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INTERNET REGULATION

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Q1: *What is the internet?*

A1: The internet is a world-wide network of computers: at the top, a number of large "backbone" computers owned by major commercial entities that offer high-speed access, which connect to thousands of ISP (internet service providers) around the globe. These ISPs in turn provide access to millions of their business and residential customers. The functioning of the internet lies with individual, independent major hosts who are responsible for maintaining their own computers. The idea of a web is a helpful metaphor in understanding the connectedness of the internet: if one path to the destination is blocked, the network can route the message along a series of alternate paths. No one agency or nation can shut down the internet, as the remaining computers can divert the information around any blockages. This structure is both the strength and weakness of the internet.

Popular components of the internet are email and the world wide web.

Q2: *Isn't the internet the same thing as the world wide web?*

A2: While the terms "internet" and "world wide web" are sometimes used as though they were identical, actually they are not. The internet refers to the entire network of computers, which can communicate in a variety of ways: through email, file-sharing, instant messaging, and websites. The world wide web is just the part of the internet that displays websites. Granted, this is a large and catchy portion of the internet, but actually the true "killer app" (most-used feature) of the internet is email,¹ which is an internet, not a web, application.

¹ According to a Nielsen//NetRatings First Quarter 2002 Global internet Trends report, cited at http://www.aspnews.com/news/article/0,2350,4191_1120841,00.html

Q3: *Didn't the United States start the internet, and if so, why don't we still control it?*

A3: The internet began as a brainchild of a professor at MIT, who became the head of computer research at an American Department of Defense program, the Defense Advanced Research Projects Agency (DARPA) in the 1960s. Many scientists and researchers at DARPA worked on implementing this idea, and the first network, called ARPANET, was built in 1969. The first computers on the internet were universities and DARPA contractors. Other educational institutions and contractors became interested in the concept and usefulness of networking computers. Continued research and development eventually created in the early 1980s the interlocking web of computer networks we now refer to as the internet.

The internet spread first through the research and educational communities, both in America and abroad, and then became available to the general public. Research and development of the internet has always been done in an open, collaborative style between scientists, educational institutions, government, and private entities. Many of the essential technical coordination functions were handled on an informal basis by U.S. government contractors, research institutions, and volunteers.

In 1995, primary responsibility for maintaining the computers that serve as the backbone of the internet was turned over to large commercial internet providers such as MCI and Sprint. The United States had had control over some basic management functions, such as assigning domain names (like capitol.hawaii.gov and state.hi.us) but in 1998 agreed to gradually transfer that responsibility to ICANN, an international nonprofit group.

No one person, institution, or nation "owns" the internet, although certain groups have taken the lead in development, implementation, and management of specific tasks that require central coordination.

Q4: *Why can't Hawaii just prohibit sending spam (electronic junk mail)?*

A4: The structure of the internet – multiple computers routing information world wide – is also the feature that makes the internet most difficult to regulate. Commercial enterprises, called spammers, send out bulk unsolicited mass emails, called spam, to try to reach as many people as possible at a cost that is a tiny fraction of that of bulk mail. Unlike traditional bulk mail, the costs of spam are imposed on the recipient and the recipient's internet service provider (ISP). Spam also causes slower internet speed, uses ISPs' processors without compensation, and wastes time and money of consumers and their ISPs.

The difficulty in anti-spam legislation is in its enforcement. While the spam is received by Hawaii residents, often the sender is out of the state or the country. The difficulty lies in tracking down these spammers and in deciding who will bear the burden of pursuing them. Few states appear to be doing so themselves: a request to NCSL and a review of major anti-spam sites such as CAUCE² turned up only four mentions of state action against spammers: two in Washington state, one in Massachusetts, and one in California.³ The reason for the small number of state-led cases, according to NCSL, is that "enforcement of spam laws is not likely to be high on the list of law enforcement priorities."⁴ The rest of the states allow individuals to sue, passing the burden of enforcement onto the consumers, giving them the opportunity to fight spam, but at their own time and expense.

According to NCSL, twenty-six states have enacted anti-spam legislation, such as instituting criminal penalties for falsifying information in the header, subject line, or point of origin of the email, by providing "opt-out" provisions for the consumers, or by requiring labeling such as "ADULT ADVERTISEMENT" in the subject line. However, due to spam's pervasiveness, many observers believe that spam is best addressed at the federal level.

Federal legislation would ease the difficulty of enforcement, something like the federal law prohibiting junk faxes. However, to date no federal legislation has passed both houses of Congress. CAUCE notes on its website that not all federal legislation is equally helpful and effective for the consumer. One basic divide is between "opt-in" and "opt-out" legislation. In the former, a spammer can never send spam unless the consumer first agrees to receive the mailings. In the latter, spam may be sent freely until the consumer sends an email asking to be removed from the list. The problem with "opt-out" legislation is that it allows each spammer to get at least one piece of email through. Also, consumers are reluctant to use the "please remove" function for spam as statistics show that the majority of "please remove" links are either nonfunctional or serve as a source of addresses to be sold to other spammers. Thus, even if federal legislation is passed, if it is not strong enough, it will not stop the problem.

² The Coalition Against Unsolicited Commercial Email, <http://www.cauce.org>.

³ See, e.g., "The state goes after deceptive e-mailer," Seattle Post-Intelligencer, July 12, 2002, at http://seattlepi.nwsourc.com/business/78263_spamsuit12.shtml

⁴ Email from Pan Greenberg, NCSL Program Principal, to researcher, on September 10, 2002.

Q5: *What's so hard about passing a law protecting children from internet pornography?*

A5: The fluid and open nature of the internet makes it particularly hard to police. Unlike written materials, which must be physically distributed, or broadcast media, which is limited in range and susceptible to a high degree of regulation due to its limited availability, the internet is literally everywhere. As discussed above, there is no single entity in charge of the internet.

Congress has tried twice to restrict minors' access to pornography on the internet, and both times the legislation has been stricken down as an unconstitutional burden on freedom of speech for adults. The first attempt was the Communications Decency Act, part of the Telecommunications Act of 1996. This act was struck down by the United States Supreme Court in 1997.⁵ The basis for striking this Act down is that websites have no way to determine the age of those who visit their sites, and cannot segregate or label communications in a way that would block them from minors. The only way to restrict access to minors would be to ban it entirely, which would infringe on the constitutional right of adults to access pornography in their own homes.

The second attempt was made in the Child Online Protection Act (COPA). It was initially struck down by a federal district court on First Amendment grounds, and then on appeal by the Third Circuit Court of Appeals on different constitutional grounds. The United States Supreme Court reviewed the Third Circuit decision and reversed it, but kept the district court injunction in place, and directed the Third Circuit to review the appeal again and consider the constitutional problems that the District Court had found. Briefs in this case were filed in July and August 2002. It seems likely that the Third Circuit decision, whichever way it goes, will also be appealed to the Supreme Court.

Based on these two statutes and resultant case law, it is not yet clear whether there is any constitutional way that either a state or the federal government can effectively prevent the viewing of pornography by minors through the internet. The State should wait for the conclusion of the COPA litigation before it considers any laws in this area.

Q6: *I hear some states are trying to regulate sales on the internet. What have they done? Can Hawaii start taxing sales on the internet?*

A6: States are very interested in trying to tax internet sales: according to the July 2002 issue of *Governing* magazine, states lost an estimated \$13.3 billion worth of sales taxes on internet sales in 2001, and that amount is projected to increase substantially.

⁵ Reno v. ACLU (1997)

Currently, the United States Supreme Court⁶ in the Quill case has prohibited states from charging sales taxes unless the business already has a physical location in the state. This prohibition is for all types of sales, including catalog sales, and is based on the huge number – approximately 7500 – of state, county, and local taxing authorities that out-of-state sellers would be required to comply with. The difficulty is not just in the amount of tax, but what is taxed: in one jurisdiction, orange juice might be classified as a fruit, and thus taxed, but in another, as a beverage, and not subject to tax. Requiring an out-of-state seller with no physical location in the state to comply with all possible in-state regulations runs afoul of the Commerce Clause of the United States Constitution (this problem may not be so apparent in Hawaii with its single sales tax authority, but it is in places where state, county, and city taxes can apply to a single transaction). The Quill Court handed resolution of this situation to Congress, stating that it has the power to grant equitable collection authority to the states for sales taxes on remote sales.

The majority of states have banded together to create a Streamlined Sales Tax Project to eliminate undue administrative burdens on interstate commerce by simplifying this complex tax situation.⁷ If they are successful in reaching agreement, then the plan is for the states to approach Congress to show that Quill is no longer a barrier to the collection of sales and use taxes, and ask for appropriate legislation to allow state taxes on internet sales.

However, taxation of internet sales will presumably only be available to states that are participants in the Streamlined Sales Tax Project, which Hawaii has not yet joined. If Hawaii wants to position itself to take advantage of the Project, it would need to either join the project or at least conform its tax legislation to that devised by the Project. It is beyond the scope of this Note to determine how revenue collections would change were such legislation to be adopted.

So in answer to this question, while the state legislature cannot directly enact legislation that would allow internet sales to be taxed, it can enact legislation to set up Hawaii's tax system to adopt conforming legislation from the Streamlined Sales Tax Project, and then take advantage of any Congressional legislation to support the project.

⁶ Quill Corporation v. North Dakota (1992).

⁷ According to the Streamlined Tax Project website, 31 states have adopted legislation, and four have pending legislation. Other states are official observers, or do not have sales taxes. Hawaii is one of three states without any participation in the project. <http://www.nga.org/nga/salestax/1,1169,,00.html>