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Consuelo Lauda Kertz

Assoc. Prof., Emory University Business School

Lisa Boardman Burnette

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

by **Consuelo Lauda Kertz**
and **Lisa Boardman Burnette**
Emory University

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I. INTRODUCTION

The first part of this article examined how new telephone information technology has created commercial opportunities for business and has enhanced information services for consumers through innovations in pay-per-call or audiotext ("900 number") services. It also discussed how that same technology has created new ways to commit telemarketing fraud.

This second part of the article will address the innovations of live and pre-recorded autodialed calls and the business use of caller identification ("Caller ID") services. These services, while creating business opportunities, have also decreased individual privacy through the disclosure of telephone numbers and the compilation of credit records, buying patterns, and other personal information in databases. Further, these innovations have allowed unsolicited telephone calls and fax messages to disrupt life at home and the office.

Public outcry has prompted federal and state governments and their regulatory agencies to create new laws, to enhance enforcement of existing laws, and otherwise to address consumer concerns about fraud, privacy, and public safety. For example, Congress recently enacted the Telephone Consumer Protection Act of 1991,¹ which restricts unsolicited telemarketing calls and prohibits some autodialed calls and unsolicited faxes.

The recent regulations and legislation try 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 the First Amendment rights of consumers willing to receive that information.

In discussing telemarketing calls that use autodialing equipment and the business use of Caller ID, this article will analyze statutes and regulations that have been proposed and enacted to 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. TELEMARKETING CALLS: UNSOLICITED LIVE CALLS AND AUTODIALED AND PRERECORDED VOICE MESSAGES

Telephone technology has enabled salespeople to enter consumers' homes, often without their consent or despite their lack of consent. Live unsolicited telemarketing calls are nothing new, stemming from the 1930s and 1940s, when war-era marketers had to adjust to a decreased sales force.² However, computer technology has made it easier to collect and use telephone numbers and other consumer information, causing these calls to be more frequent and pervasive in consumers' lives. The Federal Communications Commission ("FCC") studied unsolicited telemarketing calls in the early 1980s, but it decided not to regulate them because too few were interstate to jus-

Consuelo Lauda Kertz is an associate professor at the Emory University Business School. She was formerly in law practice with the Atlanta and Washington, D.C. firm of Sutherland, Asbill and Brennan. Professor Kertz received her B.A. in history from the University of Chicago and her J.D. from Emory University.

Lisa Boardman Burnette received her J.D. from Emory University School of Law, and her M.B.A. from Emory Business School. She received her B.S. in finance and organizational management from the University of South Carolina.

tify the cost and the burden on First Amendment free speech rights.³ However, the revenues from goods and services sold through telephone solicitations increased from more than \$108 billion in 1984 to \$435 billion in 1991.⁴ In particular, the advent of technology enabling computers to dial consecutive phone numbers and to transmit prerecorded sales messages has allowed marketers to reach more consumers than ever. While one live telemarketer can make about 63 calls daily, one automatic dialing system, or autodialer, can deliver sales messages to 1,000 households in a day.⁵

Although this technology presents new and profitable opportunities for legitimate businesses, such as 900 numbers, it also has allowed fraudulent marketers to reach more victims. The Alliance Against Fraud in Telemarketing, a coalition of consumer groups, business associations, and government officials, estimates that consumers spend \$15 billion yearly on fraudulent telemarketing schemes.⁶ For example, the first national survey on telemarketing fraud revealed that a single telemarketing scheme defrauded about fifty-four million Americans in 1992.⁷ Typical fraudulent practices include asking the caller to send money or to disclose his or her credit card number for bogus or low-quality products. These scams are often targeted at vulnerable audiences, such as young people or the elderly, who tend to be home during the daytime.⁸ Further, the telemarketing fraud schemes often are used with 900 numbers. For example, consumers may receive an unsolicited call telling them that they have won an award and instructing them to call a 900 number to claim the prize or to receive further information. The cost of the call often exceeds the value of the "prize."⁹ This scheme can be particularly effective when prerecorded messages are used because the call recipient cannot question the caller.

Although the Federal Trade Commission ("FTC") and other regulatory groups can deal effectively with fraudu-

lent telemarketing practices by enforcing current laws, many Americans feel that even legitimate telemarketing calls are still an invasion of privacy. The

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calls often are made at dinnertime or on the weekend, times when consumers are most likely to be at home. However, these are also times that many people want to relax and "escape the hurly-burly of the outside business and political world."¹⁰ Even when consumers are not at home, many autodialers leave prerecorded messages on answering machines. They also have been known to call pagers, which often are used to receive only emergency calls. As a result, telemarketing calls to pagers used for emergency calls may prove traumatic for the recipient.¹¹ These autodialing systems also are used to send advertising messages to fax machines, disrupting businesses and wasting expensive fax paper.¹²

In addition, the calls may create public safety problems. Because autodialing systems dial telephone numbers consecutively, they can tie up phone lines throughout a hospital, or at a police or fire station. Some autodialers do not disconnect immediately after the caller hangs up, creating further problems. For example, in one instance a mother could not call an ambulance for her injured child because the line was tied up by a computer call that would not disconnect until the message was completed.¹³

A. Regulation of Telemarketing Calls

Concerns regarding telemarketing

calls were cited by the supporters of legislation that Congress approved in November 1991.¹⁴ The Telephone Consumer Protection Act of 1991 ("TCPA") restricts the use of unsolicited telemarketing calls and prohibits most autodialed calls and unsolicited faxes.¹⁵ The first issue the legislation addresses is the use of automated telephone equipment or autodialers. As of December 20, 1992, telemarketers are no longer permitted to use autodialers or artificial or prerecorded voice messages to transmit their sales messages. They are prohibited from making autodialed calls to hospitals, to emergency lines, to paging services, to cellular phones, and to private residences unless the resident has given prior express consent. Exceptions to this prohibition are made only for emergency purposes (e.g., to notify residents of a power outage or impending natural disaster), or if the use is exempted by an FCC order.¹⁶ Further, telemarketers cannot use such devices to engage more than two lines simultaneously in a business with multiple lines.¹⁷ The TCPA also prohibits the use of telephone fax machines to send unsolicited advertisements.¹⁸

The FCC was charged with responsibility for developing regulations to implement the TCPA. Congress suggested that the FCC exempt calls that did not adversely affect privacy rights and that did not transmit unsolicited advertisements.¹⁹ As promulgated, the FCC regulations allow artificial or prerecorded voice calls to residential lines if the calls are not for commercial purposes,²⁰ if the calls are commercial but do not deliver unsolicited advertisements,²¹ if the calls are to persons "with whom the caller has an established business relationship,"²² or if the call is made by a tax-exempt, nonprofit organization.²³ Additional examples of calls Congress intended to exclude are calls transmitting information that an ordered item is in stock or that a bill is overdue²⁴ and calls made by charities or automatic message delivery services that forward personal messages for individuals.²⁵

The TCPA allows a private right of action to enjoin violations and to collect actual money damages or \$500 per violation, whichever is greater. Treble damages are also allowed for willful, knowing violations.²⁶ Furthermore, a state may bring a civil action against a violator if the state believes the entity has engaged in a pattern or practice of violating the TCPA.²⁷ Every autodialed

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or prerecorded voice message must include the identity of the caller and its phone number or address.²⁸ Fax advertisements must also indicate the date, time, sender's identity, and sender's fax number on each page of the fax.²⁹

The second issue addressed by the TCPA is unsolicited live telemarketing calls. Congress suggested that the FCC institute some type of single, national database with a list of residential telephone subscribers who have expressed their wish not to receive telephone solicitations.³⁰ This list would be sold to telemarketers, who would be prohibited from calling listed persons. However, after exploring ways to protect telephone subscribers' privacy rights and to avoid objectionable telephone solicitations, the FCC decided not to establish the national database. Instead, the recently promulgated regulations require businesses to maintain their own lists of persons who do not wish to receive calls.³¹ The establishment of the no-call list requirement is analogous to the speech cases in which unwilling recipients have been permit-

ted to block speech without unduly restricting the rights of the speaker.³² The TCPA was to take effect in December 1992, but a telemarketing group recently obtained a preliminary injunction barring enforcement of the section of the Act concerning prerecorded messages to residences, pending determination of the Act's constitutionality.³³

B. Balancing First Amendment Protection of Telemarketing Messages With Consumer Privacy Rights

The TCPA tries to balance privacy rights and free speech interests "in such a way that protects the privacy of individuals and permits legitimate telemarketing practices."³⁴ The Act restricts telephone solicitation initiated to encourage "the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person without that person's prior express invitation or permission."³⁵ As was discussed in Part I of this article, the strength of the government interest necessary to justify the restriction on speech depends on whether the regulation is content-neutral or content-based. In the past, industry representatives have argued that a similar bill proposing a "no-call" list was not content-neutral because it did not apply to solicitations for votes, survey information, or political or charitable funds.³⁶ The opponents argued that those types of calls, if unsolicited, were no less intrusive than unsolicited telemarketing calls. However, the rule that commercial speech receives less First Amendment protection than other types of speech is well-established.³⁷ Telemarketing calls may be restricted as long as the government interest in protecting telephone subscriber privacy and public safety is significant and the means of restriction are narrowly tailored.³⁸ The plaintiffs in *Moser v. FCC* conceded that their messages were commercial speech and that, under *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n*,³⁹ the government has a sub-

stantial interest in protecting citizens' privacy. The question to be decided in the case was whether a reasonable fit existed between the means used and the end of promoting consumer privacy.⁴⁰

In issuing the preliminary injunction, the *Moser* court relied on the Sixth Circuit opinion in *Discovery Network, Inc. v. City of Cincinnati*.⁴¹ In that case, the court overturned a Cincinnati ordinance that would have eliminated newsracks belonging to commercial handbill distributors without restricting newsracks belonging to newspapers such as the *Cincinnati Post*, *USA Today*, and *The Wall Street Journal*. The court held that the ban on the commercial newsracks was an excessive means to accomplish the stated aesthetic and safety end urged by the city. The court suggested that lesser restrictions, including bolting the racks to the sidewalk, or rationing the total number of racks, might pass muster. While the case may have the correct factual result, the opinion ignored the distinction between the newspapers (which have additional constitutional rights) and commercial vendors.⁴² The *Discovery Network* opinion also seems to have ignored the line of cases that permit reasonable restrictions on time, place, and manner of speech.⁴³ The aesthetic and supposed safety interests proposed as reasons for restricting newsracks on public streets also seem less substantial than the privacy interests people have when in their own homes.

The United States Constitution does not explicitly provide for an individual's right to privacy, but an implied right has been acknowledged by the Supreme Court in specific applications under the Fourteenth Amendment's Due Process Clause.⁴⁴ However, the Fourteenth Amendment only prevents restriction of constitutional rights by the state, not by private action.⁴⁵ The constitutional right to privacy is not invoked in telemarketing cases because the right applies only to intrusions by the government, not those by private businesses and individuals.

However, the state has a legitimate interest in "protecting its citizens against the practices deemed subversive of privacy and of quiet."⁴⁶ "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community."⁴⁷

In fact, a disgruntled telemarketing "victim" formed a consumer group called Private Citizen, Inc. to combat unwanted telemarketing calls. The organization's founder sends notices to more than 1,000 telemarketing companies that includes a list of the organization's paid members' names and a letter trying to establish a contract "selling" the members' privacy rights for a fee.⁴⁸ The letter notifies the telemarketers that the listed consumers are not willing to accept any unsolicited calls from the marketer; however, the members will accept calls for \$100 per call, due within thirty days. The letter further states that the telemarketing call will constitute the telemarketer's agreement to accept the members' terms. It is uncertain whether the letter establishes a legally enforceable contract, but members have reported that the amount of telemarketing calls they received dropped 75 percent after joining the group. In addition, some companies have actually sent some members \$100 after calling them. The letter now serves as a basis for a lawsuit against a telemarketer who called a member after receiving the letter.⁴⁹

The state's interest in protecting its citizens' privacy may justify restrictions on an activity threatening that privacy. For example, the Supreme Court has upheld restrictions on the use of sound trucks in public streets⁵⁰ and has allowed limitations on nonconsensual door-to-door solicitations.⁵¹ The strength of the privacy interests in such instances depends upon two factors: the forum where the speech is received and the nature of the communication.⁵² Privacy rights are greatest at home but less strong in public places, including the office.⁵³ Further,

oral communications are more intrusive than visual ones because it is more difficult to turn away and block them out.⁵⁴ Thus, telephone messages received at home are more invasive of privacy rights than mail, television messages, or telephone messages received at the office. Most existing

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regulations concerning telephone messages exclude solicited calls because they do not disturb a person's privacy.⁵⁵ A call may be expressly solicited by a consumer's request or it may be implicitly solicited when it offers "information directly relat[ed] to a prior transaction of the party called and of apparent interest to that party."⁵⁶

The government is constitutionally permitted to restrict commercial speech, and commercial telemarketing calls and faxes obviously fall within this category of speech. Thus, any restriction need only directly advance the government interest in protecting its citizens' privacy and public safety in a narrowly tailored manner.⁵⁷ State regulations of autodialer use have passed constitutional scrutiny. For example, the Minnesota Court of Appeals upheld, against a First Amendment challenge, a Minnesota law that prohibited the use of autodialers unless the autodialed call was introduced by a live operator.⁵⁸ Applying the *Central Hudson* test, the court found the law was narrowly tailored to promote the state's substantial interest in protecting its citizens' privacy and in preventing fraudulent or

misleading telephone practices.⁵⁹

The Supreme Court has found that safeguarding community peace and order is a significant government interest.⁶⁰ Because the TCPA does not prohibit unsolicited telemarketing calls outright, but instead requires the express prior consent of the call recipient, the regulation is not too extensive. Willing recipients will not be deprived of the ability to receive the speech, while unwilling individuals will not be subject to unnecessary intrusions into their private residences. Further, telemarketers could benefit from the TCPA because it requires them to establish a list of consumers who are not interested in receiving the advertiser's information, saving the advertiser the expense and time of calling those people.⁶¹ While the FCC regulations under the TCPA require that consent be "prior express consent," they do not explicitly clarify what this entails. Thus, telemarketers still may make commercial calls using artificial or prerecorded voices to residences if they are not unsolicited advertisements.⁶² Unsolicited advertisements are defined as those delivered without the individual's "prior express invitation or permission."⁶³ Further, telemarketers may make such calls to consumers with whom they have an "established business relationship."⁶⁴ Telemarketers may interpret certain consumer actions, such as a previous inquiry or purchase, as giving express consent or as establishing a business relationship. For example, a 900-number service with Caller ID capabilities could record the number of a caller and later use it to solicit that caller by phone, interpreting the original call as consent for future calls.⁶⁵

III. CALLER ID — USE BY TELEMARKETERS TO GATHER AND DISSEMINATE CONSUMER INFORMATION WITHOUT EXPRESS CONSENT

Caller ID is another technological advance that has caused consumer concern. New telephone switching sys-

tems allow local telephone companies to transmit information other than voice signals. In particular, telephone companies may transmit telephone numbers. As a result, Caller ID services have been developed to display the telephone number of the calling party to the called party.⁶⁶ Caller ID has been the subject of considerable controversy because of its impact on callers' privacy rights. A full discussion of the controversy is beyond the scope of this article. Generally, though, proponents argue that the service allows telephone customers to screen phone calls and to avoid unwanted or harassing ones, while opponents argue that callers no longer would be able to control disclosure of their telephone numbers and the subsequent use of their number by the people they called.⁶⁷ In particular, consumers are concerned that businesses can use Caller ID to gather and disseminate information about consumers, possibly without their consent or knowledge.⁶⁸ Although in the past a phone number may not have revealed much information about people, except perhaps where they lived, vast databases now exist that link phone numbers with other personal information, such as buying habits and credit records.⁶⁹

Caller ID is useful when consumers call a business for information, such as the status of a purchase order. Caller ID allows the operator to retrieve the consumer's record without lengthy inquiries by the operator. This decreases costs for the business and speeds up the transaction for the consumer.⁷⁰

However, Caller ID also allows the possibility of creating marketing lists that can be cross-referenced with demographic information. Such lists can be sold subsequently to other marketers with whom the consumer has never had contact.⁷¹ In particular, 900-number services often use this technology to compile information about their customers. For example, American Telephone & Telegraph offers a special Caller ID service just for 800- and 900-number services.⁷²

Obtaining lists of potential custom-

ers is the key to any telemarketing effort.⁷³ Typically, such lists are compiled by a company for its own use, based on customers with whom they have had past dealings. However, such lists also are compiled, and then sold, by companies who base the lists on either information in public records or information they have gathered about their own customers.⁷⁴ Although the technology arguably is helpful when used by airlines or credit card companies to enhance customer service and to contact willing customers, it could allow the dissemination of private information if used by "adult" or other 900-number services. Further, use of a caller's phone number by any 900-number service without the caller's consent or knowledge is an invasion of the caller's privacy.

A. Regulation of Caller ID

Congress has proposed several bills to restrict the use of Caller ID systems, but none have been passed yet because of the debate between those who think the service is useful to deter harassing phone calls and those who think the service invades the caller's privacy.⁷⁵ For example, the proposed Telephone Privacy Act, opposed by the Bush Administration, would have restricted marketers seeking to reuse or sell information obtained through Caller ID services.⁷⁶ Various blocking services often are suggested as an addition to Caller ID, allowing consumers the option of blocking the identification of their phone numbers when they place a call. However, telephone companies are not yet able to use blocking technology on calls to 700, 800, and 900 numbers.⁷⁷ Meanwhile, the provision of Caller ID service is being adopted or rejected on a state-by-state basis.⁷⁸

B. Consumer Right to Privacy and Caller ID

When examining Caller ID regulations, one first must determine whether the actions of telephone companies, which are heavily regulated public utilities, can be deemed to be state actions

subject to constitutional limitations. Because telephone companies offer and implement the Caller ID equipment and service, they are effectively the parties revealing possibly private information. Telephone company actions are arguably state actions because government agencies and public utility or service commissions must approve them.⁷⁹ However, in *Jackson v. Metro. Edison Co.*,⁸⁰ the Supreme Court found that a "sufficiently close nexus" must exist "between the State and the challenged action of the regulated entity" to treat "the action of the latter . . . as that of the State itself."⁸¹ Furthermore, "the nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission . . . where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute [the] practice . . . into 'state action.'"⁸²

Usually, a state can be held responsible for a private action only if it has coerced or significantly encouraged, either overtly or covertly, such an action.⁸²

No court has decided whether the disclosure of a telephone number by a telephone company through Caller ID technology violates a constitutionally protected right to privacy.⁸³ However, the courts have analyzed other telephone company activities and the companies' relationships with the states. For example, a telephone company's refusal to provide billing services to a dial-a-porn service was found to be state action when the state public utility commission ("PUC") worked closely with the company in developing legislation it had proposed and in developing its tariff settlement (statement of utility's rates, terms, and conditions).⁸⁴ Although the legislation specified that the PUC would not have jurisdiction over the company's billing decisions

concerning 900 number providers, the PUC helped the phone company fine-tune the bill the phone company had proposed to “clarify [the company’s] intent of specifically attacking dial-a-porn providers.”⁸⁶ In other words, by removing the billing decision from explicit state scrutiny, the parties were hoping to avoid constitutional challenges such as the one raised in the case. Also, the PUC assured that the tariff was not to apply to billing “services which contain harmful matter.”⁸⁷

The court determined that these actions evidenced a close nexus between the telephone company and the state, such that the company’s actions could be attributed to the state and, therefore, subject to First Amendment scrutiny. The court came to this conclusion by considering five factors identified by the United States Supreme Court as important in state action determinations: (1) the statute’s effect; (2) the statute’s objective; (3) the statute’s context; (4) the amount of interaction between the state and the private party; and (5) “the existence of a state-created framework” allowing the private party’s action.⁸⁸ Under the *Jackson* definition and this test, if a state utility commission merely approved the telephone company’s offering of Caller ID, the phone companies’ action would not be deemed state action.

Putting aside the question of whether the utility’s action is state action, the disclosure of a phone number may not even be an invasion of privacy.⁸⁹ Is a telephone number personal enough to give rise to state protection? Fourth Amendment search and seizure cases that have considered the government’s gathering of information through a person’s telephone use provide an analogy. The Supreme Court has found that a telephone user has no reasonable expectation of privacy as to the numbers that they call.⁹⁰ Under Fourth Amendment analysis, courts must consider whether an individual had an actual expectation of privacy and whether that expectation was reasonable according to society’s standards.⁹¹

The Court reasoned that because callers know the telephone numbers that they call are transmitted to the telephone company and recorded for legitimate business purposes, it was “too much to believe that telephone subscribers . . . harbor any general expectation that the numbers they dial will remain secret.”⁹² However, in his dissent, Justice Stewart

Is a telephone number personal enough to give rise to state protection? . . . Under Fourth Amendment analysis, courts must consider whether an individual had an actual expectation of privacy and whether that expectation was reasonable according to society’s standards.

argued that “[t]he numbers dialed from a private telephone — although certainly more prosaic than the conversation itself — are not without ‘content.’” Telephone numbers “easily . . . [identify] . . . the persons and the places called, and thus reveal the most intimate details of a person’s life.”⁹² Consider also the fact that, in a 1992 survey, 76 percent of consumers felt they had lost complete control over how personal information about them is being disseminated and used by businesses.⁹⁴

The types of information protected as private under governmental freedom of information acts provide another analogy. The federal Freedom of Information Act provides that all persons have the right to inspect any records maintained by a public agency.⁹⁵ However, the Act does except, among other things, personnel or other files, “the disclosure of which would constitute a clearly unwarranted invasion of per-

sonal privacy.”⁹⁶ The Connecticut Supreme Court, for one, has determined that disclosure of a person’s address would not constitute an invasion of personal privacy.⁹⁷ The court did conclude, however, that if the individuals affected had made significant efforts to shield their addresses from the public, their addresses would have fallen under the exception.⁹⁸ The court relied on the fact that addresses are publicly available: they are known by friends, published in public telephone directories, and released by mail order businesses to advertisers.⁹⁹ Telephone numbers are likewise publicly available unless a consumer makes an effort to have the number unlisted, withholds it from all but close friends, or refuses to disclose it to commercial entities with which he or she deals. Further, disclosing one’s telephone number to telemarketers would not cause embarrassment or harm, unlike the arguable embarrassment or harm which may result if the number is revealed when one calls an organization such as a suicide hotline or a rape crisis center.¹⁰⁰

IV. CONCLUSION

The United States has more telephones than any other country in the world.¹⁰¹ Thus it is not surprising that 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 telemarketing industry. Autodialing technology enables marketers to rapidly dial consumers’ numbers and transmit prerecorded advertising messages at a far greater rate than a human caller. While the marketers have gained, consumers have lost privacy in their homes due to a barrage of marketing calls at inconvenient hours by impersonal computer recordings. For this reason, the federal government has enacted legislation that restricts the use of autodialers by telemarketers in order to protect consumers’ privacy. Although this privacy is not constitu-

tionally guaranteed, the government does have the ability to ensure the peace of its citizens in their private residences. However, the legislation had to be narrowly tailored to avoid violating telemarketers' First Amendment rights.

Before marketers can even make these calls, they must obtain information about consumers, including their phone numbers. Once again technology has stepped in: Caller ID services have enabled businesses to gather and disseminate, without the consumers' consent or knowledge, information about consumers who call them. Thus, consumers have become concerned that Caller ID invades the privacy they have in personal information, in particular, their phone numbers. Although the federal government has not yet enacted any law to protect consumers in this area, several restrictions have been proposed. Like regulation of other telemarketing practices, Caller ID legislation may be justified to protect consumer privacy. However, a telephone company's creation of Caller ID services is probably not state action such that the constitution guarantees the consumer a right to privacy. Thus, it will be necessary to establish that a telephone number is private information.

The new telephone technology creates many opportunities for information dissemination and collection. With the new opportunities come inherent conflicts which must be carefully resolved. 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. ♦

ENDNOTES

¹ Telephone Consumer Protection Act of 1991 (hereinafter "TCPA"), 47 U.S.C.A. § 227 (West 1992).

² See Connie Lauerman, *Hype Tech: Now It's 'Death and Taxes....and Unsolicited Commercial Phone Calls.'* CHI. TRIB. MAG., Nov. 24, 1991, at 20.

³ *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. 107 (1991)(hereinafter "Telemarketing/Privacy Hearing")(statement of Richard A. Barton, Senior Vice President for Government Affairs, Direct Marketing Association).

⁴ TCPA, 47 U.S.C.A. § 227 (findings, note 4).

⁵ 137 CONG. REC. H11310 (daily ed. Nov. 26, 1991)(statement of Rep. Markey).

⁶ Terri Shaw, *Dialing for Your Dollars: Calls From Strangers Could Be Fraud - Or Just a Terrible Nuisance*, WASH. POST, Dec. 12, 1991, at T9.

⁷ News Conference Concerning Phone Fraud Swindles, FED. NEWS SERV., July 7, 1992, available in LEXIS, Nexis Library, Currnt File (statement of Linda Golodner, President, National Consumers League).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Gregory v. Chicago*, 394 U.S. 111, 118 (1969).

¹¹ 137 CONG. REC. H11310 (daily ed. Nov. 26, 1991)(statement of Rep. Markey). See also *Telemarketing/Privacy Hearing*, *supra* note 3, at 110-11 (testimony of Michael J. Frawley, President, Gold Coast Paging).

¹² 137 CONG. REC. H11310 (daily ed. Nov. 26, 1991)(statement of Rep. Markey).

¹³ 137 CONG. REC. H11313 (daily ed. Nov. 26, 1991)(statement of Rep. Roukema).

¹⁴ Cindy Skrzycki, *House Votes to Restrict Calls by Telemarketers*, WASH. POST, Nov. 19, 1991, at B1.

¹⁵ TCPA, 47 U.S.C.A. § 227.

¹⁶ 47 U.S.C.A. § 227(b)(1).

¹⁷ 47 U.S.C.A. § 227 (b)(1)(D).

¹⁸ 47 U.S.C.A. § 227(b)(1)(C).

¹⁹ 47 U.S.C.A. § 227(b)(2)(B).

²⁰ 57 Fed. Reg. 48,333, 48,335 (1992)(to be codified at 47 C.F.R. § 64.1200(c)(1)).

²¹ 57 Fed. Reg. 48,335 (1992)(to be codified at 47 C.F.R. § 64.1200(c)(2)).

²² 57 Fed. Reg. 48,335 (1992)(to be codified at 47 C.F.R. § 64.1200(c)(3)). Established business relationship is defined as a "prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of any inquiry, application, purchase or transaction ... regarding products or services offered by such person or entity, which relationship

has not been previously terminated by either party." 57 Fed. Reg. 48,336 (1992)(to be codified at 47 C.F.R. § 64.1200(f)(4)).

²³ 57 Fed. Reg. 48,335 (1992)(to be codified at 47 C.F.R. § 64.1200(c)(4)).

²⁴ 137 CONG. REC. 11,312 (daily ed. Nov. 26, 1991)(statement of Rep. Lent).

²⁵ TCPA, 47 U.S.C.A. § 227(b)(2)(A).

²⁶ 47 U.S.C.A. § 227(b)(3).

²⁷ 47 U.S.C.A. § 227(f).

²⁸ 47 U.S.C.A. § 227(d)(3)(A). See also 57 Fed. Reg. 48,335 (1992)(to be codified at 47 C.F.R. § 64.1200(d)).

²⁹ 47 U.S.C.A. § 227(d)(1)-(2). See also 57 Fed. Reg. 48,335 (1992)(to be codified at 47 C.F.R. § 68.318(c)(3)).

³⁰ 47 U.S.C.A. § 227(c)(3)-(4).

³¹ 57 Fed. Reg. 48,335 (1992)(to be codified at 47 C.F.R. § 64.1200(e)(2)).

³² See e.g., *Breard v. Alexandria*, 341 U.S. 622 (1951)(court upheld "Green River" ordinance which prohibited door-to-door commercial solicitations without prior consent).

³³ *Moser v. FCC*, 811 F. Supp. 541 (D. Or. 1992)(order granting preliminary injunction)(manager of an Oregon chimney sweep business, joined by forty members of the National Association of Telecomputer Operators, sought the injunction).

³⁴ TCPA, 47 U.S.C.A. § 227 (findings, note 9).

³⁵ 47 U.S.C.A. § 227(a)(3).

³⁶ See *Telemarketing/Privacy Hearing*, *supra* note 3, at 105 (statement of Richard A. Barton, Senior Vice President for Government Affairs, Direct Marketing Association).

³⁷ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

³⁸ See *United States v. Grace*, 461 U.S. 171, 177 (1983) (regulations which are content-neutral are permissible when only a significant government interest will be advanced by them).

³⁹ 447 U.S. 557 (1980).

⁴⁰ *Moser*, 811 F. Supp. at 544.

⁴¹ 946 F.2d 464 (6th Cir. 1991), *aff'd*, — U.S. —, 113 S. Ct. 1505 (1993).

⁴² See *New Kids on the Block v. News America Publishing, Inc.*, 745 F. Supp. 1540 (C.D. Cal. 1990)

⁴³ See e.g., *Optimist Club of N. Raleigh, N.C., v. Riley*, 563 F. Supp. 847 (E.D. N.C. 1982)(charitable solicitations afforded full First Amendment protection); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980)(door-to-door solicitation of contributions for environmental group fully protected, noncommercial speech).

- ⁴⁴ The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST., amend. XIV. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)(statute could not restrict personal freedom to choose to attend private school rather than public school); *Skinner v. Oklahoma*, 316 U.S. 535 (1942)(government cannot interfere with individual's choice to procreate); *Griswold v. Connecticut*, 381 U.S. 479 (1965)(government could not interfere in married couple's decision to use contraceptive device).
- ⁴⁵ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974).
- ⁴⁶ *Breard*, 341 U.S. at 640.
- ⁴⁷ *Id.* (quoting *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949)). See also *Gregory*, 394 U.S. at 118 ("no mandate in our Constitution leaves States ... powerless to pass laws to protect the public from ... conduct that disturbs the tranquility of spots selected by the people ... for homes, wherein they can escape the hurly-burly of the outside business and political world ..."). Lauerman, *supra* note 2.
- ⁴⁸ *Id.*
- ⁴⁹ *Kovacs*, 336 U.S. 77.
- ⁵⁰ *Breard*, 341 U.S. at 640.
- ⁵¹ Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99, 101 (1986).
- ⁵² See *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748-49, n.27 (1978); *Public Utilities Comm'n v. Pollack*, 343 U.S. 451, 464 (1952)(individual traveling on public train had less complete privacy rights than he would have had in his home).
- ⁵³ See, e.g., *Cohen v. California*, 403 U.S. 15, 21 (1971).
- ⁵⁴ See, e.g., TCPA, 47 U.S.C.A. § 227(b)(1).
- ⁵⁵ Nadel, *supra* note 52, at 108. Consent for future calls may even be presumed when callers provide their telephone numbers to marketers.
- ⁵⁶ *Central Hudson*, 447 U.S. 557.
- ⁵⁷ *State v. Casino Mktg. Group*, 475 N.W.2d 505 (Minn. App. 1991).
- ⁵⁸ *Id.* at 507.
- ⁵⁹ *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940)(content-neutral time, place, and manner restrictions of religious solicitations were constitutional).
- ⁶⁰ See *Telemarketing/Privacy Hearing*, *supra* note 3, at 117 (statement of Donald MacKenzie, President, NYNEX Information Resources Company, on behalf of Yellow Pages Publisher Association).
- ⁶¹ 57 Fed. Reg. 48,335 (1992)(to be codified at 47 C.F.R. § 64.1200(c)(2)).
- ⁶² 57 Fed. Reg. 48,336 (1992)(to be codified at 47 C.F.R. § 64.1200(f)(5)).
- ⁶³ 57 Fed. Reg. 48,335 (1992)(to be codified at 47 C.F.R. § 64.1200(c)(3)).
- ⁶⁴ For years, long distance companies have offered services like Caller ID to businesses using 900 numbers. Many of these businesses use the service, called Automated Number Identification, to compile marketing lists which they then use or sell. Carla Lazzareschi, *Telephone Line With a Hook*, L.A. TIMES, July 15, 1992, at A1. Often the value of the lists is based on the type of 900 call the listed callers made. For example, businesses pay the most for lists of people who called X-rated numbers and easy credit numbers. *Id.*
- ⁶⁵ Judith Endejan, *Caller Identification Services: The Demise of the Anonymous Phone Call*, COMM. LAW., Spring 1990, at 6.
- ⁶⁶ For a full discussion of the privacy issue surrounding Caller ID see *Telemarketing/Privacy Hearing*, *supra* note 3, and Endejan, *supra* note 66.
- ⁶⁷ See Lazzareschi, *supra* note 65.
- ⁶⁸ *Telemarketing/Privacy Hearing*, *supra* note 3, at 50 (statement of Janlori Goldman, Legislative Counsel, American Civil Liberties Union).
- ⁶⁹ *Id.* at 108 (statement of Richard A. Barton, Senior Vice President for Government Affairs, Direct Marketing Association).
- ⁷⁰ See Lazzareschi, *supra* note 65.
- ⁷¹ *Telemarketing/Privacy Hearing*, *supra* note 3, at 140 (statement of Carol Knauff, Director Inbound Application Services, American Telephone & Telegraph Co. ("AT&T")).
- ⁷² See Lauerman, *supra* note 2.
- ⁷³ *Id.* See also *Lamont v. Comm'r of Motor Vehicles*, 269 F. Supp. 880 (S.D.N.Y. 1967) (marketer compiled calling lists from information purchased from state motor vehicle department); Jube Shiver, Jr., *Equifax to Stop Renting Mailing Lists to Firms*, L.A. TIMES, Aug. 9, 1991, at D1 (credit reporting agencies rented information about consumers' credit records to direct marketers).
- ⁷⁴ See, e.g., H.R. 1305, 102d Cong., 1st Sess., reprinted in *Telemarketing/Privacy Hearing*, *supra* note 3, at 20.
- ⁷⁵ S. 652, 102d Cong., 1st Sess. (1991).
- ⁷⁶ *Telemarketing/Privacy Hearing*, *supra* note 3, at 144 (statement of Carol Knauff, Director Inbound Application Services, AT&T).
- ⁷⁷ See Endejan, *supra* note 66, at 6-7.
- ⁷⁸ See, e.g., *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352 (11th Cir. 1986)(Public Service Commission approved telephone company's refusal to provide access to pornographic dial-it service).
- ⁷⁹ 419 U.S. 345 (1974).
- ⁸⁰ *Id.* at 351.
- ⁸¹ *Id.* at 357.
- ⁸² *Blum v. Yaretsky*, 457 U.S. 991 (1982).
- ⁸³ Endejan, *supra* note 66, at 8.
- ⁸⁴ *Westpac Audiotext, Inc. v. Wilks*, 756 F. Supp. 1267, 1268-70 (N.D. Cal. 1991).
- ⁸⁵ *Id.* at 1269 (quoting SEN. COMM. REPORT ON SB 1844, Mar. 22, 1988, at 4).
- ⁸⁶ *Id.* at 1270 (quoting Cal. Pub. Util. Comm'n Dec. 89-02-066, Feb. 24, 1989, at 34-35).
- ⁸⁷ *Id.* at 1272. Cf. *Carlin Communication*, 802 F.2d 1352. See also *Network Communications v. Michigan Bell Tel. Co.*, 703 F. Supp. 1267 (E.D. Mich. 1989)(mem.)(telephone company's termination of billing services to objectionable 900 services was not state action despite states involvement with company as utility).
- ⁸⁸ See Glenn Chatmas Smith, *We've Got Your Number! (Is It Constitutional To Give It Out?): Caller Identification Technology and the Right to Informational Privacy*, 37 UCLA L. REV. 145 (1989).
- ⁸⁹ *Smith v. Maryland*, 442 U.S. 735, 742 (1979).
- ⁹⁰ *Id.* at 740.
- ⁹¹ *Id.* at 743. The court further argued that an individual should reasonably expect that the telephone company could turn that information over to the government (in that case, the police), not to private industry. *Id.*
- ⁹² *Id.* at 748 (Stewart, J., dissenting).
- ⁹³ *Can There Be a Balance Between Credit Data and Privacy?*, CREDIT RISK MGMT. REPORT, Dec. 7, 1992.
- ⁹⁴ 5 U.S.C. §552a(d) (1988).
- ⁹⁵ 5 U.S.C. §552(b)(6) (1988).
- ⁹⁶ *West Hartford v. Freedom of Info. Comm'n*, 588 A.2d 1368 (Conn. 1991).
- ⁹⁷ *Id.* But see *Schwaneer v. Air Force*, 698 F. Supp. 4, 5-6 (D.C. 1988). The names and addresses of military personnel could not be sold to a salesperson under an exception to the Freedom of Information Act. The court noted the danger that individual privacy will be jeopardized as electronic databases of information become larger and marketers tap into them to target their mailings and phone calls. *Id.* at 6
- ⁹⁸ *Freedom of Info. Comm'n*, 588 A.2d at 1371.
- ⁹⁹ See *Telemarketing/Privacy Hearing*, *supra* note 3, at 143 (statement of Carol Knauff, Director Inbound Application Services, AT&T).
- ¹⁰⁰ Bernard Debusman, *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.