

U.S. WEST, INC. V. FCC

By Julie Tuan

The recent merger between WorldCom and MCI represents one of the largest mergers in telecommunications history.¹ The marriage of the two telecommunications giants undoubtedly engendered antitrust concerns; yet very likely, it also raised serious privacy concerns. In the last decade, dramatic technological innovations have prompted a heightened awareness and concern for information privacy. Advances in technology have made it easier and cheaper to amass, process, and use personal information. The booming mass-marketing industry gives entrepreneurs the incentive to collect and sell information.² And, in the age of convergence³ and megamergers, it is quite possible that information generated from seemingly different sources may end up in the hands of a single corporate giant.

In such an environment, the debate over privacy has reached a fevered pitch as policymakers, public interest advocates, and industry leaders clash over the importance of personal privacy and the government's role in protecting it. The recent controversy over telecommunications carriers' use of customer proprietary network information ("CPNI")—information about subscribers' use of the phone system, including whom they call, when they call, and the features of their current phone service—is an example of such a debate. In *U.S. West, Inc. v. FCC*,⁴ U.S. West challenged a CPNI Order from the Federal Communication Commission ("FCC"), which set forth restrictions regarding carriers' use of CPNI for marketing purposes. In a creative decision, the Tenth Circuit vacated the FCC's rules on the grounds that the CPNI regulations impermissibly restrict telephone

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1. Worldcom closed its \$40 billion acquisition of MCI on September 14, 1998. See, e.g., *FCC Approves WorldCom-MCI Merger*, TECHWEB NEWS (visited Dec. 13, 1999) (<http://www.techweb.com/news/story/reuters/REU19980914S0004>).

2. See, e.g., Joel R. Reidenberg, *Privacy in the Information Economy: A Fortress or Frontier for Individual Rights?*, 44 FED. COMM. L.J. 195, 198 (1992) ("Vast quantities of personal information containing greater detail than ever before about an individual's financial status, health status, activities and personal associations are now readily available through commercial information services and list brokers.").

3. Convergence is the notion that technology is increasingly overlapping, e.g., a hand held "mobile phone" can have computer, television, and Internet capabilities in addition to telephone capabilities. See, e.g., Victoria Ramundo, *The Convergence Of Telecommunications Technology And Providers: The Evolving State Role In Telecommunications Regulation*, 6 ALB. L.J. SCI. & TECH. 35, 54 (1996).

4. 182 F.3d 1224 (10th Cir. 1999).

companies' commercial speech rights, and thus violate the First Amendment.

This Note will first outline the regulatory history of the FCC's CPNI Order. Next, it will summarize the Tenth Circuit's decision in *U.S. West v. FCC*. The Note will then discuss how the Tenth Circuit erred in subjecting the CPNI Order to First Amendment scrutiny. Finally, the Note will discuss privacy issues and how the Tenth Circuit's decision negatively impacts the protection of information privacy in the United States.

I. BACKGROUND

A. Regulatory History

Prior to the enactment of the Telecommunications Act of 1996⁵ ("1996 Act"), the FCC had already placed restrictions on certain telecommunications carriers' use or disclosure of CPNI.⁶ Arising from the *Computer II*⁷ and *Computer III*⁸ proceedings, these regulations restricted AT&T, Bell Operating Companies, and GTE Corporation from using CPNI to market enhanced services and customer premises equipment.⁹ The main purposes behind these regulations were to prevent large carriers from gaining a competitive advantage in the unregulated services markets through the use of CPNI, as well as to protect customer expectations of confidentiality regarding individually identifiable information.¹⁰

Section 222 of the 1996 Act broadened restrictions on the use of CPNI applicable to all telecommunications carriers. Entitled "Privacy of Customer Information," section 222 requires all carriers to obtain customer

5. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

6. CPNI includes any information about the customer which is made available to the carrier solely by virtue of the carrier-customer relationship (e.g., information that relates to the quantity, technical configuration, type, destination, and amount of use of a telephone service subscribed to by a customer). See 47 U.S.C. § 222(f).

7. In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C. 2d 384 (1980) [hereinafter Computer II].

8. In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C. 2d 958 (1986).

9. See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 61 Fed. Reg. 26,483, 26,485 (F.C.C. 1996) [hereinafter NPRM].

10. See Second Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Implementation of Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Information and Other Customer Information, 13 F.C.C.R. 8061, ¶ 7 (Feb. 19, 1998) [hereinafter CPNI Order].

approval prior to using, disclosing, or allowing access to individually identifiable CPNI.¹¹ Yet the statute is unclear as to which uses of CPNI are restricted, and how carriers are to obtain customer approval.

Following the statute's enactment, members of the telecommunications industry contacted the FCC requesting clarification on the scope and substance of their obligations under section 222.¹² In response to these requests, the FCC issued a Notice of Proposed Rulemaking ("NPRM"),¹³ setting forth tentative regulations and inviting public comment on its conclusions, particularly with respect to the customer approval requirement.¹⁴ Accordingly, members of the telecommunications industry suggested three methods for obtaining the customer approval required by section 222. The first was the most restrictive interpretation, requiring carriers to obtain customer approval in writing.¹⁵ The second method was an "opt-in" approach, requiring carriers initially to give customers explicit notice of their CPNI rights prior to any solicitation of approval, and then to obtain express written, oral, or electronic approval for CPNI uses.¹⁶ The third method was the least restrictive, in which approval would be inferred from the customer-carrier relationship unless the customer "opts out" from the proposed use by specifically requesting that the use of her CPNI be restricted.¹⁷

The FCC's final CPNI Order¹⁸ ("CPNI Order") determined both the meaning and scope of section 222 and the appropriate method for securing customer approval. As suggested in the NPRM, the FCC interpreted section 222 through a "total service approach,"¹⁹ whereby the FCC divided the term "telecommunications service" into three categories: (1) local, (2) interexchange (encompassing most long-distance toll service), and (3)

11. 47 U.S.C. § 222(c)(1) states: "Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable [CPNI] in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories."

12. *See U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1229 (10th Cir. 1999).

13. *NPRM*, *supra* note 9.

14. *See U.S. West*, 182 F.3d, at 1229.

15. *See CPNI Order*, *supra* note 10, ¶12.

16. *See id.*

17. *See id.*

18. *See CPNI Order*, *supra* note 10. A summary of the CPNI Order appears in the Federal Register. *See Telecommunications Carriers' Use of Customer Proprietary Information and Other Customer Information*, 63 Fed. Reg. 20,326 (1998).

19. *See CPNI Order*, *supra* note 10, ¶ 27.

commercial mobile radio service (including mobile or cellular service).²⁰ The regulations in the CPNI Order allowed carriers to use, disclose, or share CPNI for marketing purposes, but carriers could only use CPNI to market products within the category of service to which their customers had already subscribed.²¹ Where customers had not subscribed to a particular service, the regulations prohibited carriers from using CPNI for marketing purposes unless they obtained prior customer approval.²² For example, a telephone company could not use CPNI generated from local telephone service to market long-distance service to customers who did not already subscribe to that service, unless the customers first granted permission to use her CPNI. With respect to the method of approval, the FCC adopted the “opt in” approach: carriers were required to first obtain express written, oral, or electronic approval from customers before they could use CPNI.²³

B. U.S. West, Inc. v. FCC

U.S. West filed a challenge to the FCC’s chosen approval process in the Tenth Circuit.²⁴ It challenged on two grounds. First, U.S. West claimed that the “opt-in” approach violated its First Amendment rights by restricting its ability to engage in commercial speech with its customers.²⁵ Second, U.S. West argued that the CPNI regulations constituted a Fifth Amendment taking because CPNI represents property that belongs to the carriers, and the FCC’s regulations greatly diminish the property’s value.²⁶

The Tenth Circuit’s analysis focused exclusively on whether the CPNI regulations violate the First Amendment.²⁷ After finding that the restrictions on carriers’ use of CPNI were tantamount to restrictions on speech,

20. See NPRM, *supra* note 9, at 26,487.

21. See CPNI Order, *supra* note 10, ¶¶ 4, 35.

22. See *id.* ¶ 66.

23. See *id.* ¶ 4.

24. United States Courts of Appeals have exclusive statutory jurisdiction to review the FCC’s final orders. See 28 U.S.C. § 2342(1) (1994).

25. See U.S. West, Inc. v. FCC, 182 F.3d 1224, 1230 (10th Cir. 1999).

26. See *id.*

27. Most likely, the Tenth Circuit summarily dismissed the Fifth Amendment challenge because most of the Bell Operating Companies have (unsuccessfully) raised this argument in 1996 Act-related litigation. See, e.g., Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999) (challenging the 1996 Act’s universal service requirements as impermissible under the Fifth Amendment); see also Iowa Util. Bd. v. FCC, 120 F.3d 753, 818 (8th Cir. 1997) (challenging on Fifth Amendment grounds the FCC’s decision to require local exchange carriers to provide competition with unbundled access to operational support systems), *aff’d in part and rev’d in part*, 525 U.S. 366 (1999).

the court held that under the commercial speech test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,²⁸ the FCC's interest in promulgating the regulations failed to justify the restrictions made on speech. As such, because the "FCC failed to adequately consider the constitutional implications of its CPNI regulations,"²⁹ the court vacated the CPNI Order and the regulations adopted therein.

The Tenth Circuit first determined whether the CPNI regulations pass the threshold test for First Amendment scrutiny—application to speech. The court rejected the FCC's argument that the customer approval regulations only prevent carriers from using CPNI to target customers, and do not prevent carriers from communicating with their customers or limit the content of their communication.³⁰ Citing the seminal case *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,³¹ the court explained that effective speech has two components—a speaker and an audience—and that a restriction on either of these components is a restriction on speech. Because the CPNI Order restricts U.S. West's ability to speak to a targeted audience, the FCC's regulations effectively restrict speech.³²

The court then examined the nature of the speech at issue. The court determined that because the purpose of the speech is to solicit customers to purchase more or different telecommunications services, the carriers' speech does "no more than propose a commercial transaction."³³ Thus, under settled law, the speech fit "soundly within the definition of commercial speech."³⁴

Although generally afforded less protection than non-commercial speech, commercial speech is nevertheless protected under the First Amendment. The test for commercial speech is spelled out in *Central Hudson*. Under this test, the government may restrict speech only if the following criteria are met: (1) the commercial speech concerns lawful activity and is not misleading; (2) the government has a substantial state interest in regulating the speech; (3) the regulation directly and materially advances that interest; and (4) the regulation is no more extensive than necessary to serve the interest.³⁵ Since the government did not dispute that

28. 447 U.S. 557 (1980).

29. *U.S. West*, 182 F.3d at 1240.

30. *See id.* at 1231-32.

31. 425 U.S. 748 (1976)

32. *See U.S. West*, 182 F.3d at 1232.

33. *Id.* (quoting *Virginia State Bd.*, 425 U.S. at 760.).

34. *Id.* at 1233.

35. *See Central Hudson*, 447 U.S. at 566.

commercial speech based on CPNI was truthful and not misleading, the court focused on the last three prongs of the *Central Hudson* test. Ultimately, the court effectively concluded that the FCC failed to satisfy each of the remaining elements.

The FCC argued that the CPNI regulations advanced two substantial state interests: protecting customer privacy and promoting competition. The Tenth Circuit, however, refused to recognize competition as a substantial interest, concluding that Congress' primary purpose in enacting section 222 was "concern for customer privacy, not the broader purpose of increasing competition."³⁶ The court then stated that although protection of privacy may constitute a substantial state interest, it only suffices if the government specifically articulates and justifies its interest.³⁷ The court reasoned that because the FCC failed to provide empirical evidence showing that dissemination of CPNI would inflict specific and significant harm on the customers, the FCC failed to adequately justify its interest.³⁸ The court concluded, however, "notwithstanding our reservations, we assume for the sake of this appeal that the government has asserted a substantial state interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information."³⁹

The Tenth Circuit next determined that the FCC failed to show that its regulations directly and materially advanced the state interest. Again, the court found that because the FCC failed to present any evidence showing that a carrier's use of CPNI causes harm to privacy, the agency failed to prove that its regulations would directly and materially alleviate the harm caused.⁴⁰ Since the court found the FCC's argument to be based only on speculation that harm would result, it concluded that the CPNI Order failed to satisfy the third prong of *Central Hudson*.⁴¹

Lastly, the Tenth Circuit determined that even if the preceding prongs of *Central Hudson* had been satisfied, the regulations regarding customer approval were not narrowly tailored to meet the FCC's purported objective. The court explained that restrictions on speech are narrowly tailored only if they signify a "careful calculation of the costs and benefits associated with the burden on speech imposed by its prohibition."⁴² The court

36. *U.S. West*, 182 F.3d at 1237.

37. *See id.* at 1235.

38. *See id.*

39. *Id.* at 1235-36 (emphasis added).

40. *See id.* at 1237.

41. *See id.* at 1237-38.

42. *Id.* at 1238 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993)).

found that the FCC's choice of the "opt-in" approach to customer approval indicated a lack of diligence in considering the costs and benefits imposed by the CPNI regulations, because in the court's view, the "opt-out" strategy was an "obvious and substantially less restrictive alternative."⁴³ The court concluded that the FCC's failure to adopt the "opt-out" approach indicated a failure to narrowly tailor the CPNI regulations to meet the government's concerns.⁴⁴

Judge Briscoe offered a well-reasoned dissent to the Tenth Circuit's ruling. First, he argued that the FCC's choice of the "opt-in" method of customer approval was reasonable in light of Congress's intent to permit customers to make informed decisions regarding use of their CPNI;⁴⁵ as such, the court should have granted the FCC *Chevron* deference.⁴⁶ Next, Judge Briscoe attacked the majority's constitutional analysis, maintaining that "[t]he CPNI Order does not . . . directly [or indirectly] impact a carrier's expressive activity . . . in such a manner as to warrant First Amendment scrutiny."⁴⁷ Yet for the sake of argument, he assumed that the CPNI Order did restrict speech in a way that would invoke constitutional scrutiny,⁴⁸ and explained that the CPNI Order nevertheless passes the *Central Hudson* commercial speech test.⁴⁹ Thus, Judge Briscoe concluded that U.S. West's First Amendment challenge on the CPNI Order was not "serious enough to warrant abandoning the traditional deference [courts] grant agency interpretations under *Chevron*."⁵⁰

43. *Id.* at 1238.

44. *See id.* at 1238-39.

45. *See id.* at 1241 (Briscoe, J., dissenting).

46. *See id.* at 1242. In *Chevron, U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), the Supreme Court established a two step analysis for courts to employ when reviewing an administrative agency's decisions. Courts must first ask whether the statute speaks directly to the issue at hand. *See id.* at 842-43. If Congress has spoken to the precise issue, courts must give effect to Congress's express intent. *See id.* However, where a federal statute is silent or ambiguous, the reviewing court must determine whether the agency's interpretation is reasonable. *See id.* at 843. If it is reasonable, the court must defer to the agency's interpretation, even if the interpretation is not the most reasonable construction, or one that the court itself would have selected if it were to make the determination in the first instance—the court "may not substitute its own construction of a statutory provision." *Id.*

47. *Id.* at 1244.

48. *See id.*

49. *See id.* at 1244-48.

50. *See id.* at 1243.

II. DISCUSSION

The Tenth Circuit's analysis is fundamentally flawed for four reasons. First, the court misinterpreted the scope of U.S. West's challenge: what U.S. West really contested were the restrictions mandated by Congress in § 222, and not the FCC's interpretation of those restrictions. Second, the court erred by concluding that the CPNI Order restricted speech. Third, even assuming the CPNI Order did restrict speech, the court erred by concluding that the CPNI Order failed the *Central Hudson* commercial speech test. Finally, the Tenth Circuit failed to recognize the importance and validity of protecting information privacy.

A. U.S. West Challenged Congress's Restrictions, Not the FCC's

As Judge Briscoe argued in his dissenting opinion, U.S. West's First Amendment challenge was more appropriately directed at requirements mandated by Congress, rather than at those adopted by the FCC.⁵¹ U.S. West asserted that the CPNI Order violated the First Amendment because it required carriers to secure prior affirmative approval from customers before carriers could use CPNI to speak with their customers on an individualized basis about services beyond the categories of telecommunications services to which they currently subscribe.⁵² Yet the restrictions alleged to violate the First Amendment are outlined in section 222 itself. Section 222(c)(1) states:

Except . . . with the approval of the customer, a telecommunications carrier . . . shall only use, disclose, or permit access to individually identifiable [CPNI] . . . in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.⁵³

Since U.S. West did not challenge the constitutionality of section 222, the Tenth Circuit should not have equated U.S. West's dispute with the validity of the CPNI Order with a challenge on section 222 itself.

Instead, the Tenth Circuit should have given *Chevron* deference to the FCC's interpretation of section 222.⁵⁴ The Tenth Circuit correctly concluded that as for the means by which carriers are to obtain customer approval, Congress's intent was unclear, since section 222 does not explic-

51. *See id.* at 1243

52. *See id.*

53. 47 U.S.C. § 222 (c)(1) (1999).

54. *See supra* note 46.

itly indicate the methods to be used.⁵⁵ However, the court failed to consider the arguments for why the FCC's interpretation of the statute was reasonable.

The FCC's interpretation was reasonable in light of the 1996 Act's overall purpose to promote competition. By enacting the 1996 Act, Congress intended to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly . . . services to all Americans by opening all telecommunications markets to competition, and for other purposes."⁵⁶ Since CPNI is of great value to telecommunications carriers in marketing new products, those carriers which have access to CPNI have a great competitive advantage over those who do not.⁵⁷ Local exchange carriers, by virtue of their historical monopolies, as well as large conglomerate carriers such as MCI and GTE possess vast amounts of CPNI, and can market new services to their existing customers far more efficiently than new entrants.⁵⁸ Indeed, the FCC's pre-1996 CPNI restrictions⁵⁹ were aimed at preventing precisely this problem as carriers with large quantities of CPNI began competing in new markets.⁶⁰ The "opt-in" approach reduces anti-competitive behavior because it limits the instances in which carriers can win over customers for new services on the basis of their existing relationships, as opposed to their service quality or prices.⁶¹

The FCC's interpretation of the customer approval requirement is also reasonable in light of the privacy concerns addressed in section 222. Congress's intent to safeguard customers' privacy in personal information is apparent from the titles of section 222 and subsection (c)(1): "Privacy of Customer Information" and "Confidentiality of CPNI." As Judge Briscoe argued, the statute makes it clear that Congress "intended for customers to make an informed decision as to whether they would allow their individu-

55. See U.S. West, Inc. v. FCC, 182 F.3d 1224, 1230 (10th Cir. 1999).

56. S. REP. NO. 104-23, at 1 (1995).

57. See Brief for the Competition Policy Institute at 2, *U.S. West* (No. 98-9518).

58. See *id.*

59. See *supra* notes 7-8 and accompanying text.

60. See Brief for the Competition Policy Institute at 2, *U.S. West* (No. 98-9518). However, it should be noted that these prior CPNI restrictions applied only to the use of CPNI in marketing "enhanced services" and "customer premise equipment," not other major markets such as long distance and cellular services. Under these pre-1996 regulations, AT&T, GTE, and Bell Operating Companies were allowed to use CPNI to market services as long as they notified customers of their right to restrict CPNI use, and as long as customers did not "opt-out" by affirmatively exercising that right. See NPRM, *supra* note 9, at 26,485. Nevertheless, the FCC's choice of the "opt-in" approach in interpreting § 222 is consistent not only with the pro-competitive design of the 1996 Act but also with the privacy concerns addressed by § 222, as discussed in the main text.

61. See CPNI Order, *supra* note 10, ¶ 66.

ally identifiable CPNI to be used.”⁶² The FCC’s adoption of the “opt-in” approach best serves this goal because it ensures that customers are able to make informed decisions regarding use of their CPNI. By contrast, the “opt-out” approach, where customer consent is implied, does not achieve this purpose because there would be no assurance that any implied consent would be truly informed. Given that many customers may not read their CPNI notices, their failure to respond to a notice should not constitute an informed approval of its contents. Thus, the FCC’s adoption of the “opt-in” mechanism of express approval is reasonable because it ensures that customers are truly able to control use of their CPNI. Given that its interpretation of section 222 was reasonable, the Tenth Circuit should have shown *Chevron* deference to the FCC.

B. The FCC’s Customer Approval Requirement Does Not Implicate the First Amendment

Although the Tenth Circuit concluded that the FCC “failed to adequately consider the constitutional implications of its CPNI regulations,”⁶³ an examination of First Amendment jurisprudence shows that the CPNI Order does not implicate constitutional protection. While the landmark case *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*⁶⁴ extended First Amendment protection to commercial speech,⁶⁵ subsequent decisions have established that commercial speech is generally afforded less protection than non-commercial speech.⁶⁶ A threshold test for First Amendment scrutiny is whether a regulation imposes a blanket ban on commercial speech, be it speech that is directed at the general pub-

62. U.S. West, Inc. v. FCC, 182 F.3d at 1241 (Briscoe, J., dissenting). Judge Briscoe explained that because Congress did not specifically define “approval,” its ordinary and natural meaning should be adopted. Because “approval” implies knowledge and exercise of discretion after knowledge, Judge Briscoe reasoned that Congress intended to protect the privacy of CPNI by allowing customers to make informed decisions regarding use of their CPNI. *See id.* (citing United States v. Roberts, 88 F.3d 872, 877 (10th Cir. 1996)).

63. *Id.* at 1240.

64. 425 U.S. 748 (1976).

65. *See id.* at 770. In *Virginia State Board*, the Supreme Court concluded that speech which does no more than propose a commercial transaction is also worthy of constitutional protection. *Id.* The Court justified its decision on the grounds that commercial speech has value and consumers have an interest in the free flow of commercial information. *See id.* at 764-65.

66. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-15, at 896 (2d ed. 1988). Note, however, that recent cases such as *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), suggest that protection for commercial speech is now very close to the high levels of protection traditionally afforded to non-commercial expression. *See* 2 RODNEY A. SMOLLA & MELVILLE B. NIMMER, FREEDOM OF SPEECH § 20:1 (1999). For a history of the commercial speech doctrine, see *id.* § 20.

lic, or targeted toward a specific audience.⁶⁷ The Tenth Circuit failed to establish that the CPNI Order passes this preliminary test.

The CPNI Order does not impose a blanket ban on commercial speech. By restricting telecommunications carriers' use of CPNI, the Order merely restricts the source of the information carriers can use when deciding whom to solicit. For example, under the Order, carriers would still be able to use customer lists for marketing purposes, and may advertise to customers at large. As such, the Order does not extinguish a carrier's right to engage in commercial speech, nor a customer's right to receive speech. Even telecommunications carriers themselves concede this point, as evidenced by their own explanations regarding the relationship between CPNI use and commercial speech. In a notice to customers entitled "Your Customer Proprietary Network Information Rights,"⁶⁸ Southwestern Bell Mobile Systems ("SMBS/Cellular One") advises the following:

Please note that restricting your customer information will not . . . eliminate all SMBS/Cellular One marketing communications with you:

1. You would still receive marketing contacts from us that are not based on your customer-specific CPNI.
2. SMBS/Cellular One is permitted to use your customer-specific CPNI to market telephone services we offer that are not available to you from another source.
3. Even if your CPNI is restricted, we may still use it to market those telephone services or features that may be available to you from a source other than SMBS/Cellular One if you contact us and inquire about them.⁶⁹

To the extent that the FCC's CPNI Order *does* prohibit telecommunications carriers from communicating with their customers, such a restriction is nevertheless permissible because it is consistent with existing law.

67. See, e.g., *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 479 (1988) (holding that the state may not categorically prohibit lawyers from soliciting legal business by sending truthful letters to potential clients known to face a particular legal problem); *Bolger v. Youngs Drugs Prod. Corp.*, 463 U.S. 60, 74 (1983) (holding that a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives is an unconstitutional restriction of commercial speech); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 572 (1980) (holding that a regulation completely banning an electric utility from advertising to promote use of electricity is unconstitutional); *Virginia State Bd.*, 425 U.S. at 749-50, 773 (holding that a state statute completely suppressing the advertisement of prescription drug prices is unconstitutional).

68. Southwestern Bell Mobile Systems, *Your Customer Proprietary Network Information Rights* (visited Nov. 7, 1999) (<http://buffalo.cellone.com/cpni.html>).

69. *Id.*

For example, the Telephone Consumer Protection Act of 1991 (“TCPA”)⁷⁰ prohibits companies from soliciting individuals for commercial purposes through the use of any automated telephone dialing system or artificially prerecorded voice.⁷¹ Existing laws also give individuals the right to control whether they would like to receive commercial speech. For example, the FCC has promulgated “Do Not Call” Rules in which individuals can request not to receive live telephone solicitations.⁷² Individuals may directly inform companies that they do not wish to receive telephone solicitations, or they can contact the Telephone Preference Service of the Direct Marketing Association, an organization that commercially publishes lists of customers who do not wish to receive solicitation calls,⁷³ to request that their names be placed on those lists. Should commercial entities violate these “Do Not Call” Rules, the FCC’s regulations provide that individuals may sue in state courts for damages if their state permits such actions.⁷⁴ States may also help initiate actions in federal courts against any person or entity that engages in a pattern or practice in violation of the TCPA or the FCC’s rules.⁷⁵ As the FCC’s CPNI Order gives customers the right to control whether telecommunications carriers may use CPNI, which in turn allows them to decide whether they wish to receive targeted commercial solicitations, it is therefore consistent with existing law.

C. The CPNI Order Nonetheless Passes the *Central Hudson* Commercial Speech Test.

Even assuming that the FCC’s restrictions on CPNI use are constitutionally equivalent to a ban on speech itself, the CPNI Order nevertheless passes the *Central Hudson* commercial speech test.⁷⁶ Both of the FCC’s

70. 47 U.S.C. § 227 (1995).

71. *See id.*

72. Solicitors are required to maintain records of “do not call requests,” must keep the record of requests for ten years from the time of the request, and may not make further telephone solicitations to that particular individual. *See Federal Communications Comm’n, Consumer News: What You Can Do About Unsolicited Telephone Calls and Faxes* (visited Jan. 20, 2000) (http://www.fcc.gov/ccb/consumer_news/unsolici.html).

73. *See id.*

74. *See id.*

75. *See id.* Such seemingly blatant restrictions on commercial entities’ freedom of speech right do not violate the First Amendment because commercial speech is subject to restrictions on content. Therefore, to the extent that the FCC’s CPNI Order restricts commercial speech, one could argue that the restrictions also reflect constitutionally permissible limits on speech content.

76. As stated above, under *Central Hudson*, the government may restrict lawful, non-misleading commercial speech if the government proves: (1) there is a substantial state interest in regulating the speech; (2) the regulation directly and materially advances

asserted state interests—protection of privacy and promotion of competition⁷⁷—rise to the level of substantial state interests. The Supreme Court has squarely held that the government has a substantial interest in protecting privacy.⁷⁸ With respect to competition, in *Turner Broadcasting System v. FCC*,⁷⁹ the Supreme Court determined that promoting competition among cable systems is not only a permissible governmental justification, but an “important and substantial federal interest.”⁸⁰ Similarly, in *SBC Communications v. FCC*,⁸¹ the Fifth Circuit held that “the competition-enhancing interests” addressed by the 1996 Act “are manifestly sufficient to meet the first hurdle” of the commercial speech test.⁸²

The CPNI Order directly and materially advances the dual goals of protecting privacy and competition. The FCC’s choice of the “opt-in” approach best serves the protection of privacy because it enables customers to make informed decisions regarding the use and disclosure of their information. By contrast, the “opt-out” approach, which the court impliedly considers to be the constitutionally required solution, would be less effective in serving the privacy interest because customers may be unaware of the privacy protections afforded by section 222, and may not understand that they must take affirmative steps to restrict access to sensitive information.⁸³ The CPNI Order also helps diminish anti-competitive barriers in the telecommunications market because by restricting use of CPNI, the Order reduces the possibility that an incumbent carrier will use CPNI to target existing customers and convert them into customers for new products or services, at marketing costs far lower than for new entrants without CPNI.

that interest; and (3) the regulation is no more extensive than necessary to serve the interest. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980).

77. The Tenth Circuit erred in summarily rejecting the promotion of competition as an asserted state interest. When evaluating a regulation under *Central Hudson*, a reviewing court does not have the authority to assess the integrity of an asserted state interest, and cannot at the outset discard a stated interest. *See Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (“[U]nlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions. Neither will we turn away if it appears that the stated interests are not the actual interests served by the restriction.”) (citation omitted).

78. *See id.* at 769 (“[P]rotection of potential clients’ privacy is a substantial state interest).

79. 512 U.S. 622 (1994).

80. *Id.* at 647.

81. 154 F.3d 226 (5th Cir. 1998).

82. *Id.* at 247.

83. *See* CPNI Order, *supra* note 10, ¶ 91.

Lastly, the CPNI Order is narrowly tailored to serve the interests of protecting privacy and competition. The Tenth Circuit concluded that because the “opt-out” approach was an “obvious and less restrictive alternative,”⁸⁴ the FCC failed to narrowly tailor its CPNI regulations. Yet the Supreme Court has emphasized that the chosen regulations do not have to represent the single best disposition, but one whose scope is in proportion to the interest served,⁸⁵ and that there must be a “fit” between the regulation’s means and ends, a fit that is not necessarily perfect, but reasonable.⁸⁶ Of the three suggested methods for obtaining customer approval, the FCC adopted the most reasonable choice: neither the most restrictive method (requiring explicit written approval), nor the most lenient approach (allowing carriers to infer approval unless instructed otherwise). Although the opt-out approach might be less restrictive, the existence of an “obvious and less-restrictive”⁸⁷ alternative is not dispositive to a determination of the reasonableness of the FCC’s restrictions.⁸⁸

III. PRIVACY RIGHTS IN PERSONALLY IDENTIFIABLE INFORMATION

The Tenth Circuit missed the point. The FCC’s CPNI Order does not impermissibly hamper commercial speech rights, but rather creates strong privacy protections that maximize customers’ control over use and disclosure of their personal information. In subjecting the CPNI Order to First Amendment scrutiny, the court not only discounted the merits of protecting information privacy, but struck down the government’s affirmative attempt to safeguard individuals’ privacy interests.

84. U.S. West, Inc. v. FCC, 182 F.3d 1224, 1238 (10th Cir. 1999).

85. See *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

86. See *id.*

87. *U.S. West*, 182 F.3d at 1238.

88. While the Supreme Court has observed that the existence of “numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable,” *Florida Bar v. Went for It*, 515 U.S. 618, 632 (1995) (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993)) (emphasis added), the Court has not explicitly held that the existence of alternatives is dispositive. Moreover, in cases where the existence of alternatives was a significant factor, the restrictions at issue involved blanket restrictions on commercial speech, in which all alternatives were clearly less-burdensome. See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 763 (1993) (holding that a state statute banning certified public accountants from making telephone solicitations to potential customers is inconsistent with the First Amendment); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 412 (1993) (holding that a city ordinance prohibiting the distribution of commercial handbills on public property violates the First Amendment).

The greatest flaw in the Tenth Circuit's decision is that it failed to accept the protection of privacy in personally identifiable information⁸⁹ as a substantial state interest in the *Central Hudson* calculus. In essence, the Tenth Circuit refused to recognize privacy rights in such information because:

Although we may feel uncomfortable knowing that our personal information is circulating in the world . . . [a] general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial state interest under *Central Hudson* for it is not based on an identified harm.⁹⁰

Such a statement, however, seems somewhat antiquated in light of the present age of technological innovation and convergence. The present society is an "information society," where vast quantities of personal information can be easily gathered, stored, processed, and disseminated by the government and private entities.⁹¹ Whereas in previous years, an intrusion into one's home or seclusion constituted an invasion of privacy,⁹² today, many consider the uncovering of one's most frequently dialed phone numbers, the discovery of which products one buys, or the tracking of one's clickstream on the Internet,⁹³ to be just as much an invasion of privacy.⁹⁴

Although formal studies and the popular media indicate that the American public is increasingly concerned with the privacy of its personal information,⁹⁵ "information privacy" has nevertheless received minimal

89. In the context of this Note, personally identifiable information is data that can be linked to a particular individual, rather than data that is accumulated or processed in the aggregate.

90. U.S. West, Inc. v. FCC, 182 F.3d at 1224, 1235 (10th Cir. 1999).

91. See Fred H. Cate, *Business Law Symposium: Entering a New Era In Telecommunications Law: Privacy in Telecommunications*, 33 WAKE FOREST L. REV. 1, 3 (1998); Reidenberg, *supra* note 2, at 198;

92. See William Prosser, *The Right of Privacy*, 48 CALIF. L. REV. 383, 389 (1960); RESTATEMENT (SECOND) OF TORTS, § 652B (1997).

93. The Federal Trade Commission defines a "clickstream" as a user's path through the Internet, which can be tracked, stored, reused, and aggregated. See Federal Trade Commission, *Online Privacy: General Practices and Concerns* (Dec. 1996) (<http://www.ftc.gov/reports/privacy/privacy3.htm>).

94. See Jonathan P. Cody, Comment, *Protecting Privacy Over the Internet: Has the Time Come to Abandon Self-Regulation?*, 48 CATH. U. L. REV., 1183, 1185-86 n.12 (1999).

95. In 1996, Equifax, a leading credit bureau, and Alan Westin, a privacy scholar, conducted a study on privacy in the technological age. The study found that 89% of those

legal protection.⁹⁶ This lapse in protection is partly due to the fact that privacy law itself is ill defined,⁹⁷ and the fact that because the U.S. Constitution does not specifically guarantee the right to privacy,⁹⁸ the value of privacy interests is often limited when weighed against more explicit constitutional rights.⁹⁹

Defining and justifying protection for personal information is especially problematic because it is difficult to incorporate it into "traditional" privacy law, which centers on harm to the individual. Under the common law, individuals may bring tort actions for invasion of their privacy only if another has intruded upon their seclusion, publicly disclosed embarrassing

polled in the United States expressed that they were either very concerned or somewhat concerned about privacy. See Alan Westin, "*Whatever Works*": *The American Public's Attitudes Toward Regulation and Self-Regulation on Consumer Privacy Issues*, in U.S. DEP'T OF COMMERCE, PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE ch.1, § F (1997) (visited Jan. 20, 2000) (<http://www.ntia.doc.gov/reports/privacy/selfreg1.htm#1F>). Surveys of Internet users indicate that cyberspace—the web of consumer electronics, computers, and communications networks interconnecting the world—will exacerbate the anxiety over privacy. See Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1197 (1998).

96. See Cate, *supra* note 91, at 31. However, it should be noted that to varied extents federal and state legislatures have extended privacy rights with respect to the collection, use and distribution of personally identifiable information. Yet protection is limited only to specific categories of information user, context, and type of information. Existing laws most often prohibit certain disclosures, rather than collection, use, or storage of personal information. Moreover, relevant laws do not completely protect privacy interests because they have carved out exceptions for uses of personal information in commercial or marketing contexts. See, e.g., Privacy Act of 1974, 5 U.S.C. § 552(b) (1998) (prohibiting the federal government from using federal agency records containing personal information that is not relevant to accomplish that agency's purpose); Video Privacy Protection Act of 1988, 18 U.S.C. §§ 2710-11 (1994) (regulating the disclosure of consumers' videotape rental information); The Cable Communications Policy Act of 1984, 47 U.S.C. § 551 (1994) (governing cable television companies' collection and use of personal information from their subscribers); CAL. CIV. CODE § 1799.3 (West Supp. 1991) (video rental privacy); CAL. PENAL CODE § 637.5 (West 1988) (cable communications privacy).

97. Fred Cate describes privacy protection in the United States as "complex and decentralized . . . a cacophony of constitutional rights, narrow sectoral statutes, state legislation, federal regulations, and common law torts." Cate, *supra* note 91, at 3-4. The laws and regulations governing the use of personal information are limited to a specific industry or agency, which often results in "uneven and inconsistent privacy protection." *Id.* at 4.

98. The Supreme Court, however, has interpreted the First, Third, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments to provide an individual with some privacy protection from government activities. See FRED H. CATE, PRIVACY IN THE INFORMATION AGE 52 (1997). For a history of the development of the right to privacy, see Cody, *supra* note 94, at 1192-97.

99. See Cate, *supra* note 91, at 18.

facts about them, placed them in a false light, or appropriated their name or likeness.¹⁰⁰ Those reluctant to extend privacy rights to personal information are likely to respond in a manner similar to the Tenth Circuit: extending privacy rights to personally identifiable information is undeserved because there is no identifiable harm comparable to the harm sustained in other tort scenarios. Indeed, credit card agencies, phone carriers, and other entities, which collect, store, and use personal information do not view privacy issues as being problematic until specific abuses occur.¹⁰¹

With respect to telecommunications carriers' unauthorized use of CPNI, however, at least two harms can be identified. First, individuals are harmed when an unauthorized party uncovers private, sensitive information about them. As the FCC explained, much CPNI consists of highly sensitive information. From CPNI, one can obtain information such as the destination of an individual's calls, the numbers subscribers call and from which they receive calls, as well as when and how frequently subscribers make their calls.¹⁰² While such information may be benign on its face, this data can be processed and translated into subscriber profiles which may contain information about the identities and whereabouts of subscribers' friends and relatives, which businesses subscribers patronize, when subscribers are likely to be home and awake, product and service preferences, and subscribers' medical, business, client, sales, organizational, and political telephone contacts.¹⁰³ As the FCC indicated, the ability to construct such profiles means that CPNI "may be equally or more sensitive than medical and financial records."¹⁰⁴

Second, individuals are harmed when telecommunications carriers use CPNI for purposes outside the relationship which generated the CPNI. While this is a subtle point, it is significant given that personal data now has commercial significance. As there are several profitable industries in the business of collecting and using individuals' personal information, information disclosed and collected for one purpose may easily have an associated use in an entirely different and undesirable context.¹⁰⁵ The specific harm to individuals then is the appropriation of private information, and is best understood when analyzed under a contract analysis.

Commentators have described the unauthorized use of personal information as being analogous to unjust enrichment in a contractual situa-

100. See Prosser, *supra* note 92, at 389.

101. See Reidenberg, *supra* note 2, at 206.

102. See CPNI Order, *supra* note 10, ¶ 94.

103. See *id.* ¶ 61.

104. See *id.* ¶ 94.

105. See Reidenberg, *supra* note 2, at 206.

tion.¹⁰⁶ Such analyses presuppose that customers expect that their personal information will be used only in the context of the transactions that generate the information.¹⁰⁷ Thus, when companies sell collected information to third parties, or when they otherwise use it to their own advantage in areas unrelated to the relationship that generated the information, they unjustly derive benefits at the expense of their customers.¹⁰⁸ However, such an argument actually substitutes a property right for a right of privacy; for inherent in the reasoning is that a name and address are property in which the individual has an exclusive right.¹⁰⁹ Thus, when a customer voluntarily discloses information, and the merchant then uses it for "un-contracted" purposes, the merchant appropriates another's property. However, the merchant does not invade a privacy right per se, because arguably, there is no invasion of privacy if a customer voluntarily discloses information.¹¹⁰

An argument that more persuasively supports the notion that individuals have privacy rights in personal information works in situations where customers do not voluntarily disclose personal information.¹¹¹ Thus, when an entity collects and reveals personal information that was not intentionally disclosed, a privacy right is invaded. Such an analysis is appropriate in the CPNI use context, because CPNI is incidental to the customer-carrier relationship: by subscribing to phone service, customers do not voluntarily choose to disclose the numbers which they call, or when they most frequently use the phone. Moreover, in many localities, customers do not have a choice between local carriers; in these cases, customers must reveal personal information if they wish to have phone service. Therefore, when carriers use or disclose CPNI, customers' privacy interests are invaded; the harm is even greater when the use or disclosure is made outside of the relationship which generated the information.

106. See Craig Martin, Comment, *Mailing Lists, Mailboxes, and the Invasion of Privacy: Finding a Contractual Solution to a Transnational Problem*, 35 Hous. L. Rev. 801, 826-30 (1998).

107. See *id.* at 827-28.

108. See *id.* at 826-28.

109. See *id.* For a discussion on extending property rights to personal information, see generally Kang, *supra* note 95; Robert S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L. J. 2381 (1996); see also, Pamela Samuelson, *A New King of Privacy? Regulating Uses of Personal Data in the Global Information Economy*, 87 CALIF. L. REV. 751, 769-73 (1999) (book review).

110. *Dwyer v. American Express Co.*, 273 Ill. App. 3d 742, 746 (1995), affirms this theory by upholding the proposition that when information is voluntarily given to an information collector, no right exists that would prevent disclosure of that information. See Martin, *supra* note 106, at 830.

111. See Martin, *supra* note 106, at 830.

The pertinent question, then, is whether and to what extent carriers can use CPNI outside of the customer-carrier context. For if carriers cannot and do not disclose information to third parties, then it follows that no harm to privacy may result from “un-contracted” disclosure. Indeed, this concern seems to have been at the heart of the Tenth Circuit’s analysis:

While protecting against disclosure of sensitive and potentially embarrassing personal information may be important in the abstract, we have no indication of how it may occur in reality with respect to CPNI. . . . The government presents no evidence regarding how and to whom carriers would disclose CPNI. By its own admission, the government [has stated] “[W]e agree . . . that sharing of CPNI within one integrated firm does not raise significant privacy concerns because customers would not be concerned with having their CPNI disclosed within a firm in order to receive increased competitive offerings.” Yet the government has not explained how or why a carrier would disclose CPNI to outside parties. . . . This leaves us unsure exactly who would potentially receive the sensitive information.¹¹²

While section 222 makes it clear that carriers may not sell customer information to other companies,¹¹³ arguably, it leaves ambiguous the extent to which carriers may share information internally.¹¹⁴ Given that large corporate mergers are becoming increasingly common, and that telecommunications carriers today now provide much more than traditional telephone service,¹¹⁵ even information that is shared internally is likely to violate privacy interests. For when a company provides information about a customer’s use of the phone system to its credit card or financial services division, it uses the information for “non-contracted” purposes. As telecommunications carriers diversify themselves, there will no longer be a meaningful difference between “selling” information to third parties and “sharing” information with affiliates. Both the Tenth Circuit and even the

112. U.S. West, Inc. v. FCC, 182 F.3d 1224, 1237-38 (10th Cir. 1999).

113. Section 222 states that telecommunications carriers “shall only use, disclose, or permit access to individually identifiable [CPNI] in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.” 47 U.S.C. § 222 (c)(1) (1999).

114. The term “used in,” as stated in section 222 (c)(1)(B), could be interpreted broadly.

115. For example, AT&T now has stakes in DSL, the cable television industry, the credit card business, and recently has even begun to offer “Student Advantage Cards,” which give college students discounts at participating retailers.

FCC seemed to have overlooked the fact that use and disclosure of CPNI within the same firm can threaten customers' privacy interests.

IV. CONCLUSION

Given that businesses have commercial incentives to use personal information, that advances in technology have made it easier and cheaper to amass, process, and use the information, and that the changing corporate environment allows large quantities of personal data to rest in the hands of single business entities, safeguards to protect the privacy of personal information are warranted. By issuing the CPNI Order, the FCC attempted to create strong privacy protections that maximized customers' control over the use and disclosure of their personal information. Yet the Tenth Circuit's decision in *U.S. West v. FCC* undermined the government's objectives. In a misguided First Amendment analysis of the CPNI Order, the court struck a blow to affirmative efforts to protect consumers' privacy interests. If left unchallenged, the Tenth Circuit's decision will surely have a negative impact on privacy considerations in other industries. For, as the telecommunications industry is one of the most highly regulated sectors in the United States, if the government's efforts to protect privacy interests are invalidated in this sector, then they are also very likely to be invalidated in others.