3 (1982) (arguing that decentralized political power leads to innovation). Justice Brandeis's "laboratory" metaphor is often invoked in case law and academic writing about federalism. See, e.g., Lucian Arye Bebchuck, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992); Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 18 (2003); Lewis B. Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 853-55 (1979); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988); Eric Lamond Robinson, *The Oregon Basic Health Services Act: A Model for State Reform*, 45 VAND. L. REV. 977, 986-88 (1992); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987).

for personal jurisdiction,<sup>31</sup> state-by-state regulation creates an environment in which prudent Internet-related businesses must conform to every state unfair competition law, producing in effect a national policy based on the standards of the most restrictive state. In effect, the least common denominator predominates in the context of Internet governance, thereby nullifying the experimentation that Brandeis praised.<sup>32</sup> Given the uncertain contours of state unfair competition law, a federal preemptive regulatory approach provides a better climate than decentralized state regimes for both regulating spyware and encouraging business and software innovation.

This Article begins by developing a framework for assessing the allocation of governance authority for regulating Internet activities. Part II focuses on whether states should be free to experiment with regulatory approaches or whether the federal government should have principal, if not exclusive (preemptive), regulatory authority over Internet-related activities. Part III examines the experience thus far in addressing the legality of behavioral marketing under federal and state unfair competition law. Using litigation pertaining to behavioral advertising companies as a case study, Part III also shows that the lack of harmonization of, and uncertainty surrounding, state unfair competition law produces costly, confusing, multi-district litigation and pushes enterprises to adhere to the limits of the most restrictive state. Such a governance regime unduly hinders innovation in Internet business models. A uniform federal regulatory system would offer substantial advantages without jeopardizing consumer protection or fair business competition. Part IV reviews federal initiatives aimed at addressing spyware concerns. The concluding Part extrapolates from this study of spyware regulation to the larger context of Internet governance.

## II. FEDERALISM, REGULATORY LABORATORIES, AND REGULATION OF INTERNET ACTIVITIES

Justice Brandeis's metaphor of states serving as "laboratories" of regulatory experimentation and innovation has long intrigued legal and policy analysts. Public policy is an empirically driven social science. Theoretical

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31. See generally Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1352 (2001); Dennis T. Yokoyama, *You Can't Always Use the Zippo Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147 (2005).

32. I do not mean to question the value of policy experimentation, but to recognize that interstate experimentation can occur most effectively where activities do not cross state boundaries or have interstate impacts—as in the case of local zoning regulation.

models can rarely, if ever, predict perfectly the outcomes of government policy. What works in theory does not always work in the real world. Policy initiatives often produce unintended consequences. Therefore, experimentation plays a vital role in assessing the efficacy of alternative policies, and the notion that states can serve this function resonates with deeply ingrained federalist political values at the core of American democratic institutions. Furthermore, heterogeneity among jurisdictions in terms of geography, demographics, economic infrastructure, and social values may well favor non-uniform policies attuned to local characteristics.<sup>33</sup>

Nonetheless, decentralized public policymaking as well as non-uniform standards can produce undesirable effects, especially where activities cross state boundaries. Interstate commerce serves as a principal justification for national policy trumping state law. Interstate externalities and spillovers also justify national, or at least, regional decisionmaking authority.<sup>34</sup> Conflicting standards can result in the most restrictive regimes trumping more permissive approaches. Such concerns arise with particular force in the context of the Internet—which spans all states (and nationalities).

Before turning to the analysis of the proper jurisdictional authority over spyware regulation, it is useful to develop a general framework for analyzing federalism. In particular, it will be useful to understand those conditions under which Brandeis’s “states as laboratories of experimentation and innovation” model holds, and the circumstances under which a national preemptive regime is most efficacious. Although much has been written on federalism in various contexts, few scholars have analyzed the proper allocation of decisionmaking authority with respect to Internet governance.

#### **A. Federalism and Laboratories of Innovation: General Considerations**

Justice Brandeis’s metaphor draws upon a fundamental and powerful method of modern science—the idea of controlled experimentation. Sci-

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33. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (proposing a model for calculating “the level of expenditures for local public goods which reflects the preferences of the population more adequately than they can be reflected at the national level”).

34. See Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977); Richard O. Zerbe, *Optimal Environmental Jurisdictions*, 4 ECOLOGY L.Q. 193 (1974). *But cf.* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001).

ence seeks understanding of the operation of general laws governing the physical world. Understanding of these laws can be gleaned and refined through systematic experimentation. Essential to such testing—and the scientific method more generally—is the use of controlled environments in which particular variables can be examined individually and systematically.

In extrapolating from the scientific laboratory setting to public policy experimentation, Justice Brandeis presumed that each state could be viewed as a controlled and isolated laboratory environment—“[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>35</sup> In this way, the differing policies of the states could be examined essentially as independent experiments, producing valid, independent data for assessing alternative policies.<sup>36</sup> For various areas of policy, states can be treated as isolated environments. For example, land use policies, at least in non-interstate border areas, tend to have predominantly local effects and do not produce significant out-of-state spillovers. Therefore, policy “experiments” can be implemented and studied in isolation.<sup>37</sup> In fact, land use has long been viewed as an area in which local authority remains paramount.<sup>38</sup> Other policies—such as welfare benefits, property and casualty insurance, local election law, and some aspects of health care—may also be confined within state boundaries. Outside of land use, we see varying patterns of local, state, and national governance.

As a general theory of the role of states in a federal system, Justice Brandeis’s metaphor overlooks two essential aspects of the scientific method—the need for uncontaminated (truly isolated) laboratories and identical starting conditions. For purposes of analyzing Internet policy, the

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35. *New State Ice Co.*, 285 U.S. at 311.

36. The state policy in question in *New State Ice Co.* concerned regulation of the ice industry. At this relatively early stage in the development of refrigeration technology, ice was generally manufactured in factories and distributed to households. Justice Brandeis believed that allowing some experimentation in the regulation of such businesses could produce valuable information. *See id.* Given the inherently local scale of ice manufacturing and distribution at the time, there is little reason to believe that state experiments would have significant interstate effects.

37. Even land use policies can distort out-of-state communities to the extent that they influence interstate commerce.

38. But even here, national interests can trump local autonomy, as in the case of some aspects of wildlife law (migratory birds and endangered species) and habitat protection. *See generally* DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW 831-1099, 1164-1349 (2002).

first issue is most pertinent. Unlike land use—which is stationary and inherently bounded by geographic limitations—and some aspects of social welfare policy, the Internet transcends the borders of any state. Hence, any state-specific policy experiment will inevitably taint the “laboratories” of other states to the extent that Internet activities are subject to regulation in that state. In so doing, they present risks to the nation as a whole.

## **B. Federalism and Internet Policy**

The ubiquity of the Internet contradicts the premise that states can experiment with regulatory policies without distorting activities outside of their borders—thereby posing “risk to the rest of the country.” The inherent architecture of the Internet—which makes it difficult if not impossible to restrict Internet access to one or several states<sup>39</sup>—in combination with the relatively liberal rules of personal jurisdiction<sup>40</sup> means that most substantial Internet-based commercial activities are subject to liability in many, if not all, of the fifty states. Consequently, decisions by businesses about use of the Internet are governed, to a significant extent, by the liability standards of every state. Prudent businesses conducting commerce on the Internet must evaluate their potential exposure based on the laws of all 50 states. In seeking to avoid liability exposure, such businesses will conform their practices to the standards set by the most restrictive state, producing what might be called a “least common denominator” approach to due diligence.

Without federal preemption of state law, the “net” effect of state regulation of Internet activities will therefore be an unintended form of national regulation in which the standards of the most restrictive state become de facto national standards, at least for businesses having a substantial web presence. Rather than promoting experimentation, state regulation

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39. The Internet’s “end-to-end” infrastructure enables the transmission of information among geographically independent end points. See generally Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 930-34 (2001); J.H. Saltzer et al., End-to-End Arguments in System Design, Second International Conference on Distributed Computing Systems 509-512 (Apr. 8, 1981), reprinted in INNOVATIONS IN INTERNETWORKING 195-206 (Craig Partridge ed., 1988), available at <http://web.mit.edu/Saltzer/www/publications/endtoend/endtoend.pdf>. In some contexts, it is possible to restrict Internet communication on the basis of geographic criteria, but such technologies impose costs that may be wasteful. See Goldsmith & Sykes, *supra* note 29, at 809-13 (noting that websites can use registration and customer profiles); Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951 (2005) (suggesting that innovations in information technology may afford states greater ability to enforce their regulatory policies electronically).

40. See *supra* note 31; Reidenberg, *supra* note 39.

left unchecked will contaminate laboratories in other states and inhibit federal regulatory initiatives. Therefore, the characteristics of the Internet favor federal preemption of state regulation as the most appropriate default regime. Uncoordinated and diverse state laws will produce a legal environment in which the most restrictive state laws dominate Internet business activities. Thus, Justice Brandeis's "state laboratories" theory of federalism does not apply well to the Internet—a medium that does not and cannot effectively be confined to state boundaries. The effects of state experimentation cannot be cabined within state boundaries, and therefore will present "risk to the rest of the country."

There may well be other justifications for decentralized decisionmaking authority with regard to Internet activities. Differential capture of political actors as between the state and federal levels could, in theory, favor decentralized governance. Concerns about excessive rigidity at the federal level prematurely cutting off policy experimentation at the state level could also favor a federal governance regime. Neither theory, however, seems likely to apply to Internet regulation.

### 1. *Capture Theory*

Capture theory derives from the "public choice" branch of political science, which analogizes political decisionmaking to market transactions.<sup>41</sup> Within this framework, legislation emerges from the interaction of interest groups which form the demand side of the market and legislators who form the supply side of the market. Interest groups seek to influence legislators through campaign contributions and other lobbying activities. Those groups which are best mobilized—typically because they stand to gain concentrated benefits or bear concentrated costs as a result of government policy—tend to have more influence than potentially large but diffuse constituencies. Polluting industries, for example, tend to have strong incentives to dissuade legislators from imposing strict and costly pollution controls even where many individuals might stand to gain more collectively, but relatively little individually. The latter face substantial transaction costs in organizing due to the free-rider problem, whereas the former are fewer in number and have much to gain individually as well as collectively, making political mobilization more likely.

This framework has been extended to analysis of federalism in the following manner. To the extent that federal or state legislators are more

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41. See William Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285-88 (1988); JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

prone to capture, legislation from such a governmental level is more suspect and should be subject to greater scrutiny. To the extent such differential capture may occur, however, it favors federal preemption of state standards.<sup>42</sup> Adherents worry that states are more prone to capture than the federal government due to the higher costs of organizing at the state level (due to the multiplicity of states) and economies of scale in organizing at the federal level.<sup>43</sup> Many environmental advocates worry that only national standards will provide adequate protection for public health and ecology. Inadequate standards in any one state jeopardize these values.

The technological characteristics of the Internet and the distinctive array of interests affected by its regulation create different conditions for analyzing the optimal allocation of governance responsibilities in a federal system. The ubiquity of the Internet and the inability to constrain Internet activities within state boundaries means that interest groups seeking stringent regulation need only capture the legislature of one state in order to have far-reaching effects. Unlike many environmental effects, which tend to be localized, Internet activities are global. Stringent regulation in any one state potentially constrains activities on a global scale.

The analysis of Internet regulation on behavioral marketing is somewhat more complex due to the multiplicity of business interests. The battle appears to be between traditional web publishers<sup>44</sup> and emerging behavioral marketing companies.<sup>45</sup> As in the environmental area, consumer interests tend to be more diffuse, although various consumer-oriented interest groups have formed around Internet and online privacy issues.<sup>46</sup> It is

42. See, e.g., Esty, *supra* note 34; Stewart, *supra* note 34. But see Revesz, *supra* note 34.

43. See Esty, *supra* note 34, at 597-98 (arguing that “asymmetries [among interest groups] may be more significant at the state and local levels” than the federal level); Stewart, *supra* note 34, at 1213 (“In order to have effective influence with respect to state and local decisions, environmental interests would be required to organize on a multiple basis, incurring overwhelming transaction costs. Given such barriers, environmental interests can exert far more leverage by organizing into one or a few units at the national level.”).

44. The Interactive Advertising Bureau (IAB) represents companies that sell interactive advertising such as web publishers—companies that deliver banner and other advertisements to visitors of their websites. See Stefanie Olsen, *Chorus of Gator Critics Grows*, CNET NEWS.COM, Aug. 27, 2001, [http://news.com.com/Chorus+of+Gator+critics+grows/2100-1023\\_3-272244.html](http://news.com.com/Chorus+of+Gator+critics+grows/2100-1023_3-272244.html).

45. See *infra* text accompanying note 139.

46. Organizations mobilized around these issues include: Center for Democracy and Technology (CDT), Electronic Frontier Foundation (EFF), and the Electronic Privacy Information Center (EPIC). See CDT, *Spyware*, <http://www.cdt.org/privacy/spyware> (last visited Aug. 27, 2005); Posting of Wendy Seltzer to Deeplinks, <http://www.eff.org/>

not at all clear that federal preemption would clearly favor one constituency or another relative to state regulation, although the recent enactment of broad spyware legislation in Utah illustrates the sway even one or a few companies can have in state legislative decisionmaking.<sup>47</sup> In a non-preemption regime, over-regulation by even one state could have distortionary effects on business activity throughout the nation.

## 2. *Excessive Federal Rigidity*

The concern about excessive rigidity at the federal level prematurely cutting off policy experimentation at the state level overlooks the inherent nature of the Internet. As noted earlier, state policy experimentation on the Internet will tend to act as a one-way ratchet. Stricter rules in any state will be seen by prudent businesses effectively as national standards unless they can effectuate different web functionality on a state-by-state basis. Therefore, the excessive rigidity problem will be present to the extent that any state implements more restrictive policies.

At least on theoretical grounds, therefore, the case for federal preemption of state regulation of Internet activities appears quite strong.<sup>48</sup> The emergence of behavioral marketing business models provides a natural experiment of how one form of state law—unfair competition—has affected Internet entrepreneurship and the extent to which differential state law standards affect Internet business decisionmaking. Over the past four years, the two most prominent pioneers in the use of behavioral marketing technology—Gator (now Claria) and WhenU—have faced a barrage of lawsuits alleging violations of federal and state laws. A review of this experience suggests that the lack of harmonization of, and uncertainty surrounding, state unfair competition law produces costly, confusing, multi-

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deeplinks/archives/003536.php (Apr. 28, 2005, 01:54 PM); <http://www.epic.org> (last visited Aug. 27, 2005). A researcher formerly associated with the Berkman Center for Internet and Society has long followed spyware and adware issues and served an active advocacy role. See Benjamin Edelman, <http://www.benedelman.org> (last visited Aug. 27, 2005).

47. See *infra* text accompanying note 208.

48. The above analysis does not imply that states should have no role in Internet governance, only that standard setting should be done at the federal level. States could play a complementary role in enforcing such standards. Cf. Michael Gormley, *Will Spyware Be Spitzer's Next Big Thing?*, MSNBC, May 7, 2005, <http://www.msnbc.msn.com/id/6448213/did/7753583> (reporting that Eliot Spitzer, New York's maverick Attorney General, has been investigating spyware for some time now and may expand his office's enforcement efforts into this area); Seltzer, *supra* note 46. State agencies may be better situated to enforce Internet standards by virtue of having better access to victims and knowledge about local businesses. As in other areas of joint enforcement, there would be some benefits to coordination with federal authorities and state officials.

district litigation and pushes enterprises to adhere to the limits of the most restrictive state. Furthermore, the enactment of specialized legislation addressing spyware in one state (Utah) indicates that state legislatures may be prone to capture by unrepresentative political interests.<sup>49</sup> Thus, multiple, conflicting state regimes governing the Internet may well discourage innovation in Internet business models by creating a gauntlet of legal costs and exposure—both in business planning and implementation. A uniform federal regulatory system would offer substantial advantages without jeopardizing consumer protection or fair business competition.

### III.    A CASE STUDY OF THE APPLICATION OF STATE UNFAIR COMPETITION LAW TO BEHAVIORAL MARKETING BUSINESS MODELS

The emerging area of behavioral marketing provides a useful context for testing the effects of state regulatory regimes on Internet business models and activities. The interactivity of the Internet, in combination with advances in software and database technology, has enabled new forms of advertising that were never before feasible on a wide scale. Behavioral marketing uses automated software agents to deliver advertisements based on the web-surfing behavior of Internet users. At the same time, such technologies can be used in unscrupulous ways—ranging from delivering unwanted pop-up advertisements without the consent of the computer user to monitoring a user's keystrokes as part of an identity theft scheme. Drawing the appropriate regulatory lines to police such activities without choking off potentially beneficial business models requires some care. This Article focuses on how regulatory authority should be allocated between the state and federal levels to achieve an appropriate balance. The working hypothesis, traced in Part II, is that a mixed or decentralized (non-preemptive) governance regime will push the effective governance regime to the standards of the most restrictive state.

In order to assess this hypothesis, we need to understand the existing legal landscape. The free enterprise system generally eschews regulation of business activities unless some market failure arises. But even here, direct government regulation is usually a last resort. Legislators and regulatory agencies will typically allow general background legal rules—often in the form of evolving common law regimes and existing statutes—to play out before taking action. In the case of spyware, several bodies of background rules arguably govern: copyright, trademark, consumer protection, and unfair competition law. For a variety of reasons, copyright is already

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49. See *infra* text accompanying note 210.

governed almost exclusively by federal law<sup>50</sup> and therefore does not require further consideration here.<sup>51</sup> Trademark, consumer protection, and unfair competition law have both state and federal counterparts. These areas have evolved together within the rubric of unfair competition law.

This section begins by tracing the evolution and contours of unfair competition law. It then examines how the current legal regime—mixed federal and state law governance—has affected the early entrants into the field of behavioral marketing and assesses whether the least common denominator hypothesis governs Internet-related activities in this particular setting.

### A. The Landscape of Unfair Competition Law

For a variety of historical and jurisprudential reasons, unfair competition has long been one of the most amorphous bodies of common law. As Judge Learned Hand observed 80 years ago, “[t]here is no part of the law which is more plastic than unfair competition, and what was not reckoned an actionable wrong 25 years ago may have become such today.”<sup>52</sup> In 1959, Judge Medina lamented the lack of harmonization among state common law unfair competition jurisprudence and expressed the hope that “[s]ince most cases involve interstate transactions, perhaps some day the much needed federal statute or uniform laws on unfair competition will be passed.”<sup>53</sup> These observations could just as easily be made today. The continuing rudderless quality of state unfair competition common law has only been exacerbated by the spate of differing state unfair competition statutes enacted in the 1960s and 1970s.

A comprehensive delineation of the contours of unfair competition law would require treatise-length coverage<sup>54</sup> and extend well beyond the task

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50. See 17 U.S.C. § 301 (2005). See generally 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01 (2005).

51. All of the cases that addressed copyright allegations have ruled that pop-up advertisements do not implicate website owners’ display right or right to create derivative works. See *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 309 F. Supp. 2d 467, 484-88 (S.D.N.Y. 2003); *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734, 769-71 (E.D. Mich. 2003); *U-Haul Int’l, Inc. v. WhenU.com, Inc.*, 279 F. Supp. 2d 723, 729-31 (E.D. Va. 2003); cf. Aaron Rubin, *Are You Experienced? The Copyright Implications of Web Site Modification Technology*, 89 CALIF. L. REV. 817 (2001).

52. *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603, 604 (2d Cir. 1925), *rev’d on other grounds*, 273 U.S. 132 (1927).

53. *Am. Safety Table Co. v. Schreiber*, 269 F.2d 255, 271 (2d Cir. 1959).

54. See generally RUDOLPH CALLMANN, CALLMANN ON UNFAIR COMPETITION, TRADEMARK, AND MONOPOLIES (4th ed. 1981); J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (4th ed. 2005); RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995).

of assessing the allocation of governance responsibilities between federal and state authorities. Hence, this Article focuses on the general features of unfair competition law and the relationship of federal and state sources of authority. Some discussion of the evolution of this body of law is necessary in order to grasp the relationships between federal and state law.

### 1. *Federal Unfair Competition Law*

Federal law governing advertising and marketing reflects two distinct approaches to consumer protection: one organized around the protection of trademarks and a second focused on policing consumer advertising and trade practices directly. The former model, which grew out of the common law tort of passing off and has since been codified in statute, operates primarily on a private enforcement model in which competitors police the use of their marks in commerce. An optional federal registration process complements this system. The latter approach, which took root in the formation of the FTC in 1914, relies principally on a regulatory/public enforcement model.

- a) Early 19th Century through 1938: Federal Common Law, Trademark Legislation, and the Creation of the Federal Trade Commission

As the mercantile economy developed in the early to mid 19th century, federal courts came to see trademark infringement as an actionable offense.<sup>55</sup> Justice Joseph Story granted the first injunction based on trademark infringement in 1844.<sup>56</sup> Federal courts played the principal role in the early development of trademark law as the most significant businesses sought to enforce their trademarks under the emerging federal common law. Diversity of citizenship afforded jurisdiction and the federal courts offered the fullest body of legal precedents and broadest enforcement reach. The most influential jurists of that era articulated the elements and limiting doctrines that defined the unfair competition tort.

Congress did not enter the field until 1870, when it enacted the first federal trademark statute<sup>57</sup> pursuant to the Intellectual Property Clause of the U.S. Constitution.<sup>58</sup> After the Supreme Court struck down the act as exceeding the scope of that clause (which authorizes Congress to enact

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55. See generally Rudolf Callmann, *What Is Unfair Competition?*, 28 GEO. L.J. 585 (1940); Milton Handler, *Unfair Competition*, 21 IOWA L. REV. 175 (1936); Zechariah Chafee, Jr., *Unfair Competition*, 53 HARV. L. REV. 1289 (1940).

56. *Taylor v. Carpenter*, 23 F. Cas. 742 (C.C.D. Mass. 1844) (No. 13784).

57. Act of July 8, 1870, ch. 230, §§ 77-84, 16 Stat. 198 (entitled "An Act to revise, consolidate, and amend the Statutes relating to Patents and Copyrights").

58. U.S. CONST. art. I, § 8, cl. 8.

laws promoting the progress of science and the useful arts),<sup>59</sup> Congress reenacted a more limited statute in 1881 pursuant to the Commerce Clause limiting protection to marks in foreign commerce.<sup>60</sup> Congress significantly expanded the trademark statute in 1905 by extending its reach to marks in interstate commerce, effectively eliminating the intent to deceive requirement, and expanding protection to include noncompeting goods.<sup>61</sup>

In parallel with the evolution of a federal statutory regime for trademark registration and enforcement, federal courts played a growing role in the evolution of a federal common law of unfair competition. Courts initially limited the doctrine of unfair competition to situations in which one company “passed off” its goods as those of another.<sup>62</sup> Federal decisions gradually expanded upon this basic fact pattern to encompass various other scenarios in which one trader diverted patronage from a rival. The Supreme Court’s articulation of a general misappropriation tort under federal common law in *International News Service v. Associated Press*<sup>63</sup> represented a high water mark in common law regulation of trade practices. The Court recognized a quasi-property interest in news gathering: “the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired.”<sup>64</sup> The court analogized the underlying principle to the equitable theory of consideration in the law of trusts—“that he who has fairly paid the price should have the beneficial use of the property.”<sup>65</sup> Justice Holmes, concurring in the judgment, viewed the case as a species of reverse passing off, focusing on the fact that the defendant was able to deliver news gathered by the plaintiff to some markets faster than the plaintiff.<sup>66</sup>

In a 1925 decision, Judge Learned Hand broadened the principle of passing off to encompass deceptive promotion:

While a competitor may, generally speaking, take away all the customers of another that he can, there are means which he must not use. One of these is deceit. The false use of another’s name as maker or source of his own goods is deceit, of which the false

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59. See *Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

60. Act of Mar. 3, 1881, ch. 138, 21 Stat. 502.

61. Act of Feb. 20, 1905, ch. 592, 33 Stat. 724 (entitled “An Act To authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same”).

62. See MCCARTHY ON TRADEMARKS, *supra* note 54, at § 1.12.

63. 248 U.S. 215 (1918).

64. *Id.* at 236.

65. *Id.* at 240.

66. *Id.* at 246-48 (Holmes, J., concurring).

use of geographical or descriptive terms is only one example. But we conceive that in the end the questions which arise are always two: Has the plaintiff in fact lost customers? And has he lost them by means which the law forbids? The false use of the plaintiff's name is only an instance in which each element is clearly shown.<sup>67</sup>

In resolving this case, Judge Hand articulated what came to be known as the “single source” exception to a significant limitation on the common law of unfair competition: that unfair competition extended only to confusion as to the source of goods and not misrepresentations as to the product itself.<sup>68</sup> Judge Hand held that where a particular product could come from only a single source—in this case, because the manufacturer possessed a patent on an essential feature of the product in question—then another company's advertisement falsely offering such product (with the patented feature) was actionable.

The second branch of federal unfair competition law emerged as part of the mandate of the FTC. In 1914, Congress enacted the Federal Trade Commission Act for the primary purpose of enforcing federal antitrust laws by preventing “unfair methods of competition.” In addition to pursuing anticompetitive behavior in the antitrust sense, the FTC interpreted its authority and directed its enforcement resources toward combating deceptive trade practices generally. The Supreme Court validated the FTC's authority to combat false advertising in 1922.<sup>69</sup> In 1938, Congress clarified that the FTC's jurisdiction extends to deceptive practices without regard to evidence of competitive harm.<sup>70</sup> The Commission must, however, establish that its actions respond to specific and substantial harm to the public interest.<sup>71</sup>

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67. *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603, 604 (2d Cir. 1925), *rev'd on other grounds*, 273 U.S. 132 (1927).

68. *See Washboard Co. v. Saginaw Mfg. Co.*, 103 F. 281 (6th Cir. 1900) (justifying this limitation on the grounds that a competitor of a deceptive advertiser could not necessarily establish that his sales were adversely affected).

69. *See FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922). Commentators came to see the FTC as “the ‘Magna Charta’ of truth in interstate trade and of incalculable service to both industry and the public at large.” R.S. Ely, *The Work of the Federal Trade Commission*, 7 WIS. L. REV. 195, 210 (1932).

70. Wheeler-Lea Amendment, ch. 49, § 3, 52 Stat. 111 (1938) (codified at 15 U.S.C. § 45(a) (2000)).

71. *FTC v. Klesner*, 280 U.S. 19 (1929).

b) Post-Erie: The Lanham Act and FTC Efforts to Foster State Consumer Protection Regimes

The development of the federal common law of unfair competition was abruptly derailed in *Erie R.R. Co. v. Tompkins*,<sup>72</sup> in which the Supreme Court largely abolished federal common law. In effect, *Erie* shifted further evolution of the common law of unfair competition to the states and further development of federal unfair competition law to the legislative arena.

In 1946, the U.S. Congress took up where Judge Hand and other jurists had left off and pushed federal statutory protection against unfair competition to the forefront.<sup>73</sup> The Lanham Act supplanted prior trademark enactments and expressly added significant new protections against unfair competition and false advertising. Section 43(a) recognized a right of action against “a false designation of origin, or any false description or representation” used in connection with any goods or services in favor of “any person who believes that he is or is likely to be damaged.” Some early interpretations confined § 43(a) to misrepresentations relating to source; other interpretations viewed it as a codification of existing common law liability under the “single source” doctrine.<sup>74</sup> Subsequent decisions in several circuits established the section’s general applicability to deceptive advertising and rejected the attempt to engraft common law limitations onto the statutory tort.<sup>75</sup> The 1988 revision of § 43(a) removed any doubt that the Lanham Act extends to both misrepresentations of source and other deceptive representations made in connection with the marketing of goods and services<sup>76</sup> and does away with the single source

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72. 304 U.S. 64 (1938).

73. Act of July 5, 1946, ch. 540, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§1051-1127 (2000)).

74. See *Samson Crane Co. v. Union Nat’l Sales*, 87 F. Supp. 218, 222 (D. Mass. 1949), *aff’d*, 180 F.2d 896 (1st Cir. 1950). The “single source” doctrine was a prudential limitation on false advertising which allowed a competitor to recover against a deceptive advertiser only if they could show that they were the only legitimate manufacturer of the product in question. See *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603 (2d Cir. 1925) (finding liability where the plaintiff held a patent), *rev’d on other grounds*, 273 U.S. 132 (1927); *Washboard Co. v. Saginaw Mfg. Co.*, 103 F. 281 (6th Cir. 1900) (justifying this limitation on the grounds that a competitor of a deceptive advertiser could not necessarily establish that his sales were adversely affected).

75. See *Coca-Cola Co. v. Procter & Gamble Co.*, 822 F.2d 28 (6th Cir. 1987); *Procter & Gamble Co. v. Cheesebough-Pond’s Inc.*, 747 F.2d 114 (2d Cir. 1984); *U-Haul Intern., Inc. v. Jartran, Inc.*, 681 F.2d 1159, 1162 (9th Cir. 1982).

76. Pub. L. No. 100-667, 102 Stat. 3935 (1988). As revised, trademark liability extends to:

limitation on recovery.<sup>77</sup> The plaintiff must, however, establish some likelihood of harm to itself in order to have standing to bring an action under the Lanham Act.<sup>78</sup> Congress has since expanded the federal unfair competition regime to provide causes of action against dilution of famous marks<sup>79</sup> and registration of trademarks as domain names in bad faith.<sup>80</sup>

During the heyday of the civil rights, environmental, and consumer movements of the 1960s, the FTC led an effort to expand the effectiveness of consumer protection regulation by encouraging states to adopt what have come to be known as “little” FTC Acts. In order to guide states in the

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a) (2000).

77. See *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964 (D.C. Cir. 1990); *Pacamor Bearings, Inc. v. Minebea Co.*, 918 F. Supp. 491 (D.N.H. 1996) (holding that trademark owner need only prove that defendants’ conduct was likely to be injurious to the plaintiff’s business); *Forschner Group, Inc. v. Arrow Trading Co.*, 833 F. Supp. 385 (S.D.N.Y. 1993) (allowing one of two sellers of genuine product to sustain an action for false advertising without the other), *order vacated*, 30 F.3d 348 (2d Cir. 1994).

78. See *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690 (2d Cir. 1994); *PDK Labs, Inc. v. Friedlander*, 37 U.S.P.Q.2d 1195 (S.D.N.Y. 1995) (denying standing to sue under § 43(a) to one who is not yet a competitor of the alleged false advertiser), *aff’d*, 103 F.3d 1105 (2d Cir. 1997). Moreover, the harm must be caused by the false or otherwise improper advertisement. See *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379 (5th Cir. 1996); *Zschaler v. Claneil Enterprises, Inc.*, 958 F. Supp. 929, 936-37 (D. Vt. 1997) (noting that the mere fact that the parties are in competition does not establish causation, at least where the false advertisement is non-comparative); *Brown v. Armstrong*, 957 F. Supp. 1293 (D. Mass. 1997) (denying relief where plaintiff offered no evidence that any consumer was actually misled or made a purchasing decision as a result of having been misled), *aff’d*, 129 F.3d 1252 (1st Cir. 1997).

79. See Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified as amended at 15 U.S.C. §§ 1125(c), 1127 (2000)) (defining “dilution”).

80. See Anticybersquatting Consumer Protection Act, Title III of the Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (1999) (codified at 15 U.S.C. § 1125(d)).

development of such laws, the FTC drafted a model act in the late 1960s—the Unfair Trade Practices and Consumer Protection Law (UTPCPL).<sup>81</sup> Like the FTC Act, the model state law authorized the creation of state agencies to promulgate standards to combat unfair and deceptive practices<sup>82</sup> and expand enforcement. Of comparable significance, the model law, reflecting the spirit of the times, proposed the establishment of a private right of action against those who engage in unfair or deceptive selling practices.<sup>83</sup> This provision—focusing on persons who suffer ascertainable

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81. See UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW, in Council of State Governments, 29 Suggested State Legislation 141-52 (1970).

82. Section 2 of the Model Act offered states three formulations for their laws: Alternative 1 prohibits “methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” Alternative 2 prohibits “false, misleading, or deceptive acts or practices in the conduct of any trade or commerce.” Alternative 3 specifies a detailed list of unfair practices—such as passing off and false advertising—as well as a general bar against “any act or practice which is unfair or deceptive to the consumer.”

83. The private cause of action is set forth in Section 8:

(a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by Section 2 of this Act, may bring an action under rules of civil procedure in the (trial court of general jurisdiction of the county or judicial district) in which the seller or lessor resides or has his principal place of business or is doing business, to recover actual damages or \$200, whichever is greater. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper.

(b) Persons entitled to bring an action under subsection (a) of this Section may, if the unlawful method, act or practice has caused similar injury to numerous other persons similarly situated and if they adequately represent such similarly situated persons, bring an action on behalf of themselves and other similarly injured and situated persons to recover damages as provided for in subsection (a) of this Section. In any action brought under this Section, the court may in its discretion order, in addition to damages, injunctive or other equitable relief.

(c) Upon commencement of any action brought under subsection (a) of this Section the clerk of court shall mail a copy of the complaint or other initial pleading to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

(d) In any action brought by a person under this Section, the court may award, in addition to the relief provided in this Section, reasonable attorney’s fees and costs.

(e) Any permanent injunction, judgment or order of the court made under Section 5 [providing for the Attorney General to bring

losses from the purchase or lease of goods or services primarily for personal, family, or household purposes—envisioned consumer and consumer class action suits against unscrupulous sellers.

Mindful of the need for harmonization among jurisdictions (and with the federal regime), the FTC model state unfair competition law tethered interpretation to the FTC’s evolving definitions and standards.

### Section 3. Interpretation

(a) It is the intent of the legislature that in construing Section 2 of this Act due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45 (a)(1)), as from time to time amended; and

(b) the attorney general may make rules and regulations interpreting the provisions of Section 2 of this Act. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45 (a)(1)), as from time to time amended.<sup>84</sup>

The FTC’s “unfairness” and “deception” standards have since gone through several stages of evolution. The FTC Act was deliberately framed in general terms in order to provide the Commission flexibility to address trade practices as they developed.<sup>85</sup> In 1964, the Commission identified three factors that it considered when applying the prohibition against consumer “unfairness”: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been

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enforcement actions] shall be *prima facie* evidence in an action brought under Section 8 of this Act that the respondent used or employed a method, act or practice declared unlawful by Section 2 of this Act.

84. UTPCPL, § 3.

85. See H.R. REP. NO. 1142, at 19 (1914) (stating that if Congress “were to adopt the method of definition, it would undertake an endless task”). As the Supreme Court observed as early as 1931, the ban on unfairness “belongs to that class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called ‘the gradual process of judicial inclusion and exclusion.’” *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931); see also *FTC v. R. F. Keppel & Bro.*, 291 U.S. 304, 310 (1934) (“Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories.”).

established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers (or competitors or other businessmen).<sup>86</sup> In 1980, the FTC narrowed its “unfairness” standard by emphasizing the need for “substantial” consumer injury, adopting a cost-benefit test (weighing harm against offsetting consumer or competitive benefits), and limiting the public policy prong to “clear and well-established” statements of public policy.<sup>87</sup>

Similarly, the FTC reined in its “deception” standard in the 1980s. Dating back to the Supreme Court’s 1934 decision in *FTC v. Algoma Lumber Co.*,<sup>88</sup> the FTC had applied a relatively broad standard to the interpretation of “deception” in the statute—any trade practice having the “tendency or capacity to deceive” violated the Act. In what had come to be known as the “fool’s test,” the Second Circuit approved a broad standard for deception based on the principle that the FTC Act was not developed to protect experts, but rather the general public—“that vast multitude which includes the ignorant, the unthinking and the credulous.”<sup>89</sup> In 1983, the FTC replaced the “tendency or capacity to deceive” standard with a definition of a deceptive act as “a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances,

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86. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964). These factors were later quoted with apparent approval by the Supreme Court in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n.5 (1972). See also *Spiegel, Inc. v. FTC*, 540 F.2d 287, 293 n.8 (7th Cir. 1976); *Heater v. FTC*, 503 F.2d 321, 323 (9th Cir. 1974).

87. FTC Policy Statement on Unfairness, Letter from Wendell H. Ford & John C. Danforth to Senate members of the Consumer Subcommittee of the U.S. Senate Committee on Commerce, Science, and Transportation (Dec. 17, 1980), available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>. The FTC dropped the “immoral, unethical, oppressive, or unscrupulous” factor on the ground that it overlapped with the other two. *Id.*

88. 291 U.S. 67, 81 (1934).

89. *Charles of the Ritz Distributions, Corp. v. FTC*, 143 F.2d 676, 678-79 (2d Cir. 1944) (quoting the Supreme Court’s decision in *FTC v. Standard Education Society*, 302 U.S. 112, 116 (1937), the court observed that “the fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced.”). See generally Ernest Gellhorn, *Proof of Consumer Deception before the Federal Trade Commission*, 17 U. KAN. L. REV. 559 (1969).

to the consumer's detriment."<sup>90</sup> This standard was ratified a year later in *In re Cliffdale Associates*.<sup>91</sup> By focusing upon whether an act or practice is likely to mislead consumers acting reasonably in the circumstances to their detriment, the 1983 standard narrowed the reach of the FTC Act.<sup>92</sup>

## 2. State Unfair Competition Law

In addition to shifting federal unfair competition law from a common law foundation to statute (the Lanham Act), the *Erie* decision<sup>93</sup> relocated development of the common law to state courts. State courts have since developed a variegated jurisprudence within the general contours of pre-*Erie* federal common law.<sup>94</sup> In the false advertising area, state courts have retained the single source limitation as a barrier to recovery;<sup>95</sup> although many state legislatures have abolished this restriction through legislation. The misappropriation tort articulated by the Supreme Court in *Interna-*

90. FTC Policy Statement on Deception, Letter from FTC to John D. Dingell, Chairman U.S. House of Representatives Committee on Energy & Commerce (Oct. 14, 1983), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

91. 103 F.T.C. 110 (1984). See generally Jack E. Kairns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 DICKINSON L. REV. 373 (1990).

92. See Patricia Bailey & Michael Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U. L. REV. 849 (1984) (authored by the two dissenting commissioners in the *Cliffdale Associates* case).

93. See *supra* note 72.

94. See generally RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995).

95. See, e.g., *California Apparel Creators v. Wieder of California, Inc.*, 162 F.2d 893 (2d Cir. 1947). See generally 1A CALLMANN ON UNFAIR COMPETITION, TRADEMARK, AND MONOPOLIES § 5:2 (4th ed. 1981). "[I]n an action for false advertising, a plaintiff, in order to have standing to sue, must demonstrate that defendant has either palmed off his goods as those of the plaintiff or that the plaintiff has a monopoly of the goods involved, so that injury can be readily inferred." *Smith-Victor Corp. v. Sylvania Elec. Prods., Inc.*, 242 F. Supp. 302, 309 (N.D. Ill. 1965); followed in *Julie Research Labs., Inc. v. Gen. Resistance, Inc.*, 268 N.Y.S.2d 187 (N.Y. App. Div. 1966), order *aff'd*, 227 N.E.2d 892 (N.Y. 1967); followed in *Magnus Organ Corp. v. Robbins Music Corp.*, 163 U.S.P.Q. 695 (N.Y. 1969) ("[W]hile it may be morally wrong and improper to impose upon the public by the sale of spurious goods, false advertising does not give rise to a private right of action, unless some property right of the plaintiff has thereby been invaded."); *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690 (2d Cir. 1994) (finding no standing to sue for false advertising without a showing of harm to the plaintiff); *Nordictrack, Inc. v. Soloflex, Inc.*, No. 93-1432-JE, 1994 U.S. Dist. LEXIS 16172, at \*9 (D. Or. 1994): ("[T]o prevail under Minnesota [common] law, [plaintiff] must establish that it lost sales through [defendant's] false advertising."); *Multi-Tech Sys., Inc. v. Hayes Microcomputer Prods., Inc.*, 800 F. Supp. 825, 848 (D. Minn. 1992).

*tional News Service v. Associated Press*<sup>96</sup> has been elaborated to some extent, but has not been expanded.<sup>97</sup>

State unfair competition law has expanded most significantly through several waves of legislation. Although the impetus for the first wave of state unfair competition legislation was to unify this field of law, the effects have tended in the opposite direction. Even the FTC's encouragement of state consumer protection regimes tethered to federal standards has resulted in centrifugal rather than centripetal results. The landscape of unfair competition law today can best be characterized as fragmented, uncoordinated, and amorphous. The proliferation of state statutes aimed at controlling deceptive advertising, including many authorizing treble or punitive damages, has broadened the field, expanded the tools available, and promoted recourse to state unfair competition law.

a) State Unfair Competition Protection for Competitors

State common law and statutory protections against trademark infringement and unfair competition developed along tracks roughly parallel to the federal regime. Prior to the *Erie* decision in 1938, federal common law tended to dominate the field as federal courts took a leadership role in setting the scope of the emerging common law of unfair competition. The rise of the Lanham Act less than a decade later reinvigorated the federal role and it has continued to dominate the field of unfair competition.<sup>98</sup> Following the abrupt elimination of federal common law in 1938, litigants continued to invoke state common law where their claims did not fall squarely within federal or state statutory protections. The absence of a unifying mechanism produced confusing, if not conflicting, legal standards. As noted earlier, the lack of harmonization among state common law

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96. 248 U.S. 215 (1918).

97. See, e.g., *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 847 (2d Cir. 1997); *United States Golf Ass'n v. St. Andrews Sys., Data-Max, Inc.*, 749 F.2d 1028 (3d Cir. 1984). But see *United States Golf Ass'n v. Arroyo Software Corp.*, 81 Cal. Rptr. 2d 708, 714 (Cal. Ct. App. 1999). See generally Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401 (1998) (arguing that flexible and evolving common law norms are an effective means for addressing the dynamism brought about by technological change); Leo J. Raskind, *The Misappropriation Doctrine as a Competitive Norm of Intellectual Property Law*, 75 MINN. L. REV. 875 (1991); Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621 (2003); Edmund J. Sease, *Misappropriation Is Seventy-Five Years Old; Should We Bury It or Revive It?*, 70 N.D.L. REV. 781 (1994).

98. See Bruce P. Keller, *"It Keeps Going and Going and Going": The Expansion of False Advertising Litigation Under the Lanham Act*, 59 LAW & CONTEMP. PROBS. 131 (1996).

precedents prompted Judge Medina of the U.S. Court of Appeals for the Second Circuit to lament that distillation of the applicable law was an area “where angels fear to tread.”<sup>99</sup> He called for the adoption of either a preemptive federal statute or a uniform state law to govern unfair competition.<sup>100</sup>

The American Bar Association’s Section of Patents, Trademark and Copyright Law also took note of the problem. In its 1958 report,<sup>101</sup> a special committee concluded that with the exception of California unfair competition law,<sup>102</sup> which was codified in statute, all state unfair competition laws were “ambiguous,” “archaic,” and inadequate to cope with current conditions of commerce. The Committee passed a resolution which stated that “there should be uniformity in the law of unfair competition among the respective states.”<sup>103</sup> Efforts to achieve a new federal law, however, stalled in Congress. Meanwhile, the ABA Committee drafted the Uniform Deceptive Trade Practices Act (UDTPA), which the National Conference of Commissioners on Uniform State Laws adopted in 1964.<sup>104</sup>

The Uniform Act sought to update state law to provide businesses with a direct cause of action against competitors for deceptive trade practices. In so doing, it removed traditional common law restrictions, such as the single source rule.<sup>105</sup> The uniform law was modeled roughly after California law.<sup>106</sup> The Act incorporated the following principles: likelihood of confusion is sufficient to establish liability; actual competition between the parties is not a prerequisite to relief; and a defendant need not be an intentional wrongdoer to incur liability. The statute avoids a restrictive or exclusive definition of unfair competition, providing instead a list of a dozen specific and broad prohibited practices ranging from passing off to

99. *Am. Safety Table Co. v. Schreiber*, 269 F.2d 255, 271 (2d Cir. 1959).

100. There was still substantial discord among the federal courts over whether the Lanham Act confined § 43(a) to misrepresentations relating to source or whether it could be invoked to address any form of deceptive advertising. Many circuits did not broaden their interpretation until the early 1980s, which Congress codified in the 1988 amendments. *See supra* note 76.

101. *See* National Conference of Commissioners of Uniform State Laws, Prefatory Note, Revised Uniform Deceptive Trade Practices Act (1966) (referencing the 1958 ABA Report), available at [http://www.law.upenn.edu/bll/ulc/fnact99/1920\\_69/rudtpa66.htm](http://www.law.upenn.edu/bll/ulc/fnact99/1920_69/rudtpa66.htm).

102. *See* CAL. CIV. CODE § 3369 (West 2004); Victor S. Netterville, *California Law of Unfair Competition: Unprivileged Imitation*, 28 S. CALIF. L. REV. 240 (1955).

103. *See supra* note 101.

104. *Id.* NCCUSL amended this report in 1966 to provide for the award of reasonable attorney fees in some circumstances.

105. *Id.*

106. *See* CAL. CIV. CODE § 3369.

various forms of false advertising.<sup>107</sup> The UDTPA provides solely for injunctive relief, although it permits damages to be awarded for the same conduct where actionable under the common law or other statutes.<sup>108</sup>

The UDTPA affords business enterprises a cause of action against other businesses which obtain a competitive advantage by deceiving consumers. After being adopted by fourteen states<sup>109</sup> relatively soon after its promulgation, the UDTPA lost momentum and has declined in significance. The 1988 amendments to the Lanham Act fully extended the coverage of federal law into this field.<sup>110</sup> The UDTPA was withdrawn from recommendation for enactment by the National Conference of Commissioners on Uniform State Laws in 2000 on the grounds that it had become obsolete. The NCCUSL website no longer maintains information about this uniform statute.<sup>111</sup> Nonetheless, the dozen or so state statutes modeled after the UDTPA remain in effect and they have assumed a life of their own within the particular states in which they were enacted. The ABA's goal of creating "uniformity in the law of unfair competition among the respective states" through adoption of a uniform state law has not come to pass. Even in states with such statutes, common law remedies have remained viable. Hence, unfair competition law continues to be amorphous and variable across state jurisdictions.

#### b) Consumer Protection Against Deceptive Trade Practices

In theory, state common law doctrines of deceit and fraud afforded remedies against unscrupulous sellers, although neither proved particularly effective in practice.<sup>112</sup> These causes of action impose relatively high burdens of proof upon plaintiffs.<sup>113</sup> Since most consumers suffer relatively

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107. UDTPA, § 2.

108. UDTPA, § 3.

109. Colorado, Delaware, Georgia, Hawaii, Illinois, Kansas, Minnesota, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, Oregon, and Utah. *See* Legal Information Institute, Uniform Business and Financial Laws Locator, <http://www.law.cornell.edu/uniform/vol7.html#dectr> (last visited Aug. 28, 2005).

110. *See supra* note 76.

111. *See* National Conference of Commissioners on Uniform State Laws Drafts of Uniform and Model Acts, [http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm) (last visited Aug. 28, 2005).

112. *See generally* Jeff Sovern, *Private Actions under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437 (1991).

113. The common law action for deceit requires that the plaintiff prove:

(1) a material representation which is (2) false and (3) known to be false, or made recklessly as an assertion of fact without knowledge of its truth or falsity, and (4) made with the intention that it shall be acted upon, and (5) acted upon with damage. . . . In addition to these

small harms, common law remedies were rarely utilized to combat practices that collectively imposed significant consumer harm. In recognition of these limitations, the limited effective reach of the FTC Act (due to resource and information constraints), and the growing public support for stronger consumer protection laws, every state had passed its own consumer protection statute by the mid 1970s. Most of these statutes trace their specific provisions to one of the alternatives recommended by the FTC in the Unfair Trade Practices and Consumer Protection Law. Fourteen states<sup>114</sup> adopted some variation on Alternative 1 of the FTC model act.<sup>115</sup> Kentucky and Texas adopted Alternative 2, which omits reference to the FTC's standard of "unfair methods of competition" and focuses on "false, misleading, or deceptive acts or practices." Ten states<sup>116</sup> adopted some version of Alternative 3, which enumerates twelve (and in some cases more) specific unlawful trade practices. Twenty other states and the District of Columbia have an itemized list of unlawful acts or practices.<sup>117</sup>

By creating a private right of action and the opportunity to obtain treble and/or punitive damages in many states, these statutes expanded the role of courts in regulating unfair and deceptive practices. These statutes provide a much broader assault on unfair and deceptive trade practices than the UDTPA and have come to dominate the field, at least with regard to consumer-related harms.<sup>118</sup> Variation in the substantive provisions of

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elements, it must also be proved that the plaintiff (6) relied upon the representations, (7) was induced to act upon them, and (8) did not know them to be false, and (9) by the exercise of reasonable care could not have ascertained their falsity.

Coffin v. Dodge, 76 A.2d 541, 543 (Me. 1950); Inman v. Ken Hyatt Chrysler Plymouth, 363 S.E.2d 691, 692 (S.C. 1988) (a fraud "complaint is fatally defective if it fails to allege all nine elements of fraud"). Even breach of contract claims can be difficult to prove and they do not permit recovery of punitive damages or attorney fees. *See generally* Ernest Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307 (1969).

114. Connecticut, Florida, Hawaii, Louisiana, Illinois, Massachusetts, Maine, Montana, Nebraska, North Carolina, Vermont, South Carolina, Washington, and West Virginia. California, Wisconsin, and Utah have statutes patterned directly upon the FTC Act, including the Act's emphasis on "unfair methods of competition."

115. *See* Anthony Paul Dunbar, Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Practices Legislation*, 59 TUL. L. REV. 427 (1984).

116. Alabama, Alaska, Georgia, Idaho, Maryland, Mississippi, New Hampshire, Pennsylvania, Rhode Island, and Tennessee.

117. Indiana, Michigan, New York, South Dakota, Virginia, and Wyoming have crafted their own consumer protection statutes blending elements of the different model acts with distinctive language and procedures.

118. *See generally* JONATHAN SHELDON & CAROLYN L. CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (National Consumer Law Center, 4th ed. Supp. 2000).

these statutes as well as the role of the courts in interpreting them have resulted in a rather complex legal landscape for companies operating nationally. As noted by two commentators, “[t]he process of judicial interpretation followed by legislative clarification or adjustment has further eroded the uniformity of the [FTC’s] original proposal.”<sup>119</sup> Furthermore, some states have enacted both deceptive practices statutes focused on business competition as well as FTC-like consumer protection statutes. Over time, the courts have tended to blur the distinctions between the two regimes.

From a practical standpoint, the state regimes differ along three critical dimensions: (1) standing to sue; (2) scope and extent to which they look to applicable federal law (under either the Lanham Act or the FTC Act); and (3) remedies. With regard to standing, the FTC’s model act (the UTPCPL) limited the private right of action to consumers purchasing goods for personal use.<sup>120</sup> Many states, however, adopted a modified version of this provision omitting the limitations on the type of injured party. Furthermore, some state courts have interpreted standing under such statutes broadly. With regard to scope, the UTPCPL provided for states to look to federal interpretations of unfair competition in construing their acts.<sup>121</sup> State commissions and courts have varied in the extent to which they have followed the evolution of federal standards, producing divergent standards. Most states do not require that private litigants meet a “public interest” standard, as required under the FTC Act.<sup>122</sup> States also vary in terms of whether they follow the pre or post-*Cliffdale Associates* test<sup>123</sup> for deception and the remedies available, with some states allowing plaintiffs to recover treble or punitive damages and fees.

From the standpoint of businesses operating in many or all states, the patchwork of unfair competition and consumer protection regimes creates significant confusion, increases the costs of assessing legal standards, and

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119. See EDMUND W. KITCH & HARVEY S. PERLMAN, *INTELLECTUAL PROPERTY AND UNFAIR COMPETITION* 144 (5th ed. 1998).

120. See UTPCPL, § 8 (“[a]ny person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property.”)

121. See UTPCPL, § 3.

122. Of the forty-two states that afford a private cause of action under statutes derived from the UTPCPL, only six have imposed a showing of a “public interest” by a private plaintiff. See Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521 (1980).

123. 103 F.T.C. 110 (1984); see *supra* note 89 (discussing evolution of federal “deception” standard).

may inhibit some forms of innovation. Due to the relative ease of hauling Internet businesses into court in just about any state,<sup>124</sup> such businesses are particularly exposed to the constraints of the most restrictive state unfair competition laws.

## **B.      The Application of State Unfair Competition Law to Behavioral Marketing Businesses**

With this backdrop in place, we turn to the case study of Internet-based behavioral marketing businesses. The goal is to assess how the patchwork of federal and state unfair competition law standards has affected this emerging sector.

### *1. History of Internet-Based Advertising*

Internet marketing began more than a decade ago, shortly after the launch of the World Wide Web.<sup>125</sup> The first generation of Internet advertising utilized banner advertisements. Advertisers could deliver these advertisements to web surfers visiting particular websites. Early efforts to customize advertising delivery mimicked traditional media advertising by using relatively crude sampling techniques to map demographic characteristics.<sup>126</sup> The ability to monitor response “click through” rates in real time, however, provided web-based advertising companies new opportunities for measuring advertising efficacy. Web-based advertising grew rapidly, along with the dot com boom, rising from essentially zero in 1994 to \$8 billion by the year 2000.<sup>127</sup> During this time, online advertisers developed more sophisticated techniques for customizing advertisements, including advertising networks (consortia of websites that allow advertisers to buy advertisements on multiple sites), keyword-triggered advertisements, geographic indicators to localize advertisements, and the use of “cookies” (data files stored on computer users’ hard drives that can be used to track

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124. See *supra* note 31.

125. See RICK E. BRUNER, DOUBLECLICK, THE DECADE IN ONLINE ADVERTISING 1994-2004 (Apr. 2005), [http://www.doubleclick.com/us/knowledge\\_central/documents/RESEARCH/dc\\_decaderinonline\\_0504.pdf#search='the%20decade%20in%20online%20advertising%20and%20rick%20bruner'](http://www.doubleclick.com/us/knowledge_central/documents/RESEARCH/dc_decaderinonline_0504.pdf#search='the%20decade%20in%20online%20advertising%20and%20rick%20bruner').

126. CNET NEWS.COM, *See Advertising as a science*, Oct. 4, 1996, [http://news.com.com/Advertising+as+a+science/2100-1001\\_3-235158.html](http://news.com.com/Advertising+as+a+science/2100-1001_3-235158.html) (citing study by Internet Profiles (I/Pro) and DoubleClick Network, entitled “A Comprehensive Analysis of Ad Response,” finding that web surfers click on 2.11 percent of all ad banners displayed, while direct mail typically generates a 1 percent to 2 percent response rate and print ads 0.5 percent to 0.75 percent response rate).

127. See DoubleClick, *supra* note 125, at 4.

surfing activity).<sup>128</sup> Online advertisers also used response information to tie advertising pricing to various measures of performance, such as click through rates and revenues attributable to online advertisements.<sup>129</sup>

Web advertising slowed in the late 1990s, with revenues leveling and then declining as the dot com bubble burst.<sup>130</sup> In addition, web users began to recognize some of the more aggressive modes of online advertising, such as e-mail spam, as a nuisance. The use of increasingly sophisticated data tracking tools generated controversy over the privacy rights of web surfers. Consumer privacy groups objected when DoubleClick, one of the leading online advertising companies, proposed to combine online and off-line information databases to develop detailed consumer profiles.<sup>131</sup> In response to pressure from privacy organizations, the FTC, and members of Congress, DoubleClick scaled back its plans and instituted a privacy policy and review board.<sup>132</sup>

Behavioral marketing took root in the wake of these events. In 1999, The Gator Corporation introduced technology that utilized Internet users' search queries as a vehicle for delivering category-specific advertising in the form of pop-up and pop-under windows and banners that overlay ad-

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128. See *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 502-06 (S.D.N.Y. 2001) (describing DoubleClick's Dynamic Advertising Reporting & Targeting (DART) technology); CNET NEWS.COM, *Ads find strength in numbers*, Nov. 4, 1996, [http://news.com.com/Ads+find+strength+in+numbers/2009-1001\\_3-243757.html](http://news.com.com/Ads+find+strength+in+numbers/2009-1001_3-243757.html); Tim Clark, *User profiles in privacy stir*, CNET NEWS.COM, Aug. 17, 1998, [http://news.com.com/User+profiles+in+privacy+stir/2100-1023\\_3-214527.html](http://news.com.com/User+profiles+in+privacy+stir/2100-1023_3-214527.html); Tim Clark, *DoubleClick localizes Web ads*, CNET NEWS.COM, Jul. 14, 1998, [http://news.com.com/DoubleClick+localizes+Web+ads/2100-1023\\_3-213317.html](http://news.com.com/DoubleClick+localizes+Web+ads/2100-1023_3-213317.html); Janet Kornblum, *DoubleClick launches ad service*, CNET NEWS.COM, Oct. 5, 1998, [http://news.com.com/DoubleClick+launches+ad+service/2100-1023\\_3-216287.html](http://news.com.com/DoubleClick+launches+ad+service/2100-1023_3-216287.html).

129. See J. William Gurley, *How to succeed in advertising*, CNET NEWS.COM, Apr. 20, 1998, [http://news.com.com/How+to+succeed+in+advertising/2009-1023\\_3-210389.html](http://news.com.com/How+to+succeed+in+advertising/2009-1023_3-210389.html).

130. See DoubleClick, *supra* note 125, at 4.

131. See *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d at 497; Sandeep Junnarkar, *DoubleClick accused of unlawful consumer data use*, CNET NEWS.COM, Jan. 28, 2000, [http://news.com.com/DoubleClick+accused+of+unlawful+consumer+data+use/2100-1023\\_3-236216.html](http://news.com.com/DoubleClick+accused+of+unlawful+consumer+data+use/2100-1023_3-236216.html).

132. See Jim Hu, *Consumer advocates to head DoubleClick privacy efforts*, CNET NEWS.COM, Mar. 8, 2000, [http://news.com.com/Consumer+advocates+to+head+DoubleClick+privacy+efforts/2100-1023\\_3-237710.html](http://news.com.com/Consumer+advocates+to+head+DoubleClick+privacy+efforts/2100-1023_3-237710.html); Patricia Jacobus, *"Cookies" targeted as Congress, advocates address Net privacy*, CNET NEWS.COM, Feb. 11, 2000, [http://news.com.com/Cookies+targeted+as+Congress%2C+advocates+address+Net+privacy/2100-1023\\_3-236800.html?tag=st.rn](http://news.com.com/Cookies+targeted+as+Congress%2C+advocates+address+Net+privacy/2100-1023_3-236800.html?tag=st.rn); Stefanie Olsen, *Ad firms benefit from FTC privacy decision*, CNET NEWS.COM, Jul. 28, 2000, [http://news.com.com/Ad+firms+benefit+from+FTC+privacy+decision/2100-1023\\_3-243822.html](http://news.com.com/Ad+firms+benefit+from+FTC+privacy+decision/2100-1023_3-243822.html).

vertisements delivered by the website that a consumer was visiting. With venture capital backing from Garage.com and founders of Sun Microsystems, Symantec, and Intuit,<sup>133</sup> Gator set out to develop a large audience for its advertising vehicles by offering free software products—such as its eWallet product, which stores a user’s passwords in an encrypted file on the user’s computer and automatically fills in authentication forms as users surf the web—in exchange for users’ consent to receive contextual advertising.<sup>134</sup> Gator earned revenue principally from advertisers who paid for advertisements on its contextual advertising platform. This system enabled Gator and its clients to measure click-through rates and various other metrics relating to advertising success. Gator rapidly expanded the size of its audience by offering other “free” software products and entered agreements with emerging peer-to-peer distributors to bundle Gator software with downloads of peer-to-peer software.<sup>135</sup>

As its advertising platform grew into the tens of millions of computers running its software, Gator attracted a large and diverse clientele of national brands, including Allstate Insurance, American Express, Apple, Mastercard, Chrysler, Expedia, FTD.com, NetFlix, Orbitz, Priceline, Sun Microsystems, and Verizon DSL.<sup>136</sup> Gator was also able to serve as a conduit for Overture, an online advertising company that charges clients on a “cost-per-click” basis.<sup>137</sup> Gator’s growing visibility, however, raised concerns among some traditional web publishers, who complained that Gator’s advertising technology—which allowed precise targeting of advertisements by competitors—interfered with their own on-line advertising

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133. See Brian McWilliams, *Gator Branded A Trojan Horse Despite Security*, NEWSBYTES, Mar. 7, 2002, <http://www.newsbytes.com/news/02/175046.html>, available at <http://seclists.org/lists/isn/2002/Mar/0045.html>.

134. See Claria, Corporate Overview, <http://www.claria.com/companyinfo> (last visited Aug. 28, 2005).

135. In 2003, Gator paid \$19.3 million on such distribution agreements, approximately 43 cents per active user. See Wienbar, *supra* note 8; FTC Spyware Report, *supra* note 8, at 5.

136. See Benjamin Edelman, *Documentation of Gator Advertising and Targeting*, <http://cyber.law.harvard.edu/people/edelman/ads/gator/gator-customers.html> (last visited Aug. 23, 2005); PC Pitstop, *Gator’s Advertisers*, <http://www.pcpitstop.com/gator/advertisers.asp> (last visited Aug. 23, 2005).

137. See Wienbar, *supra* note 8. In 2003, nearly one-third of Gator’s revenue came from Overture. See Stefanie Olsen, *Adware anxiety gives Claria cold feet*, CNET NEWS.COM, Aug. 12, 2004, [http://news.com.com/Adware+anxiety+gives+Claria+cold+feet/2100-1024\\_3-5307545.html](http://news.com.com/Adware+anxiety+gives+Claria+cold+feet/2100-1024_3-5307545.html).

and poached visitors to their websites.<sup>138</sup> Consumers and privacy organizations also became concerned about the means by which adware was being loaded onto their computers and the difficulty of removing it.<sup>139</sup>

More recently, Gator has sought to soften its image by changing its name to Claria Corporation, expanding its advertising product and research offerings, distancing itself from more aggressive web advertisers, and seeking to build partnerships with traditional web publishers.<sup>140</sup> At the same time, other behavioral marketing companies, such as WhenU, 180Solutions, and Direct Revenue, have developed their own behavioral marketing networks and further raised the ire of web publishers and consumer organizations.

## 2. *Unfair Competition Challenges to Internet-Based Behavioral Marketing Ventures*

Gator's rise in the online advertising world quickly generated controversy over whether contextual advertising infringed the intellectual property rights of web publishers. WhenU soon found itself in a similar situation. Web publishers brought the first wave of litigation, seeking to prevent behavioral marketing companies from delivering advertisements when consumers visit their websites. Such litigation has alleged copyright infringement (on the ground that presenting a pop-up window or banner advertisement above a copyrighted website constitutes an unauthorized derivative work), trademark infringement (for the use of website owners' trademarks to trigger advertisements as well as confusion as to the source, sponsorship, or affiliation of pop-up advertisements), and various forms of

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138. See Stefanie Olsen, *Chorus of Gator critics grows*, CNET NEWS.COM, Aug. 27, 2001, [http://news.com.com/Chorus+of+Gator+critics+grows/2100-1023\\_3-272244.html](http://news.com.com/Chorus+of+Gator+critics+grows/2100-1023_3-272244.html); Stefanie Olsen, *UPS sues Gator for wrongful delivery*, CNET NEWS.COM, Oct. 2, 2002, [http://news.com.com/UPS+sues+Gator+for+wrongful+delivery/2100-1023\\_3-960535.html](http://news.com.com/UPS+sues+Gator+for+wrongful+delivery/2100-1023_3-960535.html) (noting that Gator's software "might display a Federal Express ad to people viewing UPS.com").

139. See CDT, *GHOSTS IN OUR MACHINES: BACKGROUND AND POLICY PROPOSALS ON THE "SPYWARE" PROBLEM* (Nov. 2003), [http://www.cdt.org/privacy/031100\\_spyware.pdf](http://www.cdt.org/privacy/031100_spyware.pdf); *Guess What—You Asked For Those Pop-Up Ads*, Jun. 28, 2004, [http://www.businessweek.com/magazine/content/04\\_26/b3889095\\_mz063.htm](http://www.businessweek.com/magazine/content/04_26/b3889095_mz063.htm); Stefanie Olsen, *Web surfers brace for pop-up downloads*, CNET NEWS.COM, Apr. 8, 2002, [http://news.com.com/Web+surfers+brace+for+pop-up+downloads/2100-1023\\_3877568.html](http://news.com.com/Web+surfers+brace+for+pop-up+downloads/2100-1023_3877568.html).

140. Stefanie Olsen, *Adware anxiety gives Claria cold feet*, CNET NEWS.COM, Aug. 12, 2004, [http://news.com.com/Adware+anxiety+gives+Claria+cold+feet/2100-1024\\_3-5307545.html](http://news.com.com/Adware+anxiety+gives+Claria+cold+feet/2100-1024_3-5307545.html); Stefanie Olsen, *Gator sheds skin, renames itself*, CNET NEWS.COM, Oct. 29, 2003, [http://news.com.com/Gator+sheds+skin%2C+renames+itself/2100-1024\\_3-5099212.html](http://news.com.com/Gator+sheds+skin%2C+renames+itself/2100-1024_3-5099212.html).

federal and state unfair competition claims. In the few cases that have gone to trial, the courts have been skeptical of the federal copyright and trademark allegations.<sup>141</sup> No case has yet fully addressed the unfair competition allegations, in part because many of the cases settled before trial.

This section explores the contours of the state law claims as a gauge of the exposure that behavioral marketing firms face. Within a relatively short period of time, web publishers filed suit against Claria in California, Florida, Georgia, Michigan, New Jersey, North Carolina, South Carolina, Utah, and Virginia.<sup>142</sup> WhenU was sued in Michigan, New York, Utah, and Virginia.<sup>143</sup> Whereas the federal law claims were largely the same in each of these cases, the state law unfair competition claims reflected a range of statutory and common law sources. Even where the underlying statutes or common law doctrines were parallel, the jurisprudence surrounding such causes of action varied. This predicament can best be illustrated by surveying the unfair competition regimes in several of these states.

#### a) California

California's unfair competition regime is set forth rather tersely in its Business & Professions Code: "unfair competition shall mean and include

141. See *1-800 Contacts, Inc. v. WhenU.Com, Inc.*, 2005 U.S. App. LEXIS 12711 (2d Cir. 2005); *U-Haul Int'l, Inc. v. WhenU.com, Inc.*, 279 F. Supp. 2d 723 (E.D. Va. 2003); *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734 (E.D. Mich. 2003).

142. *Hertz Corp. v. The Gator Corp.*, 250 F. Supp. 2d 421 (D.N.J. 2003); *Tigerdirect, Inc. v. The Gator Corp.*, No. C-02-23615 (S.D. Fla. Dec. 20, 2002); *The Gator Corp. v. TigerDirect, Inc.*, No. C-02-5875-BZ (N.D. Cal. Dec. 19, 2002); *The Gator Corp. v. PriceGrabber, Inc.*, No. C-02-5875-BZ (N.D. Cal. Dec. 16, 2002); *Lendingtree, Inc. v. The Gator Corp.*, No. 3:02-CV-519-V (W.D.N.C. Dec. 11, 2002); *Extended Stay Am., Inc. v. The Gator Corp.*, No. 7:02-3845-20 (D.S.C. Nov. 14, 2002); *Six Continents Hotels v. The Gator Corp.*, No. 1:02-CV-3065-JOF (N.D. Ga. Nov. 12, 2002); *The Gator Corp. v. Extended Stay Am.*, No. C-02-5226-CRB (N.D. Cal. Oct. 29, 2002); *United Parcel Serv. of Am. v. The Gator Corp.*, No. 1:02-CV-2639-BBM (N.D. Ga. Sept. 26, 2002); *Washington Post.Newsweek Interactive Co. v. The Gator Corp.*, No. CV 02-909-A (E.D. Va. June 25, 2002). The Hertz Corp. lawsuit brought in New Jersey does not allege violations of any state deception or unfair competition statutes. See *Hertz Corp.*, 250 F. Supp. 2d at 421.

143. *Louis Vuitton Malletier v WhenU.com*, No. 1:05-CV-01325 (S.D.N.Y. Feb. 3, 2005); *Louis Vuitton Malletier v WhenU.com*, No. 1:04-CV-03249 (S.D.N.Y. Apr. 28, 2004); *1-800-Contacts, Inc. v. WhenU.com*, No. 1:03-CV-08043 (S.D.N.Y. Nov. 7, 2003); *Overstock.com v. WhenU.com*, No. 2:03-CV-00570 (D. Ut. Jun. 25, 2003); *Wells Fargo Co. v. WhenU.com*, No. 2:03-CV-71906 (E.D. Mich. May 16, 2003); *Vision Direct, Inc. v. WhenU.com*, No. 1:02-CV-09788 (S.D.N.Y. Dec. 11, 2002); *Tiger Direct, Inc. v. WhenU.com*, No. 1:02-CV-23306 (S.D. Fla. Nov. 12, 2002); *U-Haul Int'l v. WhenU*, No. 1:02-CV-01469 (E.D. Va. Oct. 2, 2002).

any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. . . .”<sup>144</sup> This provision can be traced back to a 1930’s enactment inspired by the enlargement of the FTC’s regulatory jurisdiction to include unfair business practices that harmed not merely the interests of business competitors but also those of the general public.<sup>145</sup> It was a pioneering state law that significantly expanded the substantive standard for pursuing unfair competition claims and the class of enforcers of such law (by creating a private right of action). While affording broad standing to consumers as well as competitors,<sup>146</sup> the statute affords only injunctive relief (including restitution where money has been paid) but does not authorize the award of civil damages.<sup>147</sup>

California’s unfair competition regime prohibits “any unlawful, unfair, or fraudulent business act or practice.”<sup>148</sup> Virtually any state, federal, or local law can serve as the predicate for the unlawful prong of this standard. With regard to the unfairness prong, courts have resisted a purely subjective standard, favoring an open-ended, nuisance-type balancing framework.<sup>149</sup> As such, the unfairness standard is quite broad, allowing courts wide discretion to prohibit new schemes to defraud. The fraud prong bears little resemblance to common law fraud or deception; rather, the test is whether the public is likely to be deceived. Thus, a violation of the fraud prong, unlike common law fraud, may be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage.<sup>150</sup>

Although similar in some respects to both the Lanham Act’s unfair competition provisions and the FTC’s unfairness and deception tests, California’s unfair competition regime may have broader reach because of dif-

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144. CAL. BUS. & PROF. CODE § 17200 (West 2004).

145. See *Gregory v. Albertson’s, Inc.*, 128 Cal. Rptr. 2d 389 (Cal. Ct. App. 2002).

146. See *id.*; CAL. BUS. & PROF. CODE § 17204 (West 2004).

147. See CAL. BUS. & PROF. CODE § 17203 (West 2004); *cf.* *People v. Thomas Shelton Powers, M.D., Inc.*, 3 Cal. Rptr. 2d 34 (Cal. Ct. App. 1992) (ordering disgorgement of profits under § 17200). *But see* *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 732 (Cal. 2000) (overruling, in part, disgorgement in *Thomas Shelton Powers, M.D., Inc.*). Public enforcers, however, may recover civil damages. CAL. BUS. & PROF. CODE §§ 17206, 17206-1 (West 2004). A successful plaintiff may seek attorney fees where the action has been brought as a “private attorney general” action. See CAL. CIV. PROC. CODE § 1021.5 (West 2004).

148. CAL. BUS. & PROF. CODE § 17200.

149. *Gregory*, 128 Cal. Rptr. 2d at 389.

150. See *People ex rel. Lockyer v. Fremont Life Ins. Co.*, 128 Cal. Rptr. 2d 463 (Ct. App. 2002), *opinion modified on denial of reh’g*, 129 Cal. Rptr. 2d 298 (Ct. App. 2003).

ferent legal standards. At a minimum, the California regime creates some added uncertainty regarding the boundaries of liability.

b) Florida

Florida has both statutory and common law restraints on unfair competition. Florida's Deceptive and Unfair Trade Practices Act (FDUTPA),<sup>151</sup> enacted in 1973, follows Alternative 1 of the proposed FTC model act: "Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."<sup>152</sup> As a guide to interpreting the scope of this provision, the Act declares that it is the "intent of the Legislature that . . . due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to § 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) as of July 1, 2001."<sup>153</sup> Although court decisions frequently applied the FTC's pre-1983 standards for determining what constitutes an "unfair" or "deceptive" trade practice, more recent decisions consider the modern interpretations of these terms by the FTC.<sup>154</sup> The Florida statute confers broad standing upon "anyone aggrieved by a violation" of the Act, extending to consumers and competitors.<sup>155</sup> The FDUTPA provides for injunctive relief, damages, and attorney fees. Prior versions of the Act allowed only consumers to obtain damages, but recent amendments have broadened the provision to apply to any "person who has suffered a loss as a result of a violation" of the Act.<sup>156</sup> Florida's common law of unfair competition does not appear to extend beyond these statutory limits.

Thus, Florida's statutory unfair competition regime parallels the federal regime. The courts have also consistently held that the analysis of Florida statutory and common law claims of trademark infringement and unfair competition is the same as under the federal trademark law.<sup>157</sup>

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151. See FLA. STAT. § 501.201 (2004).

152. FLA. STAT. § 501.204 (2004).

153. FLA. STAT. §§ 501.202, 501.205 (2004).

154. See David J. Federbush, *Obtaining Relief for Deceptive Practices Under FDUTPA*, 75 FLA. BAR J. 22 (Nov. 2001); David J. Federbush, *The Unexplored Territory of Unfairness in Florida's Deceptive and Unfair Trade Practices*, 73 FLA. BAR J. 26 (May 1999).

155. See generally Federbush, *supra* note 154.

156. FLA. STAT. § 501.211 (2004).

157. See *Gift of Learning Found., Inc. v. TGC, Inc.*, 329 F.3d 792 (11th Cir. 2003); *Investacorp, Inc. v. Arabian Inv. Banking Corp. (Investcorp) E.C.*, 931 F.2d 1519, 1521 (11th Cir. 1991); *Monsanto Co. v. Campuzano*, 206 F. Supp. 2d 1252 (S.D. Fla. 2002) ("The legal standard for federal trademark and unfair competition, and for common law

## c) Georgia

Georgia's unfair competition law comprises four distinct statutes as well as common law protection. Modeled after the Uniform Deceptive Trade Practices Act, Georgia's Deceptive Trade Practices Act (DTPA), enables competitors to enjoin a wide range of deceptive practices.<sup>158</sup> A separate statute prohibits false advertising.<sup>159</sup> Georgia's Unfair Competition Act,<sup>160</sup> dating back well over a century, prohibits the tort of passing off.<sup>161</sup> Federal courts have held that the substantive standards of liability under § 23-2-55 "mirror" the standards of liability applicable under the Lanham Act.<sup>162</sup> The Fair Business Practices Act (FBPA),<sup>163</sup> enacted in 1975, combines Alternatives 1 and 3 of the FTC's proposed Unfair Trade Practices and Consumer Protection Law. Thus, it both provides a general prohibition against unfair and deceptive trade practices and offers a large illustrative list of unfair and deceptive practices. The FBPA, however, is limited to "[u]nfair or deceptive acts or practices in the conduct of *consumer transactions and consumer acts* or practices in trade or commerce,"<sup>164</sup> and therefore denies standing to competitors.<sup>165</sup> Georgia's common law of unfair competition, although evolving beyond pre-*Erie* jurisprudential restraints,<sup>166</sup> does not appear to reach beyond the modern

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trademark infringement, are essentially the same. . . . To prevail on [] unfair competition claims under Florida common law, [a plaintiff] must show 'deceptive or fraudulent conduct of a competitor and likelihood of consumer confusion.');" *see also* *Great S. Bank v. First S. Bank*, 625 So. 2d 463 (Fla. 1993) (applying Lanham-like framework to common law trademark claim and noting that Florida's trademark act, § 495.181, states that "[i]t is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable provisions of the Trademark Act of 1946, as amended (15 U.S.C. §§ 1051 et seq.)").

158. *See* Deceptive Trade Practices Act, GA. CODE ANN. § 10-1-370 (2004).

159. *See* GA. CODE ANN. § 10-1-420 (2004).

160. *See* GA. CODE ANN. § 23-2-55 (2004).

161. *See* *Sofate of Am., Inc. v. Brown*, 318 S.E.2d 771 (Ga. 1984).

162. *See* *Univ. of Ga. Athletic Ass'n v. Laite*, 756 F.2d 1535, 1539 n.11 (11th Cir. 1985) (observing that standards under §23-2-55 "are similar, if not identical to those under the Lanham Act").

163. *See* GA. CODE ANN. § 10-1-390 (2004).

164. GA. CODE ANN. § 10-1-393(a) (2004).

165. *See* *Friedlander v. PDK Labs, Inc.*, 465 S.E.2d 670 (Ga. 1996) (emphasis added).

166. *See* *Kay Jewelry Co. v. Kapiloff*, 49 S.E.2d 19 (Ga. 1948) ("In the light of modern business trends in marketing and advertising, we think the better view of the question is that it is not essential, as a prerequisite to the granting of equitable relief in an action for infringement of a trade name, that actual and direct market competition between the litigants be shown, and that the test as to whether equitable relief is

Lanham Act or Georgia's unfair competition statutes. Thus, Georgia's unfair competition regime does not appear to extend beyond the federal Lanham or FTC Acts.<sup>167</sup>

d) Michigan

Michigan protects consumers and competitors against unfair competition under its Consumer Protection Act (MCPA),<sup>168</sup> passed in 1970, and common law. Rather than employing an open-ended standard like many other states and the FTC Act, the MCPA prohibits more than 30 specific practices, ranging from passing off to particular misleading inducements. For example, the Act prohibits representing that a consumer will receive free goods without clearly and conspicuously disclosing the conditions, terms, or prerequisites to the use or retention of the goods or services advertised.<sup>169</sup> The MCPA does, however, incorporate the FTC Act's standards by authorizing class actions to be pursued on the basis of a federal appellate decision finding a business practice to be unfair or deceptive within the meaning of section 5(a)(1) of the FTC Act.<sup>170</sup> Although initially focused on consumer harm,<sup>171</sup> recent decisions have expanded standing under the MCPA to include competitors.<sup>172</sup>

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available, should not be limited to those cases where it is shown that there has been an actual diversion of trade from one business to another.”)

167. *See* Step Co. v. Consumer Direct, Inc., 936 F. Supp 960, 967 (N.D. Ga. 1994) (observing that the case law indicates Georgia's common law of unfair competition and the GDTPA are “coextensive with the Lanham Act analysis”).

168. MICH. COMP. LAWS § 445.901 (2005).

169. MICH. COMP. LAWS § 445.903 (2005). The standard applied in determining whether defendant has engaged in “unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce,” in violation of the MCPA, is the same confusion as to source standard applicable to trademark violations under the Lanham Act. *See* Microsoft Corp. v. Compuserve Distributions, Inc., 115 F. Supp. 2d 800 (E.D. Mich. 2000); Schreiber Mfg. Co. v. Saft Am., Inc., 704 F. Supp. 759 (E.D. Mich. 1989) (holding that the likelihood of confusion standard applicable to a claim under the MCPA is the same as that involved in federal and state trademark law).

170. Mich. Comp. Laws § 445.911(b)(3)(c) (2005).

171. *See* Wynn Oil Co. v. Am. Way Serv. Corp., 736 F. Supp. 746 (E.D. Mich. 1990), *aff'd in part, rev'd in part on other grounds*, 943 F.2d 595 (6th Cir. 1991); Noggles v. Battle Creek Wrecking, Inc., 395 N.W.2d 322, 324 (Mich. Ct. App. 1986). Section 445.902(d) of the MCPA defines “trade or commerce” narrowly as “the conduct of a business providing goods, property, or service *primarily for personal, family, or household purposes . . .*” (emphasis added).

172. *See* Florists' Transworld Delivery, Inc. v. Fleurop-Interflora, 261 F. Supp. 2d 837, 848 (E.D. Mich. 2003); Action Auto Glass v. Auto Glass Specialists, 134 F. Supp. 2d 897 (W.D. Mich. 2001); John Labatt Ltd. v. Molson Breweries, 853 F. Supp. 965 (E.D. Mich. 1994) (holding that MCPA authorizes suits against competitors so long as the underlying deceptive practice relates to “goods, property, or service primarily for

Michigan's common law of unfair competition prohibits unfair and unethical trade practices that are harmful to one's competitors or to the general public.<sup>173</sup> As applied by Michigan courts, unfair competition consists in the simulation by a person of the name, symbols, or devices employed by a business competitor for the purpose of deceiving the public, or the substitution of the goods or wares of one person for those of another, thus falsely inducing the buying of the goods, and obtaining for the seller profits belonging to a business rival.<sup>174</sup> No one has the right to sell or advertise his or her own business or goods as those of another, so as to mislead the public and injure the other person, nor may any person by imitation or unfair device induce the public to believe that the merchandise he or she is selling is that of another in order to appropriate the value of the reputation which a competitor has acquired for his or her own merchandise.<sup>175</sup> Thus, Michigan courts have followed the general law of unfair competition.<sup>176</sup> As in most other jurisdictions, Michigan's common-law doctrine of unfair competition was ordinarily limited to acts of fraud, bad-faith misrepresentation, misappropriation, or product confusion,<sup>177</sup> and has retained its 1930s era constraints.<sup>178</sup> Since the passage of the MCPA, there has been little reason to invoke the Michigan common law of unfair competition in pursuing deceptive advertising and related claims.

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personal, family, or household purposes"). *But see* *Cosmetic Dermatology and Vein Ctrs. of Downriver, P.C. v. New Faces Skin Care Ctrs., Ltd.*, 91 F. Supp. 2d 1045 (E.D. Mich. 2000) (rejecting an MCPA lawsuit between competitors on the ground that there was no "purchase or transaction" involving goods or property "primarily for personal, family, or household purposes").

173. *See* *Clairol, Inc. v. Boston Disc. Ctr., Inc.*, 608 F.2d 1114, 1118 (6th Cir. 1979).

174. *See* *James Heddon's Sons v. Millsite Steel & Wire Works*, 128 F.2d 6 (6th Cir. 1942); *Moon Bros. v. Moon*, 1 N.W.2d 488 (Mich. 1942); *Carbonated Beverages v. Wisko*, 297 N.W. 79 (Mich. 1941); *Schwannecke v. Genesee Coal & Ice Co.*, 247 N.W. 761 (Mich. 1933).

175. *See* *James Heddon's Sons v. Millsite Steel & Wire Works*, 128 F.2d 6 (6th Cir. 1942); *Carbonated Beverages v. Wisko*, 297 N.W. 79 (Mich. 1941); *Williams v. Farrand*, 50 N.W. 446 (Mich. 1891).

176. *See* *A & M Records, Inc. v. MVC Distrib. Corp.*, 574 F.2d 312, 313 (6th Cir. 1978); *Tas-T-Nut Co. v. Variety Nut & Date Co.*, 245 F.2d 3, 8 (6th Cir. 1957).

177. *See generally* 54A Am. Jur. 2d *Monopolies, Restraints of Trade and Unfair Trade Practices* § 1107 (2004); *see also* *In re MCI Telecomm. Corp.*, 612 N.W.2d 826, 837 (Mich. App. 2000) (noting that Michigan's Telecommunications Act extends further than the common law of unfair competition in regulating conduct that is "adverse to the public interest").

178. *See, e.g.,* *Burns v. Schotz*, 72 N.W.2d 149 (Mich. 1955); *Good Housekeeping Shop v. Smitter*, 236 N.W. 872 (Mich. 1931). *But cf.* *Boron Oil Co. v. Callanan*, 213 N.W.2d 836 (Mich. 1973) (loosening the competition requirement).

Although it appears that Michigan's unfair competition regime largely parallels the scope and remedies available under federal law, the MCPA's somewhat different formulation of standards could potentially afford wider coverage.

e) North Carolina

The North Carolina Unfair Trade Practices Act (NCUTPA),<sup>179</sup> enacted in 1969, adopted Alternative 1 of the FTC's proposed Unfair Trade Practices and Consumer Protection Law. It does not expressly tie interpretation of its terms to interpretations given by the FTC, although courts have borrowed the expansive definition of "deception" that the federal courts have traditionally employed in interpreting the FTC Act.<sup>180</sup> The statute expressly provides for a broad private right of action extending to both consumers and businesses (including competitors).<sup>181</sup> It also affords victorious plaintiffs treble damages.<sup>182</sup> Courts may, in their discretion, award attorney fees.<sup>183</sup>

Because common law remedies were ineffective, the North Carolina legislature enacted the statute to provide a private cause of action for aggrieved consumers.<sup>184</sup> In order to prevail under the statute, plaintiff must demonstrate the existence of three factors: "(1) an unfair or deceptive act or practice, . . . (2) in or affecting commerce, and (3) which proximately caused actual damage to the plaintiff . . ." <sup>185</sup> In interpreting the first element, courts apply the broader, pre-1983 standard for deception. A trade practice is "deceptive" if it has capacity or tendency to deceive; proof of actual deception is not required. A trade practice is "unfair" when it of-

179. See N.C. GEN. STAT. § 75-1.1 (2005).

180. See *Hageman v. Twin City Chrysler-Plymouth Inc.*, 681 F. Supp. 303 (M.D.N.C. 1988); cf. *E. Roofing & Aluminum Co. v. Brock*, 320 S.E.2d 22 (N.C. 1984) (same); *State ex rel. Edmisten v. J.C. Penney Co.*, 233 S.E.2d 895 (N.C. 1977) (noting that federal decisions construing the FTC Act may furnish some guidance to the meaning of this section, but federal court decisions are not controlling).

181. See *McDonald v. Scarboro*, 370 S.E.2d 680 (N.C. Ct. App. 1988); *Harrington Mfg. Co. v. Powell Mfg. Co.*, 248 S.E.2d 739 (N.C. Ct. App. 1978) (holding that the statute applies to disputes between competitors, and not only to dealings between buyers and sellers).

182. See N.C. GEN. STAT. § 75-16 (2005). See generally Robert Morgan, *The People's Advocate in the Marketplace—The Role of North Carolina's Attorney General in the Field of Consumer Protection*, 6 WAKE FOREST INTRAMURAL L. REV. 1 (1969).

183. See N.C. GEN. STAT. § 75-16.1 (2005); *Canady v. Crestar Mtg. Corp.*, 109 F.3d 969 (4th Cir. 1997).

184. See *Bhatti v. Buckland*, 400 S.E.2d 440 (N.C. 1991).

185. See *Cash v. State Farm Mut. Auto. Ins. Co.*, 528 S.E.2d 372, 375 (N.C. Ct. App. 2000).

fends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.<sup>186</sup>

Litigation under North Carolina's UTPA statute involving competitors has been particularly brisk.<sup>187</sup> In *Polo Fashions, Inc. v. Craftex, Inc.*,<sup>188</sup> the owner of the "Polo" and "Ralph Lauren" trademarks brought suit under the Lanham Act and the North Carolina Unfair Trade Practices Act. The court held that while damages could not be awarded under the Lanham Act because 15 U.S.C. § 1111 requires the statutory notice or registration before damages are permitted, damages were available (and trebled) under the state statute.<sup>189</sup> Thus, the North Carolina unfair competition statute may well impose broader liability than federal law.

f) South Carolina

The South Carolina Unfair Trade Practices Act (SCUPTA) was initially enacted in 1962 and was amended in 1971 in light of the FTC proposed act.<sup>190</sup> In its amended form, the SCUPTA adopts Alternative 1 of the FTC's proposal but provides much more open-ended standing. Under the Act, "[a]ny person who suffers any ascertainable loss of money or property,"<sup>191</sup> not merely consumers purchasing for personal use, may bring a private action under this statute. Thus, competitors have standing under this statute.<sup>192</sup> Private parties are entitled to recover actual damages (which shall be trebled in cases of willful or knowing violations of the Act) as well as reasonable attorney's fees and costs,<sup>193</sup> although only the Attorney General may obtain injunctive relief under the statute.<sup>194</sup>

In order to make out a claim under this statute, a plaintiff must establish: (a) unfair or deceptive act or practice in the conduct of trade or commerce; (b) that the plaintiff suffered actual, ascertainable damages as a re-

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186. See *Huff v. Autos Unlimited, Inc.*, 477 S.E.2d 86 (N.C. Ct. App. 1996).

187. See EDMUND W. KITCH & HARVEY S. PERLMAN, *INTELLECTUAL PROPERTY AND UNFAIR COMPETITION* 153 (5th ed. 1998).

188. 816 F.2d 145 (4th Cir. 1987).

189. *But see Sideshow, Inc. v. Mammoth Records, Inc.*, 751 F. Supp. 78, 80 (E.D.N.C. 1990) (limiting *Polo Fashions* to intentional infringement and holding that the North Carolina automatic trebling statute does not apply to innocent and unintentional infringement of unregistered trademarks because the plaintiff is "not an injured consumer and has several other adequate remedies").

190. See S.C. CODE ANN. § 39-5-10 et seq. (2004).

191. S.C. CODE ANN. § 39-5-140.

192. See *Global Prot. Corp. v. Halbersberg*, 503 S.E.2d 483, 487 (S.C. Ct. App. 1998).

193. S.C. CODE ANN. § 39-5-140.

194. S.C. CODE ANN. § 39-5-50.

sult of the defendant's use of the unlawful trade practice; and (c) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest.<sup>195</sup> The scope of unfair or deceptive trade practices under the Act "will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a)(1),"<sup>196</sup> although as in North Carolina, South Carolina courts continue to apply the somewhat broader pre-1983 federal standard of deception: a practice is "deceptive" when it has a tendency to deceive.<sup>197</sup> An act is "unfair" when it is offensive to public policy or when it is immoral, unethical, or oppressive.<sup>198</sup> To satisfy the second requirement, the plaintiff must establish actual damage as well as causation. The third element mirrors the "public interest" requirement of the FTC Act.<sup>199</sup> An adverse impact upon the public interest can be established by showing that an unfair or deceptive act has the potential for repetition. This can be established by a showing that the same kind of actions occurred in the past or by showing that company's procedures create a potential for repetition of the unfair and deceptive acts.<sup>200</sup>

There are at least two significant reasons to believe that the application of the SCUPTA is not merely duplicative of federal Lanham Act causes of action and could expose behavioral marketing firms to more liberal liability standards. First, a finding of liability under the SCUPTA entitles the plaintiff to recover attorney fees and costs and opens up the possibility of an award of treble damages should willfulness be established.<sup>201</sup> Second, as noted above, the South Carolina courts apply the more capacious pre-1983 standards for deception and unfairness.

A 1996 case decided under the SCUPTA, although not involving Internet-related activities, suggests that South Carolina courts might consider advertisements that obscure website banners to be troubling. *Daisy Outdoor Advertising Company, Inc. v. Abbott*<sup>202</sup> involved two fiercely

195. See *Havird Oil Co. v. Marathon Oil Co.*, 149 F.3d 283, 291 (4th Cir. 1998).

196. S.C. CODE ANN. § 39-5-20(b).

197. See *Johnson v. Collins Entm't Co.*, 564 S.E.2d 653, 665 (S.C. 2002); *Williams-Garrett v. Murphy*, 106 F. Supp. 2d 834 (D.S.C. 2000).

198. See *id.*

199. See *Daisy Outdoor Advert. Co. v. Abbott*, 473 S.E.2d 47, 49-50 (S.C. 1996); *Noack Enters., Inc. v. Country Corner Interiors*, 351 S.E.2d 347, 350-51 (S.C. Ct. App. 1986).

200. See *Lib. Mut. Ins. Co. v. Employee Res. Mgmt., Inc.*, 176 F. Supp. 2d 510, 516 (D.S.C. 2001).

201. See *State ex rel. Medlock v. Nest Egg Soc'y Today, Inc.*, 348 S.E.2d 381, 383 (S.C. Ct. App. 1986) (finding "willful" violation when the party committing the violation knew or should have known that his conduct violated the Act).

202. 473 S.E.2d 47 (S.C. 1996).

competitive billboard sign companies. After one of the companies (Abbott) invested in the construction of a large billboard along a stretch of highway, a competing advertising company owning an adjacent parcel of land (Daisy) erected a sign entirely blocking Abbott's sign. The second billboard violated a state law regulating the placement of billboards. After being notified of this violation, Daisy replaced the illegal sign with a "For Sale" sign advertising the property on which the sign is located.<sup>203</sup> "For Sale" signs were exempt from the state statute regulating placement of billboards.<sup>204</sup> Like Daisy's previous sign, the unregulated "For Sale" sign completely blocked the Abbott billboard, requiring Abbott to find an alternative location for its customer's advertisement. The trial court held that Daisy's actions constituted an unfair or deceptive act or practice in the conduct of trade or commerce, caused harm to Abbott's business, and adversely affected the public interest. It awarded Abbott treble damages. On appeal, the intermediate appellate court overturned the decision under the "public interest" requirement, applying a more stringent standard.<sup>205</sup> The South Carolina Supreme Court reversed, reinstating the trial court's decision.<sup>206</sup>

### 3. *State Legislative Spyware and Adware Initiatives*

In addition to this diverse, complex, and rather amorphous landscape of state unfair competition statutory and common law, more than half of the states have either recently enacted or are actively considering legislation specifically targeting spyware. Chart I summarizes this explosion of legislative activity.<sup>207</sup>

The extent to which these laws would regulate behavioral marketing activities depends on several variables—requirements related to the means by which software triggering advertisements is installed on users' computers (notice, consent, ease of removal); restrictions on specific practices (for example, using trademarks of others to trigger advertising delivery, keystroke monitoring); scope of liability (whether it extends to advertisers as well as companies that distribute advertisements); enforcement (public, private right action, class action); and remedies (statutory damages, treble damages, fees and costs). Behavioral marketing companies have pushed for relatively lax requirements whereas traditional web publishers have

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203. Under § 57-25-140(E) of South Carolina's Highway Advertising Control Act, a billboard may not be built within 500 feet of another billboard.

204. See S.C. CODE ANN. § 57-25-140(A)(5) and (D) (2004).

205. 451 S.E.2d 394, 397 (S.C. Ct. App. 1994).

206. 473 S.E.2d 47, 48 (S.C. 1996).

207. See *infra* Supplement for Chart I.

lobbied for strong notice, consent, and removal requirements.<sup>208</sup> The Internet Alliance, a consortium of leading Internet businesses including America Online, eBay and Microsoft, have opposed spyware legislation out of concern that it could unintentionally hamper some means of doing legitimate business on the Internet.<sup>209</sup> Many of the pending bills (Alabama, Arizona, Arkansas, California, Delaware, Illinois, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New York, Texas, Virginia, and Washington) opt for weaker notice and consent requirements. A few states, most notably Alaska and Utah, have favored stronger regulation.

Utah became the first state to enact spyware legislation in March 2004.<sup>210</sup> Utah's Spyware Control Act prohibits installation of spyware or adware (triggered by use of a trademark of another) without the computer user's informed consent. The Act empowers website owners (or registrants), trademark or copyright owners, or authorized website advertisers harmed by such activities to bring suit. The legislation grew out of lobbying by website owners seeking to prevent targeting of their sites by behavioral marketing firms. Shortly thereafter, Overstock.com, a Utah-based online retailer, sued its competitor, Massachusetts-based SmartBargains.com, for allegedly serving pop-up ads over Overstock.com's site in violation of Utah's Spyware Control Act. This lawsuit also alleged common law causes of action based on unfair competition and interference with prospective economic advantage.<sup>211</sup> In an unrelated action,

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208. See John Borland, *States join spyware battle*, CNET NEWS.COM, Mar. 4, 2004, [http://news.com/States+join+spyware+battle/2100-1024\\_3-5170263.html](http://news.com/States+join+spyware+battle/2100-1024_3-5170263.html); Ben Edelman, *California's Toothless Spyware Law* (Sept. 29, 2004), <http://www.benedelman.org/news/092904-1.html>; Tobi Elkin, *A Conversation with Claria's Privacy Chief*, MEDIAPOST Q&A PART II, Aug. 5, 2004, <http://www.mediapost.com/PrintFriend.cfm?articleId=262798>; RED HERRING, *A bill on the California governor's desk seeks to block spyware on your PC, but some say it will do little to curb annoying pop-ups and intrusive software*, Sept. 17, 2004, <http://www.redherring.com/article.aspx?a=10859&hed=Should+spyware+be+a+crime?>; Memorandum in Support of Plaintiff WhenU.com Inc.'s Application for a Temporary Restraining Order and Motion for Preliminary Injunction at 7 n.6 (Apr. 12, 2004), [http://www.benedelman.org/spyware/whenu-utah/whenu-memo-tro\\_pi.pdf](http://www.benedelman.org/spyware/whenu-utah/whenu-memo-tro_pi.pdf) (noting lobbying efforts by 1-800 Contacts).

209. See Stefanie Olsen, *Utah judge freezes anti-spyware law*, CNET NEWS.COM, June 22, 2004, [http://news.com.com/Utah+judge+freezes+anti-spyware+law/2100-1024\\_3-5244151.html](http://news.com.com/Utah+judge+freezes+anti-spyware+law/2100-1024_3-5244151.html).

210. See Utah Spyware Control Act, H.B. 323 (codified at UTAH CODE ANN. § 13-4-1 (2005)); Brice Wallace, *Spyware Act has detractors*, DESERET MORNING NEWS, Mar. 19, 2004, available at <http://deseretnews.com/dn/print/1,1442,595050017,00.html>.

211. See Janis Mara & Ron Miller, *Lawsuit Filed Under Utah's Challenged Anti-Spyware Act: Massachusetts based companies fighting it out in Utah*, INTERNET NEWS, May 19, 2004, <http://internetnews.com/ec-news/article.php/3356441>. Shortly before the

WhenU.com brought an action seeking to have the Utah legislation declared invalid under the Commerce Clause. In June 2004, a state court granted a preliminary injunction blocking the Act from taking effect.<sup>212</sup>

In March 2005, Utah amended its Spyware Control Act in an attempt to circumvent the Commerce Clause bar.<sup>213</sup> The revised act retains the strong form approach—prohibiting display of pop-up advertisements in response to a mark without authorization and imposing liability upon an advertiser who receives actual notice from a mark owner of the use of its mark to trigger advertisements and fails to take reasonable steps to stop violations. It seeks to address the Commerce Clause infirmity by exempting from liability those who request information about a user's state of residence prior to sending spyware or pop-up advertisements and the user indicates a residence outside of Utah. The Act provides for both public enforcement and a private right of action by a mark owner who does business in Utah and is directly and adversely affected. It also awards treble damages in the case of willful and knowing violations.

### C. Testing the Least Common Denominator Hypothesis and Policy Implications

The review of state unfair competition law, the early state legislative forays into spyware legislation, and the first lawsuits under state laws support the hypothesis that the most restrictive state law regimes have nationwide effect on Internet-related activities. The common law of South Carolina or spyware legislation in Utah directly affect Internet-related businesses based anywhere in the nation due to the ubiquity of the World Wide Web and the minimal standards for personal jurisdiction. Furthermore, the process by which the first and arguably most restrictive state spyware laws came into existence demonstrates that state legislation can result from the lobbying efforts of even one persistent company.

Given the unpredictability of the state unfair competition law, it is perhaps not surprising that Claria chose to settle many of the lawsuits it has

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passage of the first Utah anti-spyware legislation, an active sponsor of that legislation (1-800-Contacts) brought suit against Coastal Contacts, a competitor that sponsored advertisements on WhenU.com's advertising platform targeting 1-800-Contacts' website. *See Draper firm files lawsuit over pop-up ads*, DESERET MORNING NEWS, Mar. 19, 2004, available at <http://deseretnews.com/dn/print/1,1442,595050012,00.html>.

212. *See* Stefanie Olsen, *Utah judge freezes anti-spyware law*, CNET NEWS.COM, June 22, 2004, [http://news.com.com/Utah+judge+freezes+anti-spyware+law/2100-1024\\_3-5244151.html](http://news.com.com/Utah+judge+freezes+anti-spyware+law/2100-1024_3-5244151.html).

213. *See* H.B. 104, 2005 Gen. Sess. (Utah 2005), available at <http://www.le.state.ut.us/~2005/bills/hbillenr/hb0104.htm>.

faced.<sup>214</sup> The range of states in which these cases were brought supports the nationwide exposure that Internet-based businesses face under personal jurisdiction jurisprudence and the reality that the state with the most restrictive rules serves as a least common denominator to which a prudent company must adhere.

Due to the recent vintage of the state spyware legislation, there has not been much litigation. Although many of these statutes have common elements, they will tend to diverge as courts interpret the provisions. As with state common law and existing unfair competition legislation, the provisions of the most restrictive state will set the bar for prudent Internet-based businesses.

Thus, the premise of Justice Brandeis's often cited aphorism about states serving as "laboratories" on policy innovation does not hold in the case of spyware regulation. The decisions of any one state will have significant impacts on activities in other states due to the ubiquity of the Internet. The least common denominator hypothesis suggests that spyware should be governed at the federal level and that state legal regimes—whether common law or statutory—should be preempted.

#### IV. FEDERAL SPYWARE INITIATIVES AND FEDERALISM IMPLICATIONS

The rapidity with which the Internet evolves creates unprecedented challenges for overworked deliberative bodies like legislatures and courts. For example, the rush to register trademarks of others as domain names and the scourge of computer viruses occurred in ways that few foresaw. The 1998 Digital Millennium Copyright Act, which sought to ensure the protection of copyrighted works in the digital environment,<sup>215</sup> failed to anticipate the emergence of peer-to-peer technology less than a year later. Similarly, the concerns surrounding spyware appeared suddenly and have generated a good amount of litigation and legislative hand-wringing.

Given the advantages of uniform standards for regulating Internet-related activities, are there systemic reasons to question the adequacy of federal regulators (FTC) and the federal legislature to address the public policy concerns raised by spyware? Furthermore, do these reasons over-

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214. Stefanie Olsen, *Pop-up purveyor Claria settles suits*, CNET NEWS.COM, Aug. 31, 2004, [http://news.com.com/Pop-up+purveyor+Claria+settles+suits/2100-1024\\_3-5333003.html](http://news.com.com/Pop-up+purveyor+Claria+settles+suits/2100-1024_3-5333003.html); Stefanie Olsen, *Web publishers settle with Gator*, CNET NEWS.COM, Feb. 7, 2003, [http://news.com.com/Web+publishers+settle+with+Gator/2100-1023\\_3-983870.html](http://news.com.com/Web+publishers+settle+with+Gator/2100-1023_3-983870.html).

215. See S. REP. NO. 105-190, at 8 (1998); see also H.R. REP. NO. 105-551, pt. 2, at 23 (1998).

ride the advantages of national uniformity and coordinated policy development? This section reviews the actions of the FTC and Congress in coming up to speed in addressing the policy concerns. During the relatively short time period that spyware has aroused concern, federal authorities have been attentive to the emerging problems. Although no federal legislation has yet passed, Congress has sought to balance the complex considerations and appears likely to pass balanced legislation which preempts some state initiatives. Based on the foregoing analysis, Congress should preempt state regulation of spyware. The general provisions of the Lanham Act and the FTC Act largely parallel state unfair competition and consumer protection regimes. Preempting the state counterparts to these laws in the context of Internet-related activities would substantially harmonize legal standards, reduce business planning costs, and eliminate needless and costly litigation of vague and uncertain state causes of action.

### A. FTC Enforcement and Regulatory Analysis

Federal authority over deceptive practices falls within the general jurisdiction of the Federal Trade Commission. The FTC Act authorizes the agency to promulgate rules and initiate enforcement proceedings directed at deceptive and unfair trade practices.

As the concerns relating to spyware emerged, the FTC began oversight of this area, responding to consumer complaints and studying the problems. Since 1998, the agency has brought fourteen cases relating to spyware.<sup>216</sup> For example, in 2003, the FTC initiated an enforcement proceeding against D Squared Solutions, a San Diego based software vendor that sold pop-up blocking software. D Squared Solutions promoted the software by bombarding consumers with pop-up advertisements through the use of a feature within Microsoft's Windows operating system that allows network administrators to notify users about critical maintenance. D Squared Solutions would then offer consumers the opportunity to purchase its software as a solution to such annoyance.<sup>217</sup> Under its general authority to combat unfair and deceptive trade practices, the FTC successfully obtained a court order barring D Squared Solutions from sending pop-up ads to computer users through this security hole.<sup>218</sup>

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216. See FTC Spyware Report, *supra* note 8, at 20 n.204; see also Bob Sullivan, *Federal spyware crackdown continues: But relief for consumers may be slow in coming*, MSNBC, Oct. 12, 2004, <http://msnbc.msn.com/id/6228258>.

217. See Stefanie Olsen, *Pop-up purveyor fights FTC*, CNET NEWS.COM, Dec. 10, 2003, [http://news.com.com/Pop-up+purveyor+fights+FTC/2100-1032\\_3-5119482.html](http://news.com.com/Pop-up+purveyor+fights+FTC/2100-1032_3-5119482.html).

218. See *FTC Obtains Order Barring Pop-up Spam Scam, Urges Consumers to Take Steps to Protect Themselves*, Nov. 6, 2003, <http://www.ftc.gov/opa/2003/11/>

The FTC has also devoted substantial resources to monitoring spyware activities and studying regulatory solutions. In April 2004, the agency sponsored a full day public workshop exploring the public policy issues surrounding spyware.<sup>219</sup> In March 2005, it released a detailed study, entitled “Monitoring Software on your PC: Spyware, Adware, and Other Software,” seeking to define the spyware problem, measuring its effects, exploring industry responses, and assessing enforcement and regulatory policies. At this stage, the FTC believes that its existing regulatory authority enables it to address present concerns relating to spyware adequately.<sup>220</sup> Although some critics have complained that the FTC has not been sufficiently proactive in confronting the threats posed by spyware,<sup>221</sup> the FTC’s deliberative and cautious approach ensures that the broad range of considerations will be fully considered and provides an opportunity for nonregulatory solutions to emerge.<sup>222</sup>

## B. Legislative Proposals

Spyware first appeared on the federal legislative radar screen in 2000. Senator John Edwards introduced the first bill to address surreptitious collection through the use of computer programs.<sup>223</sup> This bill would have required conspicuous notice of such data collection activities by software distributors. With growing concern about the effects of spyware, legislative interest in the field gained momentum in 2003.<sup>224</sup> Several bills have

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dsquared.htm; Grant Gross, *FTC Shuts Down Pop-Up Ad Spammers*, PC WORLD, Aug. 9, 2004, <http://www.pcworld.com/news/article/0,aid,117299,00.asp>.

219. See FTC, *Monitoring Software on your PC: Spyware, Adware, and Other Software* (Apr. 19, 2004), <http://www.ftc.gov/bcp/workshops/spyware>.

220. See Declan McCullagh, *FTC officials blast spyware measures*, CNET NEWS.COM, Apr. 29, 2004, [http://news.com.com/FTC+officials+blast+spyware+measures/2100-1023\\_3-5202016.html](http://news.com.com/FTC+officials+blast+spyware+measures/2100-1023_3-5202016.html) (noting FTC concerns that proposed laws could harm legitimate software products and innovation).

221. See Declan McCullagh, *Few Solutions Pop Up at FTC Adware Workshop*, CNET NEWS.COM, Apr. 19, 2004, [http://news.com.com/Few+solutions+pop+up+at+FTC+adware+workshop/2100-1028\\_3-5195222.html](http://news.com.com/Few+solutions+pop+up+at+FTC+adware+workshop/2100-1028_3-5195222.html).

222. Declan McCullagh, *Making the wrong move against spyware*, CNET NEWS.COM, May 2, 2005, [http://news.com.com/Making+the+wrong+move+against+spyware/2010-1071\\_3-5690270.html](http://news.com.com/Making+the+wrong+move+against+spyware/2010-1071_3-5690270.html) (advocating a cautious approach to spyware regulation and allowing enforcement under existing regulatory authority to proceed).

223. See *Spyware Control and Privacy Protection Act of 2000*, S. 3180, 106th Cong., 2d Sess. (2000), available at <http://thomas.loc.gov/cgi-bin/query/z?c106:S.3180>.

224. Declan McCullagh, *Washington wakes up to spyware, adware*, CNET NEWS.COM, Apr. 28, 2004, [http://news.com.com/Washington+wakes+up+to+spyware%2C+adware/2100-1023\\_3-5201819.html](http://news.com.com/Washington+wakes+up+to+spyware%2C+adware/2100-1023_3-5201819.html).

since been floated,<sup>225</sup> with Representative Mary Bono's Securely Protect Yourself Against Cyber Trespass Act (SPY ACT) garnering the most attention and support.<sup>226</sup> The House of Representatives passed the SPY ACT on May 23, 2005.<sup>227</sup>

The SPY ACT would prohibit the following acts: (1) taking control of the computer by various specified means; (2) modifying computer settings related to use of the computer or to the computer's access to or use of the Internet by various means; (3) collecting personally identifiable information through the use of a keystroke logging function; (4) inducing the owner or authorized user of the computer to disclose personally identifiable information or install software through various deceptive means; and (5) removing, disabling, or rendering inoperative a security, anti-spyware, or anti-virus technology installed on the computer.<sup>228</sup> The Act prohibits collection of personal information without notice and consent, subject to various exceptions and limitations on liability for telecommunication entities.<sup>229</sup> The Act also delegates rulemaking authority to the FTC<sup>230</sup> and vests the agency with enforcement powers.<sup>231</sup>

Of most importance to the issues addressed in this Article, section 6 of the SPY ACT preempts state law regulating spyware:

#### SEC. 6. EFFECT ON OTHER LAWS.

##### (a) Preemption of State Law-

(1) PREEMPTION OF SPYWARE LAWS- This Act supersedes any provision of a statute, regulation, or rule of a State or political subdivision of a State that expressly regulates--

(A) unfair or deceptive conduct with respect to computers similar to that described in section 2(a);

(B) the transmission or execution of a computer program similar to that described in section 3; or

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225. See Benjamin Edelman, "Spyware": *Research, Testing, Legislation, and Suits*, <http://www.benedelman.org/spyware/#legislation> (last visited July 13, 2005).

226. See H.R. 29, 109th Cong. (2005) (formerly H.R. 2929).

227. Roy Mark, *House Approves Anti-Spyware Bills*, INTERNET NEWS, May 23, 2005, <http://www.internetnews.com/bus-news/article.php/3507211>. A prior version of this bill passed in 2004. See Roy Mark, *House Passes Anti-Spyware Bill*, INTERNET NEWS, Oct. 6, 2004, <http://www.internetnews.com/bus-news/article.php/3417891>.

228. See SPY ACT, § 2.

229. See *id.*, § 3.

230. See *id.*, § 10.

231. See *id.*, § 4.

(C) the use of computer software that displays advertising content based on the Web pages accessed using a computer.

(2) ADDITIONAL PREEMPTION-

(A) IN GENERAL- No person other than the Attorney General of a State may bring a civil action under the law of any State if such action is premised in whole or in part upon the defendant violating any provision of this Act.

(B) PROTECTION OF CONSUMER PROTECTION LAWS- This paragraph shall not be construed to limit the enforcement of any State consumer protection law by an Attorney General of a State.

(3) PROTECTION OF CERTAIN STATE LAWS- This Act shall not be construed to preempt the applicability of--

(A) State trespass, contract, or tort law; or

(B) other State laws to the extent that those laws relate to acts of fraud.

(b) Preservation of FTC Authority- Nothing in this Act may be construed in any way to limit or affect the Commission's authority under any other provision of law, including the authority to issue advisory opinions (under part 1 of volume 16 of the Code of Federal Regulations), policy statements, or guidance regarding this Act.

This provision serves the purpose of harmonizing governance of spyware. It accomplishes this goal on both the standard setting and enforcement levels. By preempting state enforcement and forgoing a private right of action, this provision may go too far. First, state regulators may well have resources and information that could complement federal enforcement. Second, such a restrictive enforcement regime risks underenforcement to the extent that interest groups opposing regulation unduly influence federal authorities. Nonetheless, exclusive federal enforcement has the virtue of ensuring a more cohesive and predictable regulatory environment.

## V. GENERAL IMPLICATIONS FOR INTERNET GOVERNANCE

In little more than a decade, the Internet has revolutionized the way commerce and society function, becoming a critical means of communicating, transacting, and entertaining. At the same time, however, the Internet has spawned threats to personal and financial privacy, as well as a host of annoyances ranging from unsolicited e-mails to interferences with the

operation of end users' computers. Neither netiquette, market forces, nor technological fixes have adequately addressed several of these problems, prompting calls for government intervention. This Article has focused on which level of government—state or federal—is best suited for regulating Internet-related activities. In the framework suggested by Justice Brandeis, can states serve as laboratories of policy experimentation in cyberspace without jeopardizing the nation as a whole?

Using spyware and adware as a case study, this Article demonstrates that states cannot serve as independent laboratories of policy experimentation due to the inherent ubiquitous nature of the Internet. The experimentation of any one state creates national exposure, thereby making the policies of that state a national standard. State unfair competition law—encompassing both common law and state statutes—has this effect. Internet businesses can be hauled into court in any state and therefore must consider legal risks in every state. The problem is compounded by the amorphous character of unfair competition law.

This analysis can be generalized beyond the spyware area to almost all Internet-related activities. There are inherent technological limitations on the ability of states to experiment in spam, phishing, malware, privacy, or ecommerce policy without having significant effects on commerce outside of their borders.<sup>232</sup> The ubiquity of the Internet makes state borders largely irrelevant. Therefore, there should be a strong presumption in favor of at least national regulatory governance of most Internet-related activities.

The logic of the Article suggests that even the federal level may be too provincial for addressing Internet-related activities. Governance of many aspects of the Internet properly belongs on the global stage—whether private, public, or some combination thereof. As recognized in prior analyses

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232. The doctrine of trespass to chattels is an exception to this rule because chattels will have a specific locus. See *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1067 (N.D. Cal. 2000); Steven Kam, *Intel Corp. v. Hamidi: Trespass to Chattels and a Doctrine of Cyber-Nuisance*, 19 BERKELEY TECH. L.J. 427 (2004). Thus, the California rule does not prevent Minnesota or Massachusetts from experimenting with their own rules without creating a national standard. Businesses have control over which servers from which they harvest data, thereby enabling them to avoid liability in any particular states by not targeting servers in those states. There may well be benefits to a national rule in this area, cf. Dan Burk, *The Trouble With Trespass*, 4 J. SMALL & EMERGING BUS. L. 27 (2000), but unlike with spyware, companies can limit their exposure to the rules of any state through the design of their code. For example, programmers can customize their automated bots to target servers in particular states in accordance with the applicable regulatory requirements and standards.

advocating global regulatory solutions to Internet-related activities,<sup>233</sup> regulation of Internet activities in any one country can have effects beyond the borders of that particular nation.<sup>234</sup> Therefore, global or at least coordinated or harmonized regulatory standards for Internet activities would serve to create a clear and consistent regulatory environment and avoid the de facto standards from becoming the most restrictive of any nation. The allocation of domain names, which were initially handled within the United States through a government contract with Network Solutions Inc. (NSI), now takes place under the auspices of the Internet Corporation for Assigned Names and Numbers (ICANN), an international entity.<sup>235</sup> This has alleviated the problem of conflicting standards in the assignment of domain names. On larger issues of Internet governance, however, the world is far from consensus.<sup>236</sup>

In some respects, however, nation-based regulation may provide some of the advantages of policy experimentation that Justice Brandeis endorsed. International jurisdiction, country codes, and language erect partial barriers that limit the extent to which legal regulation from one nation spills over into the governance of activities in other nations. In these circumstances, nations can obtain the benefits of seeing how particular regulatory constraints affect economic activities. We are seeing the effects of such experimentation in the areas of privacy,<sup>237</sup> database protection,<sup>238</sup> spyware,<sup>239</sup> and keyword advertising.<sup>240</sup> Nonetheless, there is some risk

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233. See William J. Clinton & Albert Gore, Jr., *A Framework for Global Electronic Commerce* (1997), <http://www.ecommerce.gov/framework.htm> (discussing the need for a set of globally recognized commercial law rules); Kalama Lui-Kwan & Kurt Opsahl, Symposium, *The Legal and Policy Framework for Global Electronic Commerce: A Progress Report*, 14 BERKELEY TECH. L.J. 503 (1999).

234. Cf. Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261 (2002).

235. See Angela Proffitt, *Drop the Government, Keep the Law: New International Body for Domain Name Assignment Can Learn from United States Trademark Experience*, 19 LOY. L.A. ENT. L. REV. 601, 603 (1999); cf. A. Michael Fromkin, *Of Governments and Governance*, 14 BERKELEY TECH. L.J. 617 (1999).

236. See Irwin Arieff, *UN panel fails to agree on how to govern Internet*, REUTERS, July 14, 2005, available at <http://www.wgig.org/docs/Reuters.htm>.

237. See Council Directive 95/46/EC of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31.

238. See Stephen M. Maurer et al., *Europe's Database Experiment*, 294 SCI. 789-90 (2001); James Boyle, *A natural experiment*, FINANCIAL TIMES, Nov. 22, 2004, available at <http://news.ft.com/cms/s/4cd4941e-3cab-11d9-bb7b-00000e2511c8.html>.

239. See Dawn Kawamoto, *German court: Pop-ups need permission*, CNET NEWS.COM, Mar. 26, 2004, <http://news.com.com/2100-1024-5180240.html>; *Spyware Bill*

that such experiments will have undesirable spillover effects and that nations may use different constraints to serve protectionist goals.

Overall, the Internet's broad reach generally favors national and possibly global regulatory policies in order to promote a consistent regulatory environment. In some contexts, the locus of activity (as in the case of trespass to chattels) or practical constraints on activities (such as language and country codes) may create conditions in which sub-national or sub-global regulation is possible without spilling over into other jurisdictions. Policymakers should carefully consider the effects of such spillovers in allocating regulatory authority over Internet activities.

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*Pushes \$10,000 Fine*, AUSTRALIANIT, May 12, 2005, <http://australianit.news.com.au/articles/0,7204,15262588%5E15331%5E%5Enbv%5E15306-15318,00.html>.

240. See *Nanterre Court (TGI), emergency order, Hotels Méridien v. Google France* (Dec. 16, 2004), available at <http://www.juriscom.net/jpt/visu.php?ID=631>.