

1993

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Recommended Citation

Consuelo L. Kertz & Lisa B. Burnette *Telemarketing Tug-of-War: Balancing Telephone Information Technology and the First Amendment with Consumer Protection and Privacy, Part I*, 5 *Loy. Consumer L. Rev.* 70 (1993).

Available at: <http://lawcommons.luc.edu/lclr/vol5/iss3/4>

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Lead Articles

Telemarketing Tug-of-War: Balancing Telephone Information Technology and the First Amendment with Consumer Protection and Privacy, Part I

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Reprinted in part from *Syracuse Law Review*,
43 SYRACUSE L. REV. 1029 (1992).

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I. INTRODUCTION

New telephone information technology has created commercial opportunities for business and has enhanced information services for consumers through innovations such as autodialed calls, fax machines, pay-per-call or audiotext ("900 number") services, and caller identification services. The same technology also has created new ways to commit telemarketing fraud and has decreased individual privacy through the disclosure of telephone numbers and the compilation of credit, buying, and other personal information in databases. Further, it has allowed unsolicited telephone calls and fax messages to disrupt life at home and the office. A tension among First Amendment rights to send and receive messages, individuals' expectations of privacy in their homes, and control over private information, and consumer protection from deception and fraud has affected the exploitation of these new opportunities for disseminating and collecting information.¹

Public outcry has prompted federal and state legislatures and regulatory agencies to create laws, to enhance law enforcement, and to address consumer concerns about fraud, privacy, and public safety. For example, the Federal Communications Commission ("FCC") recently adopted regulations that impose restrictions on 900 numbers to prevent fraud and deceptive practices.² Congress also recently enacted the Telephone Consumer Protection Act of 1991,³ which restricts unsolicited telemarketing calls and

prohibits some autodialed calls and unsolicited faxes.

The recent regulations and legislation focus on different aspects of the problems created by new information technology, but both are the result of consumer complaints about particular abuses in the industry. Both attempt to balance consumer expectations of privacy and freedom from deception with the First Amendment rights of businesses to use the technology to disseminate information for profit and with the First Amendment rights of willing consumers to receive that information.

This two-part article will discuss three specific telemarketing practices that new technology has produced. Part I will look at the 900 number call business, while Part II will examine live and prerecorded telemarketing calls that use autodialing equipment and the business use of Caller ID. For each telemarketing practice, the article will analyze proposed and enacted statutes and regulations that deal with these business practices. Each restriction also will be analyzed in terms of balancing constitutional and other rights. In particular, the article will address the balance between the First Amendment and consumers' rights to privacy and freedom from deception and fraud.

II. 900 NUMBER INFORMATION SERVICES

Many specialized telephone technology businesses can profit from either 900 or 976 information services, including the information provider, the long-distance carrier, the local-exchange carrier, and perhaps a service

bureau and billing service. In this article, "900 number" will be used to refer collectively to the interstate 900 and intrastate 976 services.

Usually, 900 number services begin with an information provider who creates the content of the message ultimately received by the caller. Some information providers own the equipment necessary to answer their calls, but many hire a service bureau with the

Interactive technology — allowing callers to choose different options through the touch-tone keypad, in conjunction with new computers that could respond to thousands of phone calls in a short period of time and software that could organize facts about millions of customers, made the pay-per-call services attractive for countless legitimate uses.

equipment to manage incoming calls for many vendors. Long-distance carriers either might provide such service or might connect interstate calls to a service bureau. Local carriers generally connect the caller to the long-distance carrier and often provide billing services for the information vendor.⁴ For each 900 number call, the caller is charged a fee ranging from \$.50 to \$50, or he is charged a per-unit-of-time fee. The local phone company and the long-distance carrier usually receive about 35 percent of the charge, the audiotext service bureau receives 10 percent of the charge, and the information provider receives 55 percent of the charge.⁵

A. Growth of 900 Number Use

While variations of the pay-per-call telephone service have existed since 1974, the 900 number surfaced in 1980 when it was used to poll viewers of the televised Ronald Reagan/Jimmy Carter presidential debates. In the industry's early days, the long-distance carriers

controlled these services, and they generally consisted of only one-minute calls, at \$.50 per call. The media used the services primarily for publicity purposes.⁶

The pay-per-call industry flourished after the breakup of American Telephone & Telegraph Company ("AT&T"). As part of the AT&T proceedings, enhanced common carrier services, including pay-per-call services, were removed from FCC scrutiny.⁷ Title II of the Communications Act of 1934 gives the FCC authority to judge the legality of charges, classifications, regulations, and practices by interstate or foreign wire or radio communication.⁸ In 1980, the FCC distinguished basic transmission services from enhanced services and removed enhanced services from Title II regulation.⁹ Enhanced services were defined as those that "combine basic service with computer processing applications that act on . . . aspects of the subscriber's transmitted information . . . or . . . involve subscriber interaction with stored information."¹⁰ As part of the deregulation of these enhanced services during the AT&T breakup, the regional Bell Operating Companies ("BOCs"), such as Ameritech and Bell Atlantic, were prohibited from any involvement in information services, among other things.¹¹

In 1988, a United States District Court lifted this restriction, allowing the BOCs to transmit information, but it maintained the ban on the BOCs' creation of information content.¹² Thus, the BOCs could act as service bureaus that carried or transmitted 900 number services with messages created by other information providers, but they were prohibited from actually creating any messages they carried. The court reasoned that because the BOCs still possessed monopoly control over the local telephone exchange network, as transmitters, they could discriminate easily against competitor information providers.¹³

In July 1991, the court removed the restriction on information services; the

BOCs finally could generate their own information services, including 900 numbers.¹⁴ The decision spurred much speculation and concern within the 900 number industry,¹⁵ but the BOCs immediately began to roll out comprehensive audiotext service plans.¹⁶ It is unclear whether the BOCs' involvement will decrease competition in the industry or whether they will use their size and power to promote the industry by introducing innovations and new legitimate uses for the technology.

In addition to changes in the regulatory climate, technological advances in the 1980s boosted the 900 number industry. Although the original 900 number services primarily offered "dial-a-porn" adult entertainment lines, interactive computer technology introduced in 1988 enhanced the industry because it allowed the caller to choose different options through the touchtone keypad. Interactive technology, in conjunction with new computers that could respond to thousands of phone calls in a short period of time and software that could organize facts about millions of customers, made the pay-per-call services attractive for countless legitimate uses.¹⁷ In 1991, Americans spent \$975 million on 900 number services that offered everything from sports statistics to stock quotes to computer support services, up from \$60 million in 1988.¹⁸ The 900 number even became a tool in the 1992 presidential campaign, when one George Bush supporter created a 900 number with messages slighting Bill Clinton.¹⁹

Meanwhile, the industry is exploring other possibilities for using the new technology. Television producers are planning interactive game shows, and marketers are considering ways to use the service for one-on-one marketing.²⁰ In fact, some cable channels are devoted entirely to interactive marketing "infomercials" that use 900 numbers.²¹ Also, many television programs have used 900 numbers to gain viewer feedback and participation. For example, MTV uses 900 numbers to enable viewers to vote on the music videos they

want to see.²² MTV's sister channel, VH1, is staging an awards show based on viewers' call-in votes to 900 numbers. The campaign will be supported by magazine advertisements and VH1 commercials with the 900 number and a corresponding sweepstakes.²³ The 900 number industry's revenues are expected to grow to \$1.3 billion in 1993 and to more than \$1.8 billion in 1995.²⁴

The federal government increasingly has stepped in and implemented regulations to fill the gaps left between individual states' regulations.

B. The Inevitable Fraud

While 900 number technology has created vast selling and service possibilities, it also has become a venue for consumer fraud. Common fraudulent practices include failing to inform the caller of the charge, inserting long delays between when the call is answered and when the caller receives the message, charging inflated fees for packages of worthless generic information, and aiming manipulative appeals directly at children and other vulnerable audiences.²⁵ Some services advertise a toll-free number that, when called, relays a message directing customers to call a 900 number.²⁶ Other services relay messages so quickly or of such poor quality that people must call the number several times to hear the entire message.²⁷ One service, called "collect 900," involved a computer call to a home and an offer to sell information or products. The call recipient was instructed either to press a number or to hang up to avoid the charge. If call recipients did not understand the instructions or did not respond quickly enough, they were charged for the call.²⁸ Another scheme offered bogus products, such as pre-approved credit cards that actually were charge cards good only for the purchase of products

from a related catalog.²⁹

Fraudulent telemarketing schemes have concerned federal and state governments as well as consumer groups, telephone and long-distance companies, and the advertising media. Abusive practices have even gained the attention of the industry itself, particularly services that promote legitimate business uses of new telemarketing technology. Representatives of these groups have provided information to federal agencies that have jurisdiction over various aspects of the 900 number business, but no single agency has authority to regulate every aspect of the business.

C. Regulation of 900/976 Numbers

As a result of consumer concerns and complaints about deceptive or annoying practices, many individual states have enacted regulations regarding pay-per-call numbers and have placed restrictions on all types of telemarketing practices. For instance, many states regulate the use of intrastate pay-per-call services. These regulations create restrictions on 976 number advertisements,³⁰ require disclosures in recorded messages,³¹ place restrictions on telephone company actions when consumers refuse to pay for 976 number charges,³² and create special provisions for 976 numbers aimed at children.³³

However, state actions against 900 numbers are not feasible because interstate services are beyond state jurisdiction. In the past few years, the federal government increasingly has stepped in and implemented regulations to fill the gaps left between individual states' regulations.

The Federal Trade Commission ("FTC") and the FCC are the primary federal regulators with jurisdiction over the regulation of some aspects of 900 numbers and telemarketing. The FTC has jurisdiction over interstate unfair or deceptive acts and practices, including those involving 900 numbers.³⁴ The FTC acts against a deceptive practice when a representation, omission, or practice has been made that was likely to mislead a consumer, when the

consumer acted reasonably under the circumstances, and when the representation, omission, or practice was material.³⁵ Whether a practice, including an advertisement or telemarketing promotion, is likely to deceive depends on whether it was reasonable for consumers, in making a purchasing decision, to be influenced by the representation.

The first wave of 900 number regulation came in the mid-1980s, when the FCC placed restrictions on 900 numbers carrying pornographic messages.

The average person test is applied unless the advertisement is aimed at a special audience, such as children.³⁶ Failing to disclose information also can be misleading if, in light of the typical consumer's expectations and understandings, a disclosure would be appropriate. A representation is considered material if it is likely to affect a consumer's behavior, including a purchasing decision.³⁷

Since Janet Steiger took charge of the FTC, she has made fighting fraud in telemarketing and 900 numbers one of the agency's priorities.³⁸ The FTC filed fifty-nine telemarketing fraud cases in federal courts between 1983 and the beginning of 1991. According to FTC estimates, \$1 billion of the \$105 billion in 1988 telemarketing sales came from fraudulent schemes.³⁹ As of October 1990, the FTC had already recovered \$148 million from fraudulent telemarketing services, and many of these enforcement actions involved 900 numbers.⁴⁰ For example, the FTC recently reached a one million dollar settlement with a Georgia company, TransWorld Courier Services, to redress consumers who had called a 900 number seeking job information.⁴¹ The service's newspaper advertisements did not disclose that the caller would be charged \$15 to \$18 for the call, and many callers never received the promised job information. Other consumers

called a toll-free 800 number which directed them to call a 900 number, without warning them of the charge. The FTC also ordered Transworld to disclose the call's cost in its advertising, to insert a preamble at the beginning of the phone message telling callers they could avoid the charge by hanging up immediately, and to ensure that consumers would not be billed if they did hang up during the preamble.⁴²

The FTC also has filed complaints against several companies that promised to provide audiotext callers with credit cards.⁴³ In those cases, the callers received a card that could be used only to purchase items from catalogs distributed by the companies, and they were charged a substantial fee for the call.

Although the FTC is investigating and acting against fraudulent 900 number practices, it has not proposed any rules to regulate the 900 number industry. In a speech to the National Press Club in March 1991, the director of the FTC Bureau of Consumer Protection stated that the FTC had not taken "any position on the need for, or desirability of, legislation or other government regulation directed at the . . . industry."⁴⁴ However in 1990, the FTC issued a consumer alert advising how to avoid 900 number scams,⁴⁵ and the agency has been cooperating with state attorneys general to investigate and litigate against fraudulent 900 number scams.⁴⁶

While the FTC has no specific regulations concerning 900 numbers, the FCC regulates the interstate aspect of the 900 number industry. The FCC has authority over interstate telephone services, including 900 number and 700 number talk lines. The first wave of 900 number regulation came in the mid-1980s, when the FCC placed restrictions on 900 numbers carrying pornographic messages. The Communications Act of 1934 currently regulates only 900 numbers involving obscene or indecent communications.⁴⁷ Following a line of cases culminating in the Supreme Court decision *Sable*

The rules require that all 900 number messages that charge more than \$2 begin with a preamble that discloses all charges associated with the call and informs callers that they have an opportunity to hang up before they are charged.

Communications, Inc. v. FCC,⁴⁸ Congress amended § 223 of the Communications Act in 1989 to restrict the use of 900 number dial-a-porn services.⁴⁹ The law prohibits all obscene telephone messages. However, due to the First Amendment's protection of free speech, the law prohibits indecent telephone messages only when they are made available to minors.⁵⁰

The industry began to expand beyond dial-a-porn services as new legitimate uses combined with new interactive technology. Consumer complaints also increased, however, as deceptive telemarketing schemes began to appear. Between January 1988 and December 1990, the FCC received approximately 1,900 complaints about 900 numbers. In fact, in November 1990 alone, 15 percent of the complaints received by the FCC concerned 900 numbers.⁵¹ In March 1991, the FCC took the next step in 900 number regulation by proposing new rules that would further limit abuses in this growing industry. Those rules, finalized in November 1991,⁵⁴ and corresponding constitutional considerations are addressed below.

Until recently, it was not clear who had primary responsibility for controlling the 900 number industry. As a result, many fraudulent scams were slipping through numerous regulatory cracks. The multiple sources of responsibility for the 900 number industry and the increase in consumer complaints prompted the FCC to propose its rules.⁵³ The rules require that all 900 number messages that charge more than \$2 begin with a preamble that discloses all charges associated with the

call and informs callers that they have an opportunity to hang up before they are charged. The preamble must also describe the service the caller will receive in exchange for the charge, and it must disclose the name of the information provider. Further, preambles to calls directed at children must include a statement that they should hang up unless they have obtained parental permission to make the call.⁵⁴ The rules also require local carriers to offer free blocking to subscribers. Blocking services prohibit 900 calls from being made from the blocked telephone number.⁵⁵ Further, carriers must provide identification of 900 service providers to consumers upon request,⁵⁶ and common carriers cannot disconnect a subscriber's basic telephone service if the subscriber refuses to pay a 900 service charge.⁵⁷

D. Balancing First Amendment Protection of 900 Number Messages with Consumers' Right to Be Free From Deception and Falsehoods

To succeed, the FCC's 900 number regulations must withstand constitutional challenges under the First Amendment, which protects speech from restrictive governmental regulation. This protection is not absolute though, and commercial speech in particular receives less First Amendment protection than other forms of speech.⁵⁸

1. The Court's Treatment of Commercial Speech

In 1973, the United States Supreme Court broadly defined commercial speech as speech "which does 'no more than propose a commercial transaction.'"⁵⁹ In subsequent commercial speech cases, the Court tried to clarify this ambiguous definition. For instance, in *Central Hudson Gas & Electric v. Public Service Commission*,⁶⁰ the Court defined commercial speech as speech relating "solely to the economic interests of the speaker and its audience."⁶¹ Although the Court has not adopted a single, specific definition, it

always has stressed that the distinction between commercial speech and other types of speech is a matter of common sense.⁶²

The language the Court has used to distinguish commercial speech may not be as useful as the speech labeled as such. For example, the possibility of economic benefit from or commercial motivation for certain speech does not alone make it commercial speech. As the Court explained in *Virginia State*

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Board of Pharmacy v. Virginia Citizens Consumer Council,⁶³ speech does not become commercial speech merely because money was paid to project it, because it was presented in a form sold for profit, or because it included solicitations to purchase goods or donate money. For example, books, religious literature, and paid public service announcements are not considered commercial speech.⁶⁴ Also, some types of speech containing both commercial and noncommercial elements, such as charitable solicitations, are afforded full First Amendment protection.⁶⁵

Initially, commercial speech was found to have no First Amendment protection.⁶⁶ However, the Court extended limited protection to this type of speech in *Virginia State Board of Pharmacy* in 1976.⁶⁷ The Court recognized the importance of the “free flow of commercial information” and the need for consumers to have access to this information to make intelligent and informed purchasing decisions.⁶⁸ The Court acknowledged that commercial speech could be regulated to some extent, however, because it was distinct from other types of speech and thus commanded a lesser degree of constitutional protection.⁶⁹

The Court reasoned that commer-

cial speech could withstand some degree of regulation because it had two unique characteristics: it was more durable than other forms of speech, and it was easier to verify.⁷⁰ Commercial speech is deemed more durable because it is indispensable for profit-seeking businesses and thus less likely to be chilled by regulation. Commercial speech is also more easily verifiable because the advertiser is presumed to know best about the product or service being advertised.⁷¹

After the Supreme Court established the less protected status of commercial speech in *Virginia State Board of Pharmacy*, it developed a four-part test for permissible restraints on commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.⁷² First, to receive any First Amendment protection, the speech must not be misleading or must not pertain to unlawful activity. Second, the government must have a substantial interest promoted by the restriction. Third, the regulation must directly advance the governmental interest. Finally, the restraint must not be more extensive than necessary to advance that interest.⁷³

The elements of the *Central Hudson* test have been applied since 1980 to examine governmental restrictions on commercial speech. However, the last part of the test was broadened in 1989.⁷⁴ In the years immediately following *Central Hudson*, many commercial speech cases interpreted this element to be a least-restrictive means test, requiring regulations to employ the least restrictive means possible to promote the government’s interest.⁷⁵ In *Board of Trustees of State University v. Fox*, the Supreme Court held that commercial speech regulations need not meet a stringent least-restrictive means test.⁷⁶ Instead, the Court supported a more flexible standard: commercial speech regulations must use “means narrowly tailored to achieve the desired objective.” Only a reasonable fit is necessary between the government’s interest and the means employed to promote that

interest.⁷⁷ Thus, the decision broadened the scope of permissible government restrictions on commercial speech.

2. Balancing the Government’s Interest in Protecting Consumers from Deception

Regulation of 900 number services must balance the free speech interests of marketers and willing recipients with the government’s interest in protecting consumers from deception. The right at issue in these cases is the right to be

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free from deception. There is “no obstacle to a State’s dealing effectively with [deceptive or misleading speech]. The First Amendment ... does not prohibit the State from insuring [sic] that the stream of commercial information flow[s] cleanly as well as freely.”⁷⁸ In fact, the first part of the *Central Hudson* test is that the commercial speech not be misleading or untruthful. The issue then focuses on the government’s burden in justifying a restriction. To advance governmental interest in protecting consumers from deception, the government must show that the targeted speech is “inherently likely to deceive” or show that “a particular form or method of advertising has in fact been deceptive.”⁷⁹ In *Zauderer v. Office of Disciplinary Counsel*, the Court concluded that the possibility of deception in that case was self-evident, but suggested that if it had not been, the government would have had to survey the public to determine whether the advertisement was likely to deceive consumers.⁸⁰ Scholars have argued that, according to the *Zauderer* opinion, it cannot be assumed that false and deceptive commercial speech receives

no First Amendment protection.⁸¹ However, in *FTC v. Colgate-Palmolive Co.*, the Court held that the FTC, as the primary federal regulator of deceptive advertising, may depend on its own expertise in judging an advertisement's potential to deceive without consumer surveys or other evidence of actual deception.⁸² Thus, actual consumer deception need not occur; the government must show only that the advertisement is likely to deceive consumers.⁸³

If the speech is not inherently likely to deceive, restrictions on it must directly advance a government interest.⁸⁴ The specific level of government interest necessary to justify the restriction of non-deceptive commercial speech depends upon the nature of the regulation. Content-neutral regulations are permissible when they advance a significant government interest.⁸⁵ Such regulations are enforced without reference to the speech's content.⁸⁶ For example, the Supreme Court has approved content-neutral time, place, and manner restrictions on religious solicitations because such restrictions apply to all solicitations, not only religious ones. Further, those restrictions promote the government's significant interest in safeguarding the peace and order of the community.⁸⁷ Content-neutral restrictions also have included prohibiting sound-trucks⁸⁸ or solicitations after certain hours.⁸⁹

On the other hand, content-based regulations are enforceable only if they further a compelling government interest.⁹⁰ Such regulations are based completely on the speech's content.⁹¹ For example, the Court has approved the content-based prohibition of obscene 900 number messages because, although the restriction did not apply uniformly to all messages, the government had a compelling interest in shielding children from obscene materials.⁹²

The extent of First Amendment protection of 900 number speech against regulation depends on the nature of both the message sent and the state interest involved. A strong argument

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can be made that television or print advertisements urging consumers to call a 900 number do "no more than propose a commercial transaction."⁹³ One case that addressed this issue is *New Kids on the Block v. News America Publishing*.⁹⁴ Although the case involved a trademark infringement and misappropriation claim, the court discussed whether the First Amendment protected a 900 number message used by a magazine to poll readers on their favorite member of the rock group, *New Kids on the Block*. Because the 900 number was used to survey readers and because the survey results were to be published in a future issue of the magazine, the court held that the speech was constitutionally protected newsgathering for public dissemination and not less-protected commercial speech.⁹⁵ The district court cited *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations* and *Virginia State Board of Pharmacy* to support the proposition that the magazine's profit motive alone did not transform its 900 number message into commercial speech.⁹⁶

In dicta, the court also questioned whether a 900 number service could be considered a separate commercial enterprise, distinct from the publication enterprise using it. It dismissed this question without answering it; the court speculated, however, that if the 900 number had not been related to a future magazine article or had continued after the survey results had been published, it would have been considered com-

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mercial speech rather than fully constitutionally protected newsgathering.⁹⁷ Thus, if a 900 number is used to poll television viewers or for some other newsgathering purpose, the message may be noncommercial speech despite the profit motive of the service provider. Nonetheless, this is an uncommon type of 900 number. Most 900 services involve only commercial speech.⁹⁸ Whether the 900 message tries to sell a product or exists as a product itself, it does "no more than propose a commercial transaction" (either buying the product or calling the service again).⁹⁹

Those 900 number messages concerning lawful activities should be considered commercial speech; therefore, they should receive limited First Amendment protection under the *Central Hudson* analysis.¹⁰⁰ In addition, under the *Fox* rationale, government regulation of these communications will be permitted only if the means of regulation is narrowly tailored to directly advance a government interest.¹⁰¹ Because the new FCC rules relate to the manner, and not the content, of 900 number advertising and operation, they are content-neutral regulations requiring only a significant, rather than compelling, government interest. Here, the government interest in preventing consumer deception and fraud is significant.¹⁰²

3. Too Much Regulation?

However, some have argued that the regulations are more extensive than necessary. In particular, 900 number industry representatives have argued that the preamble requirement unnecessarily interferes with the 900 services' ability to make profits. The Information Industry Association, a trade group of 900 service providers, particularly objected to the FCC's required preamble, arguing that it would add to the cost of 900 calls and would discourage repeat calls because customers would tire of hearing the same message.¹⁰³ Another industry trade group, the National Association for

Information Services, worried that the preamble would act as a "kill message," meaning it would encourage consumers to hang up rather than simply allowing them that opportunity.¹⁰⁴ The FCC's final regulations tried to accommodate these industry concerns by providing a mechanism for repeat callers to bypass the preamble and by omitting the strong "kill" instruction except for calls from children under age eighteen. These required messages tell callers to hang up unless they have parental consent.¹⁰⁵

Objections also have been raised about disclosures required in advertisements for 900 numbers. In a different context, the Supreme Court has approved requiring disclosures or disclaimers as an acceptable means of regulating commercial speech.¹⁰⁶ Disclosure requirements are less intrusive and concern different interests than do compulsions to speak that "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹⁰⁷ For that reason, disclosure or disclaimer requirements are more likely to pass constitutional muster. "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, . . . [an advertiser's] constitutionally protected interest in not providing any particular factual information in [its] advertising is minimal."¹⁰⁸ Disclosure requirements also infringe much less on an advertiser's interests than complete prohibitions of speech. However, "unjustified or unduly burdensome disclosure requirements" might violate the First Amendment by "chilling protected commercial speech." Disclosure requirements, like other regulations, must be "reasonably related" to the state's interest.¹⁰⁹

Whether a preamble requirement impermissibly restricts free speech depends on how the message must be worded. A required preamble explaining that the caller may hang up without being charged should not be regarded

as intrusive. However, 900 number providers argue that if the preamble were required to sound more like an urgent warning, it could encourage callers to hang up, effectively restricting the dissemination of legitimate 900 number messages and unnecessarily adding to the costs of providing the service.

The required preamble for messages targeted to children easily passes constitutional muster. Regulations pro-

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tecting minors always have been more acceptable than other regulations because of the compelling government interest in the "well-being of its children."¹¹⁰ In addition, because children usually have less sophisticated understandings of telephone operations and the charging system, they are more vulnerable to deception. Children's advocates have argued that "because a child can not make a considered buying judgment, and because he is at an enormously unequal bargaining position in the face of sophisticated modern advertising, drawing a child into a decision" to call a 900 number "is inviting an unconscionable contract."¹¹¹

The 900 services targeted at children have included a 900 number to call Santa Claus at Christmas; a charge-per-minute number advertised by Arnold Schwarzeneger that urged children to call and play the "Total Recall Challenge" game, where callers scored more points the longer they stayed on the phone; and a commercial that urged children too young to dial a telephone to hold the receiver up to the television, where an automatic dialing tone was transmitted that dialed the 900 number.¹¹² Action for Children's Television has said that such advertisements are "'especially' unfair and deceptive since children can 'purchase' the ser-

vice . . . and do not necessarily have to 'persuade an adult' to buy the advertised product."¹¹³

The other FCC provisions do not affect speech, although the requirement that telephone companies offer 900 number blocking to subscribers may be unnecessarily restrictive. The new FCC regulations require local carriers to offer interstate 900 number blocking where it is technologically feasible.¹¹⁴ Carriers must offer the blocking feature free of charge to residential subscribers once, and then local carriers may charge a "reasonable" fee for changes in service. The carriers also may charge commercial customers for the blocking. However, to block undesirable 900 number services, customers also must block their access to all 900 services. Thus, some consumers face the problem of wanting to use some 900 services, such as polling or customer service lines, while they are unwilling to use, or allow their children's access to, other services, such as party talk lines or legal "sex" lines. In analogous situations, the Supreme Court has suggested that individual blocking of speech is an acceptable way to balance the rights of the speaker, the willing recipients, and the unwilling recipients without unconstitutionally restricting the speech. For example, some state regulations forbid door-to-door solicitation of people who have indicated that they do not want to be disturbed.¹¹⁵

The 900 number industry has opposed the FCC rules, arguing that self-regulatory measures would be more effective. One group has proposed voluntary guidelines requiring disclosure of charges and mandating special disclosures for calls aimed at children. In addition, the group's guidelines would prohibit false or misleading advertising, obscene messages, and messages promoting illegal activities or violence.¹¹⁶ Another group proposed more extensive standards, including consideration of consumers' right to privacy and development of standards for contests, fund-raising, and adver-

tising aimed at children.¹¹⁷ The right of privacy is not as important in 900 number cases as in other unsolicited telemarketing cases because the caller initiates the 900 number transaction. The right to privacy issue concerns the fact that data extracted from 900 number callers can be used indiscriminately by businesses and is discussed *infra* in part II of this article.¹¹⁸ Nonetheless, the effectiveness of self-regulation is questionable because it would not be mandatory.

4. Long-Distance Carrier Regulation

Many long-distance carriers already have guidelines similar to the FCC rules. AT&T caps charges for 900 numbers targeted to children at \$4 and requires a preamble for messages to children and messages costing more than \$5 per minute or a total of \$10; MCI has similar requirements.¹¹⁹ Despite these guidelines, massive consumer complaints have arisen, causing the National Association of Attorneys General to question the effectiveness of the guidelines.¹²⁰

The problem with carrier-imposed restrictions is that common carriers are obligated to provide tariffed services in a nondiscriminatory manner. Upon allowing the regional BOCs to begin transmitting information services, Judge Greene amended the original AT&T breakup decree to extend these anti-discrimination requirements to the transmission of information services, including 900 services.¹²¹ The anti-discrimination provisions were intended to prevent the BOCs from favoring either their own services, a particular long-distance carrier's services, or a particular information provider's services to the economic disadvantage of all others.¹²² This does not mean, however, that carriers cannot distinguish information providers on the basis of "reasonable business classifications."¹²³ For example, the Ninth Circuit upheld a local telephone company's policy of refusing service to information providers that created sexually

explicit messages. The court reasoned that the company had not singled out a particular 900 number service. Instead, it had decided to exclude all adult entertainment services. Thus, the carrier was permitted to make business judgments about which messages it would transmit.¹²⁴

Common carriers may also regulate information providers by refusing to sell billing and collection services to information providers creating unde-

Local and long-distance carriers not only must be concerned about consumer complaints, but they also must worry about being held liable to consumers defrauded by 900 number schemes.

sirable messages. In billing discrimination cases, courts have upheld carriers' refusals to provide billing to certain information providers based on "reasonable business classifications."¹²⁵ Of course, the carriers are prohibited from using billing methods unfairly favoring a particular company to the detriment of others.¹²⁶

For example, in response to consumer complaints, Bell Atlantic implemented a policy of refusing billing and collection services to the 900 numbers of the long-distance carriers unless they: (1) limited access to party talk lines and adult numbers to customers who specifically requested them, and (2) agreed to pay charges for calls made to such 900 numbers through their long-distance service.¹²⁷ In a motion for declaratory judgment, both information providers and long-distance carriers argued that Bell Atlantic was discriminating against them. The court rejected these arguments, however, ruling that the Bell Atlantic policy applied equally to all and that the policy was intended to solve a significant consumer problem, not to create an economic advantage for Bell Atlantic. The court recognized that regional companies' billing services may be less expensive than

those provided by the long-distance carriers or the information providers; nonetheless, this fact did not constitute discrimination in violation of the anti-trust decree.¹²⁸

Likewise, a federal district court in Nebraska upheld a telephone company's decision to refuse to sell billing services to all 900 providers who used autodialers stating that the policy was non-discriminatory.¹²⁹ The telephone company devised its policy after it received numerous consumer complaints. Consumers disliked autodialers and assumed the telephone company was partially responsible for their use because the associated 900 charges appeared on the telephone company's bill.¹³⁰

Local and long-distance carriers not only must be concerned about consumer complaints, but they also must worry about being held liable to consumers defrauded by 900 number schemes. Thus far, no carrier has been held responsible for a fraudulent 900 service it transmits just as, in general, publishers of advertisements are not held responsible for the content of those advertisements.¹³¹ Although common carriers are not exactly "publishers" of 900 number messages, they are in an analogous position to other media that publish advertisements. In negligence actions against media for publishing deceptive or false advertisements, courts have held that a publisher has "no duty, whether by way of tort or contract, to investigate the accuracy of advertisements . . . directed to the general public, unless the [publisher] undertakes to guarantee the soundness of the products advertised."¹³² Therefore, publishers, and by analogy, common carriers have no liability for misrepresentations in advertisements unless they publish the information "maliciously, or with intent to harm another, or with reckless disregard of the consequences," or when the publisher specifically undertakes to endorse the advertised product or service.¹³³

Recently, when a court ordered the interstate carrier MCI to turn over

\$450,000 from a fraudulent sweepstakes scheme, the carrier first deducted \$165,000 for its own costs, arguing that it was not liable for the fraudulent conduct of the service.¹³⁴ However, one court suggested that a telephone

Many television stations also place restrictions on 900 number advertisements, particularly those for dating services and other adult lines, as well as those directed at children.

company, as a publisher of yellow page advertisements, could be potentially responsible for misleading advertisements and thus could implement policies to avoid publishing such advertisements.¹³⁵ Meanwhile Telesphere and Sprint Telemedia, two large interstate carriers, recently stopped servicing most 900 number providers, citing the difficulty of collecting payments.¹³⁶ Interestingly, Sprint made the decision after it became the target of a grand jury probe.¹³⁷ Likewise, a local phone company, US West Communications, decided to eliminate local 976 number services.¹³⁸

Many television stations also place restrictions on 900 number advertisements, particularly those for dating services and other adult lines, as well as those directed at children. For example, a Philadelphia television station refused to broadcast an advertisement for a "Dial Santa" 976 number. The advertisement was to be aired between Saturday morning cartoons during the Christmas season and it encouraged children to call the number to talk to Santa Claus. The station relied on a contract clause allowing it a broad right to refuse broadcasting and a network policy to avoid advertisements aimed at children.¹³⁹ Although most stations do not have official policies concerning 900 number advertisements, they will restrict their broadcast to early morning hours when children probably

are not watching.¹⁴⁰ As a result, party lines and other talk lines are losing business. An owner of such an adult service stated that "[m]any more companies [are] losing money than making it," and the talk line business is thus "seriously over."¹⁴¹

III. CONCLUSION

Business and high technology have combined to create a multi-billion dollar telemarketing industry. Advances in telephone and information technology in conjunction with the deregulation of many American telephone companies have helped the 900 number industry. What was once merely a medium for pornographic and adult messages has become a tool for business, interactive multimedia marketing, and even political campaigns.

However, it also has become another method to defraud consumers. While the FTC traditionally has fought the battle against fraud and deception, the FCC recently has joined the effort in its role as the primary regulator of interstate telephone transmissions. The new FCC regulations will prevent some of the more flagrant abuses in the 900 number market concerning charges and content. Because 900 number messages are commercial speech and receive First Amendment protection, the FCC regulations were narrowly tailored to protect consumers from fraud and deception without restricting speech beyond constitutional limitations.

The new telephone technology creates many opportunities to send, receive, and collect information. But with the new opportunities come inherent conflicts that must be resolved carefully. The challenge remains to balance the legitimate business opportunities involved in the use of information and the rights of citizens to receive such information, with legitimate concerns about privacy and freedom from deception. These concerns will also be addressed at length in Part II of this article, which will appear in Volume V, Number 4. ♦

ENDNOTES

- ¹ "As new technologies become available, a tension is often created between existing societal values and expectations, and the commercial opportunities posed by these advances. New technologies pose new risks to traditional civil liberties . . . [while] we also recognize that these advances can facilitate peoples' [F]irst [A]mendment right to know, the free flow of information and, in other ways, enhance civil liberties." *Telemarketing/Privacy Issues: Hearing on H.R. 1304 and H.R. 1305 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 47 (1991) (statement of Janlori Goldman, Legislative Counsel, American Civil Liberties Union).
- ² 47 C.F.R. §§ 64.709-16, 68.318 (1992).
- ³ Telephone Consumer Protection Act, Pub. L. No. 102-243, 105 Stat. 1294 (1991).
- ⁴ *Telephone "900" Services: Hearing on H.R. 5671 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 24 (1990) (hereinafter *900 Services Hearing*) (testimony of the Hon. Bart Gordon of Tennessee).
- ⁵ Alan Radding, *Agency Compensation a Hangup*, *ADVERTISING AGE*, Feb. 18, 1991, at S-2.
- ⁶ *900 Services Hearing*, *supra* note 4, at 74-75 (testimony of Gregory M. Casey, Senior Vice President and General Counsel of Telesphere Communications, Inc., on behalf of Telesphere and the National Association for Information Services).
- ⁷ See *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 205 (D.C. Cir. 1982).
- ⁸ See Communications Act of 1934, 47 U.S.C. §§ 201-22 (1988).
- ⁹ *Computer and Communications Indus. Ass'n*, 693 F.2d at 205.
- ¹⁰ *Id.* at 205, n. 18 (quoting Final Decision, *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 387 (1980)).
- ¹¹ *United States v. American Tel. & Tel. Co. et. al.*, 552 F. Supp. 131 (D. D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).
- ¹² *United States v. Western Elec. Co. Inc.*, 714 F. Supp. 1 (D. D.C. 1988).
- ¹³ *Id.* at 3.
- ¹⁴ *United States v. Western Elec. Co. Inc.*, 767 F. Supp. 308, 327 (D.D.C. 1991). Judge Greene, the judge who presided over all the proceedings related to the AT&T breakup, was reluctant to make this decision, but felt he was bound by a Court

- of Appeals remand order to remove the restriction. *Id.*
- ¹⁵ See, e.g., *House Bill Would Set Strict Safeguards on Bells' Provision of Information Services*, BNA WASH. INSIDER, Oct. 9, 1991; John Aloysius Farrell, *Court Lets Bells Offer Information Services*, BOSTON GLOBE, Oct. 8, 1991, at 35.
- ¹⁶ For example, in April 1992, Southwestern Bell introduced several 900 number services, including weather, traffic, news, sports, stock information, and entertainment news. See *Southwestern Bell - 2nd Quarter Results*, REG. NEWS SERVICE, July 20, 1992, available in LEXIS, Nexis Library, Currnt File.
- ¹⁷ Gary Slutsker, *Relationship Marketing*, FORBES, Apr. 3, 1989, at 145-46.
- ¹⁸ Bernard Debusmann, *In Phone-Rich U.S., Dial for Sex, Sinners and Medical Advice*, REUTER LIBRARY REPORT, June 5, 1992, available in LEXIS, Nexis Library, Currnt File.
- ¹⁹ Paul Bedard, *Bush Vows to Cut Off Anti-Clinton 900 Number*, WASH. TIMES, July 15, 1992, at A3.
- ²⁰ Slutsker, *supra* note 17, at 145-46.
- ²¹ *GTE's Main Street Rolls into Carlsbad, Calif.*, TELEPHONE WEEK, Dec. 7, 1992. See also *First Infomercial Television Channel Scheduled to Launch in Fall of 1992*, BUS. WIRE, July 16, 1992, available in LEXIS, Nexis Library, Currnt File.
- ²² See *McGhan v. Ebersol*, 608 F.Supp. 277, 286 (S.D.N.Y. 1985).
- ²³ *VH-1 Salutes the Greatest of the Greatest Hits*, BUS. WIRE, July 21, 1992, available in LEXIS, Nexis Library, Currnt File.
- ²⁴ Debusmann, *supra* note 18.
- ²⁵ See *Telephone Scams for the 1990's*, CONSUMERS' RES. MAG., May 1990, at 29.
- ²⁶ *Promises of Work in Kuwait Attract More Than Jobless*, WALL ST. J., Mar. 14, 1991, at A8, col. 3. See also *F.T.C. v. US Sales Corp.*, 785 F.Supp 737 (N.D. Ill. 1992)(beginning of 900 number message about used car auctions urged callers to listen until end of message to obtain toll-free 800 number with important additional information).
- ²⁷ *Interstate 900 Telecommunications Services*, 56 Fed. Reg. 14,049, 14,050 (1991)(summary of Notice of Proposed Rulemaking)(Apr. 5, 1991).
- ²⁸ Connie Lauerman, *Hype Tech: Now It's 'Death and Taxes... and Unsolicited Commercial Phone Calls'*, CHI. TRIB. MAG., Nov. 24, 1991, at 20.
- ²⁹ *United States v. Hartbrodt*, 773 F.Supp. 1240,1241-42 (S.D. Iowa 1991).
- ³⁰ E.g., ARIZ. REV. STAT. ANN. § 13-2920 (1992); GA. CODE ANN. § 10-1-393 (Michie 1992); IOWA CODE § 714A.3 (1991); LA. REV. STAT. ANN. § 1731 (West 1992).
- ³¹ E.g., IOWA CODE §§ 714A.1-714A.2 (1991); OR. REV. STAT. § 759.705 (1991).
- ³² E.g., ME. REV. STAT. ANN. tit. 35-A, § 802 (West 1992).
- ³³ E.g., OR. REV. STAT. § 759-720 (1991); VA. CODE ANN. § 59.1-430 (Michie 1992).
- ³⁴ See Federal Trade Commission Act, 15 U.S.C. § 45 (1988).
- ³⁵ *FTC Policy Statement on Deceptive Acts and Practices*, reprinted in [1988] 4 Trade Reg. Rep. (CCH) ¶ 13,205, at 20,911-912 (Oct. 14, 1983).
- ³⁶ *Id.* at 20,913-14.
- ³⁷ *Id.* at 20,916-17.
- ³⁸ See *FTC Enforcement -- Relation With States*, 7 Trade Reg. Rep. (CCH) ¶ 50,048 at 48,677 (Dec. 14, 1990); *National Advertising Deserves More Attention, Says Agency Chair*, Trade Reg. Rep. (CCH) No. 97, at 2 (Mar. 20, 1990).
- ³⁹ Donnette Dunbar, *Dial-It Scams Net \$1 Billion*, BLACK ENTERPRISES, Feb. 1991, at 16.
- ⁴⁰ *Id.* See, e.g., *Starlink, Inc.*, [1991] 5 Trade Reg. Rep. (CCH) ¶ 22,946 (Feb. 26, 1991).
- ⁴¹ *Transworld Courier Servs.*, [1991] 5 Trade Reg. Rep. (CCH) ¶ 22,963 (Apr. 3, 1991).
- ⁴² *Id.*
- ⁴³ *FTC v. US Sales Corp.*, 785 F.Supp. 737 (N.D. Ill. 1992); *Interactive Communications Tech., Inc.*, [1991] 5 Trade Reg. Rep. (CCH) ¶ 22,930 (Jan. 18, 1991); Henrietta Timmerman, [1991] 5 Trade Reg. Rep. (CCH) ¶ 22,861 (July 27, 1990).
- ⁴⁴ *The National Symposium on 900 Numbers*, Trade Reg. Rep. (CCH), No. 149, at 8 (Mar. 12, 1991).
- ⁴⁵ Dunbar, *supra* note 39, at 16.
- ⁴⁶ See *Protecting Consumers: State AGs Heading Efforts Against Misleading Ads, Scams*, A.B.A. J., Oct. 1990, at 38; *FTC Enforcement Advertising*, [1991] 7 Trade Reg. Rep. (CCH) ¶ 50,052 (Mar. 12, 1991)(Chairperson Janet Steiger's remarks to the American Advertising Federation Government Regulations Conference).
- ⁴⁷ 47 U.S.C. § 223(b) (Supp. II 1991).
- ⁴⁸ 492 U.S.C. 115 (1989).
- ⁴⁹ 47 U.S.C. § 223(b) (Supp. II 1991). Enforcement of the law had been postponed while a challenge by several dial-a-porn companies worked its way through the courts. However, the Supreme Court had the final say in January 1992, when it refused to hear the case, leaving the law intact. *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), cert. denied, 112 S.Ct. 966. (1992).
- ⁵⁰ 47 U.S.C. § 223(b) (Supp. II 1991). See also 47 C.F.R. § 64.201 (1992).
- ⁵¹ Mike Mills, *FCC Proposes Clampdown on 900-Number Services*, CONG. Q. WKLY. REP., Mar. 16, 1991, at 665.
- ⁵² 47 C.F.R. § 64.709-16, § 68.318 (1992).
- ⁵³ 56 Fed. Reg. 56,160 (1991)(summary of action of final rulemaking)(Nov. 1, 1991).
- ⁵⁴ 47 C.F.R. § 64.711 (1992).
- ⁵⁵ 47 C.F.R. § 64.713 (1992).
- ⁵⁶ 47 C.F.R. § 64.712 (1992).
- ⁵⁷ 47 C.F.R. § 64.714 (1992).
- ⁵⁸ See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).
- ⁵⁹ *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).
- ⁶⁰ 447 U.S. 557.
- ⁶¹ *Id.* at 561.
- ⁶² E.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *Virginia State Bd. of Pharmacy*, 425 U.S. at 771 n.24.
- ⁶³ 425 U.S. at 761.
- ⁶⁴ *Id.* at 761. See also *Pittsburgh Press*, 413 U.S. at 384 ("[S]peech is not rendered commercial by the mere fact that it relates to an advertisement").
- ⁶⁵ See *Optimist Club of N. Raleigh, N.C., v. Riley*, 563 F. Supp. 847, 849 (E.D. N.C. 1982)(charitable solicitations afforded full First Amendment protection); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)(door-to-door solicitation of contributions for environmental group fully protected, noncommercial speech). But see *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978)(egg industry's advertisements discounting link of eating eggs with heart disease were commercial speech).
- ⁶⁶ *Valentine v. Chrestensen*, 316 U.S. 52 (1942).
- ⁶⁷ 425 U.S. 748.
- ⁶⁸ *Id.* at 763-65.
- ⁶⁹ *Id.* at 770, 771 n.24.
- ⁷⁰ *Id.* at 771 n.24.
- ⁷¹ *Id.*
- ⁷² 447 U.S. at 556.
- ⁷³ *Id.*
- ⁷⁴ See *Board of Trustees of State Univ. v. Fox*, 492 U.S. 469 (1989).
- ⁷⁵ *Id.* at 476.
- ⁷⁶ *Id.* at 477.
- ⁷⁷ *Id.* at 480.
- ⁷⁸ *Virginia State Bd. of Pharmacy*, 425 U.S. at 771-72.
- ⁷⁹ *In re R.M.J.*, 455 U.S. 191, 202 (1982).
- ⁸⁰ 471 U.S. 626, 652-53.
- ⁸¹ See Richard M. Schmidt & Robert C. Burns, *Commercial Speech and the First Amendment: Proof or Consequences: False Advertising and the Doctrine of*

Lead Articles

- Commercial Speech*, 56 U. CIN. L. REV. 1273, 1282-83 (1988).
- ⁸² 380 U.S. 374, 391-92 (1965).
- ⁸³ *FTC Policy Statement*, *supra* note 35, at 20,912 (Oct. 14, 1983).
- ⁸⁴ *Central Hudson*, 447 U.S. at 566.
- ⁸⁵ *United States v. Grace*, 461 U.S. 171, 177 (1983).
- ⁸⁶ *Boos v. Barry*, 485 U.S. 312, 320 (1988).
- ⁸⁷ *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940)(law forbidding religious solicitations overturned because it was overly restrictive compared to state's interest).
- ⁸⁸ *See, e.g., Kovacs v. Cooper*, 336 U.S. 77 (1949).
- ⁸⁹ *See, e.g., McMurdie v. Doult*, 468 F.Supp. 766, 776 (N.D. Ohio 1979).
- ⁹⁰ *Grace*, 461 U.S. at 177.
- ⁹¹ *Boos*, 485 U.S. at 321.
- ⁹² *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989).
- ⁹³ *See, e.g., Pittsburgh Press*, 413 U.S. at 385.
- ⁹⁴ 745 F.Supp. 1540 (C.D. Cal. 1990).
- ⁹⁵ *Id.* at 1544-46.
- ⁹⁶ *Id.* at 1544.
- ⁹⁷ *Id.* at 1546-47.
- ⁹⁸ *See The 900 Club: Numbers That Pay Off*, U.S. NEWS & WORLD REP., June 17, 1991, at 61.
- ⁹⁹ *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).
- ¹⁰⁰ For example, in *Sable Communications*, the Supreme Court found non-obscene sexual 900 messages offered to adults to be protected by the First Amendment. 492 U.S. at 126.
- ¹⁰¹ *Central Hudson*, 447 U.S. at 566.
- ¹⁰² *See, e.g., Zauderer*, 471 U.S. 626.
- ¹⁰³ Mary Lu Carnevale, *FCC Proposes Guidelines For '900' Calls*, WALL ST. J., Mar. 15, 1991, at A3.
- ¹⁰⁴ *Taking on the Tele-Scam -- Two Approaches*, ADV. AGE, Feb. 18, 1991, at S-7.
- ¹⁰⁵ *See* 47 C.F.R. §64.711 (1992).
- ¹⁰⁶ *Zauderer*, 471 U.S. at 650-56 (state did not violate First Amendment by requiring attorney to disclose client's costs in advertisement about contingent fee arrangements).
- ¹⁰⁷ *Id.* at 651 (quoting *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943)(public school students could not be required to salute the flag)).
- ¹⁰⁸ *Id.*
- ¹⁰⁹ *Id.*
- ¹¹⁰ *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)(state interest in protecting minors outweighed publisher's interest in distributing sexually explicit material).
- ¹¹¹ *Shane v. WCAU-TV*, 719 F.Supp. 353, 361 (E.D. Pa. 1989)(TV station refused to broadcast Saturday morning advertise-
- ment encouraging children to call a 900 number to talk to Santa.)
- ¹¹² *See ACT Calls on FTC to Restrict Ads for Phone Services Aimed at Children*, BROADCASTING, Aug. 12, 1985, at 36; Leslie N. Vreeland, *Dial 900-Rip-Offs For Some New Telephone Pitches*, MONEY, Aug. 1990, at 25; *Telephone Scams for the 1990's*, *supra* note 25, at 29.
- ¹¹³ *ACT Calls on FTC to Restrict Ads*, *supra* note 112, at 36.
- ¹¹⁴ 47 C.F.R. §64.713 (1992).
- ¹¹⁵ *Martin v. City of Struthers*, 319 U.S. 141, 148 (1943)(dicta); *see also Rowan v. U.S. Post Office Dept.*, 397 U.S. 728 (1970).
- ¹¹⁶ Eric Weissenstein, *FCC Answers Call for '900' Controls*, ADV. AGE, Mar. 18, 1991, at 51.
- ¹¹⁷ Mills, *supra* note 51, at 666.
- ¹¹⁸ *Id.*
- ¹¹⁹ *Id.*
- ¹²⁰ Ann H. Lindstrom, *900 Legislation Steamrolling In*, TELEPHONY, Mar. 25, 1992, at 14.
- ¹²¹ *United States v. Western Elec. Co.*, 714 F.Supp. at 17 n.67, 23.
- ¹²² *United States v. Western Elec. Co.*, 1989-2 Trade Cas. (CCH) ¶ 68,710 (D. D.C. June 26, 1989)(mem).
- ¹²³ *Carlin Communications, Inc. v. Mountain States Tel & Tel. Co.*, 827 F.2d 1291, 1293 (9th Cir. 1987).
- ¹²⁴ *Id.* at 1294; *see also Carlin Communication, Inc. v. Southern Bell*, 802 F.2d 1352, 1361 (11th Cir. 1986).
- ¹²⁵ *Integrated Info. Serv., Inc. v. Mountain State Tel. & Tel. Co.*, 739 F.Supp. 488, 492 (D. Neb. 1990)(mem.)(citing *Carlin*, 827 F.2d at 1293).
- ¹²⁶ *United States v. Western Elec. Co.*, 714 F.Supp. at 16.
- ¹²⁷ *United States v. Western Elec. Co.*, 1989-2 Trade Cas. (CCH) ¶ 68,710.
- ¹²⁸ *Id.* at 61,737.
- ¹²⁹ *Integrated Info. Serv.*, 739 F.Supp at 491.
- ¹³⁰ *Id.* at 490.
- ¹³¹ *See* Consuelo Lauda Kertz & Roobina Ohanian, *Recent Trends in the Law of Endorsement Advertising: Infomercials, Celebrity Endorsers and Nontraditional Defendants in Deceptive Advertising Cases*, 19 HOFSTRA L. REV. 603, 640-45, (1991).
- ¹³² *Pittman v. Dow Jones & Co.*, 62 F.Supp. 921, 922 (E.D. La. 1987) (*Wall Street Journal* was not liable to readers who had invested in financial scheme advertised in the newspaper). *See also Daniel v. Dow Jones & Co.*, 520 N.Y.S.2d 334 (N.Y. Civ. Ct. 1987)(publisher not liable when investor relied on misinformation in computer news service).
- ¹³³ Kertz & Ohanian, *supra* note 131, at 641, 643. One court defined reckless disregard as when the probability and gravity of a threatened harm outweigh the burden of preventing such harm. *Eimann v. Soldier of Fortune Magazine Inc.*, 880 F.2d 830, 835 (5th Cir. 1989).
- ¹³⁴ Mills, *supra* note 51, at 666.
- ¹³⁵ *Dollar A Day Rent A Car Sys., Inc. v. Mountain States Tel. & Tel. Co.*, 526 P.2d 1068, 1072 (Ariz. Ct. App. 1974).
- ¹³⁶ *FCC Cracks Down on 900 Numbers*, UPI, Dec. 9, 1991, available in LEXIS, Nexis Library, UPI File.
- ¹³⁷ Laurent Belsie, *Pay-Per-Call Services Ringing Up Lots of Flak*, CHRISTIAN SCI. MONITOR, Oct. 30, 1991, at 9.
- ¹³⁸ Tim Healy, *US West to Curtail Pay-Per-Call Information Services*, THE SEATTLE TIMES, Aug. 24, 1991, at B7.
- ¹³⁹ *WCAU-TV*, 719 F.Supp. at 356, 359.
- ¹⁴⁰ *Stations Hanging Up on Party Lines*, BROADCASTING, Mar. 5, 1990, at 61.
- ¹⁴¹ *Id.*

Announcement

A More Convenient But More Expensive Way to Buy Movie Tickets

Moviegoers living in major American cities will soon be able to avoid long lines to see popular movies by buying their tickets in advance by phone. But the new service will tack on an extra couple of dollars to the price of a movie ticket.

Ticketmaster, the nation's largest ticket service, and Movie Fone, a movie information and ticketing service, have begun operating computer-assisted ticketing machines in Los Angeles, New York, Chicago, and other major metropolitan areas. The service is popular on weekends when movies are likely to sell out, when new films are released, and when the weather is cold. Most theater companies add a \$1 service charge. Ticketmaster adds a \$2 charge for operator-assisted calls and another \$1 for seating in a section set aside for advance ticket buyers. Patrons either pick up their tickets at the theater or at an automated ticket machine, similar to a bank teller machine.