

**Telephone Transaction-Generated  
Information:  
Rights and Restrictions**

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***Program on Information Resources Policy***

Harvard University

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**Telephone Transaction-Generated Information: Rights and Restrictions**

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## Executive Summary

- Telephone transaction-generated information (TTGI) is the information generated by telephone usage and by transactions related to telephone service.
- The diversity of conflicting stakes regarding TTGI, the variety and number of stakeholders, and the availability of legal levers that they can bring to bear on TTGI make it unlikely that we will see agreement among stakeholders any time soon. It is likely that ownership of and access to TTGI, and related privacy implications, will become even more significant in the guerilla warfare-like public policy debate surrounding the transition from a monopoly to a competitive telecommunications environment.
- Transactions usually generate some sort of a record for the parties involved. Many organizations -- be they business, government, or other -- can and do put transaction-generated information (TGI) to use in characterizing, identifying, and locating their constituencies. TGI, therefore, has value.
- Computers and other information technologies have altered the record-keeping process in our society, making records more conveniently accessible and simplifying their transfer to others.
- TGI is a commodity that some would like to sell and others would like to buy. But it is also information with value when it is owned exclusively and not sold to others. And there are those who might consider the information personal, and would not like it used or sold at all.
- As of yet, few laws specifically address TTGI. However, there is precedent in areas which have certain structural similarities. Those laws may serve as analogs for arguments about TTGI and as models for possible regulatory, legislative, and judicial controls which may result.
- TGI may even be more telling than census data in defining the characteristics of an individual. As Justice Douglas wrote: "In a sense a person is defined by the checks he writes. By examining them [one] gets to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the papers and magazines he reads, and so on ad infinitum... [The]... transactions of an individual give a fairly accurate account of his religion, ideology, opinions, and interests." One could say the same of the telephone numbers he dials.
- The increasing availability of TTGI is an effect of the merger of computer and communications technologies; the fact that telephone networks, now more than ever, are capable of generating information as well as carrying it.

- The increasing demand for TTGI by non-telephone companies should be understood in the context of a continuing trend toward diversity in all aspects of society. In reaction to a perceived fragmentation of both the audiences that advertisers seek and the media that might reach them, there is a shift toward alternative marketing methods in American business.
- Database marketing, one of those alternative marketing methods, makes use of TTGI, and is simply the latest in a long line of market feedback methods used in the United States. TTGI is just one more type of transaction-generated information; like credit card data, magazine subscriptions, and other offer-response data, combined with postal and census data, it is the marketer's stock in trade.
- Implicit here is the premise that both public policy and market strategy are important in business. Indeed, policy considerations such as privacy, access, and ownership can actually help shape not only products and services but markets as well.
- If a telco owned TTGI, the telco would have a right to deny or provide access to others. The telco could sell the information or not sell it, use it or not use it, as the telco chooses. However, if the telco provides access, there are privacy implications for customers. If access is not provided, there are antitrust and regulatory implications for competitors. By the same law, one party has a right; the other is restricted. If a customer has a right to privacy, he can restrict the access rights of others. If a telco competitor has a right of access, he can restrict telco ownership rights and the privacy rights of others. Rights and restrictions are related.
- Three charts present the stakes and legal levers of stakeholders in TTGI: 1) stakes of parties in telephone transaction-generated information, 2) legal levers on telephone transaction-generated information, and 3) sample RBOC interactions with other stakeholders over telephone transaction-generated information.

## GUIDE

Accompanying this text are three wall charts. These charts present the stakes and legal levers of stakeholders in TTGI:

- I Stakes of Parties in Telephone Transaction-Generated Information
- II Legal Levers on Telephone Transaction-Generated Information
- III Sample RBOC Interactions with Other Stakeholders over Telephone Transaction-Generated Information

In the bound text, an introduction to the charts is followed by three appendices, which put TTGI in a business and legal context:

- Appendix 1: TTGI In Context
- Appendix 2: Privacy, Access, and Ownership of TTGI
- Appendix 3: More Precedent



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## OVERVIEW

This paper is about information generated from telephone transactions: what it is, who might own it, who might want access to it, and who might want to restrict access to it because of privacy and other considerations. It is also about how and why access, ownership, and privacy claims are made by the various stakeholders. Telephone transaction-generated information (TTGI) is the information generated by telephone usage and by transactions related to telephone service.

Business strategists and public policy planners who have an interest in TTGI and who want to understand its current disputes and skirmishes will find this paper useful.

In Future Perfect, called the book of the decade by popular author and management consultant Tom Peters, Stanley M. Davis introduced the concept of "mass customizing." Davis asserts that the "ultimate logic of ever-finer differentiation of the market [from mass to segmented to niche] is markets of one; that is, meeting the tailored needs of individual customers and doing so on a mass basis."<sup>1</sup>

In order to serve a market of one, detailed information about specific individuals must be collected, and in fact such information is now routinely collected and sold. TTGI is in demand for many of the same reasons as is credit transaction-generated information. Analysis of telephone usage reveals the same sort of information as analysis of credit card usage, information that helps characterize, locate, and identify individuals.

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<sup>1</sup> Stanley M. Davis, Future Perfect, New York, Addison-Wesley Publishing Co., 1987, p. 175.

As Business Week noted<sup>2</sup>

For as little as 10 cents per name, any customer -- mail order house, phone solicitor, or fringe political group -- can buy names, addresses, and phone numbers of people categorized by their income, whether they have credit cards, and how much credit they have available.

The article continued:

Last year, Equifax paid \$21 million for National Decision Systems, which sells computerized breakdowns of neighborhoods and towns with profiles of the residents' spending habits. It derives this from census data and surveys, among other sources. National plans to incorporate Equifax' credit data into its data base. And that "will take us down to the level of offering information on the habits of individual households," says Richard Abraham, National's financial services marketing director. Marketers will no longer think of two neighbors as similar because their houses are and each has two kids. National will know that one heavily uses his five Visa cards and the other has none.

There is a growing consensus that computers and other information technologies are causing a societal transformation every bit as profound as the industrial revolution which preceded it. Computers have already had a major impact in the design and manufacture of products. This paper looks at the effect computers are having on marketing.

In a sense, this paper is also about societal change caused by technological change, and the American system for dealing with both. Our legal and regulatory system constantly redefines and reinterprets the rights and restrictions affecting citizens and organizations as change occurs. Thus, the rights and restrictions that surround TTGI are by no means static. This paper is both a snapshot of the present rights and restrictions surrounding a particular type of information, and an overview of the mechanisms whereby they are changing.

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<sup>2</sup> "Is Nothing Private?", Business Week, September 4, 1989, p. 81.

Privacy is a broad and complex subject having to do with criminal law, the laws we impose on personal liberty, the right to be left alone, the right to control information about ourselves, and much more. Although the notion of privacy is an important aspect of this paper, it is not discussed in great historical or legal detail. Many works offer an overview of the topic, including two by this Program: The Right to Privacy in American History, and English Judicial Recognition of a Right to Privacy, both by David J. Seipp.

## THE CHARTS

The three large charts present the stakes and legal levers of stakeholders in telephone transaction-generated information (TTGI). TTGI is the information generated by telephone usage and by transactions related to telephone service.

Implicit in the charts is the premise that both public policy and market strategy are important in business. Indeed, policy considerations such as privacy, access, and ownership can actually help shape not only products and services but markets as well.<sup>3</sup> The charts are intended to be useful to business decision makers, public policy makers, and the public.

The charts are

- I Stakes of Parties in Telephone Transaction-Generated Information
- II Legal Levers on Telephone Transaction-Generated Information
- III Sample RBOC Interactions with Other Stakeholders over Telephone Transaction-Generated Information

The columns, labeled across the top of each chart, list types of TTGI: White Pages information, Yellow Pages information, new telephone service orders, aggregate telephone traffic information, calling number

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<sup>3</sup> For an example of a policy consideration shaping both a service and market, one need only look as far as the controversy surrounding calling number identification. Bell Atlantic has taken the position that the called party has a right to know the telephone number of the person who is calling, whether or not the number is unpublished. Some public policy makers, focusing on the caller's right to privacy, have proposed transmitting unpublished number calls to the called party with a private number notation such as "p" instead of the unpublished calling number. Some also recommend that the called party have the option to block a "p" call, if desired. The Washington Utilities and Transportation Commission has ordered Pacific Northwest Bell not to disclose unlisted numbers to anyone for any purpose, except in response to a court order or in cases of life-threatening emergency. The policy consideration of privacy has the potential to shape the characteristics of the service or to eliminate the market altogether.

identification, other network information, call detail records, and billing and credit information.

The rows, labeled along the side, list the parties with a stake in TTGI: RBOCs, IXCs, non-RBOC directory companies, direct marketers, manufacturers, electronic and print information providers, and customers.

The term "stake" (Chart I) is a catch-all for the wide variety of interests that one can have in a resource such as information. The stake may be financial but it need not be. Stakeholders are those who will be affected by events and decisions surrounding the resource.

A legal lever (Chart II) is an instrument that might be used to protect, enhance, or derive benefit from a stake. Those levers are under three main headings -- privacy, access, and ownership -- and are highlighted in Chart II. The words "can" and "could" are used in Chart II to denote different gradations of possibility. "Can" means that a legal lever has either already been used or that its use is very likely in the opinion of the author -- a lawyer by training and a strategic planner in his current position. "Could" suggests a less certain, though reasonable, possibility that a legal lever will be used.

The Sample Interactions chart (Chart III) provides some actual instances of the interplay of stakeholders regarding TTGI.

#### Telephone Transaction-Generated Information

Computers and other information technologies have altered the record-keeping process in our society, making records more conveniently accessible and simplifying their transfer to others. Transactions usually generate some sort of a record for the parties involved. Virtually every communication on a telephone network is a transaction and generates a record. Telephone transaction-generated information (TTGI) is the record created by the fact that a telephone communication or some other transaction related to telephone service has occurred.

At least three parties usually are involved in each telephone communication: the calling party, the called party, and the owner of the communication facilities. Because multiple "owners" own different components of the network, more than three parties often are involved in a telephone communication. Because occasionally the caller, the called, and the facilities may all belong to one organization, there may be fewer than three parties involved.

Both white and yellow pages information are included in the charts as types of TTGI. However, the question of what is yellow pages information, what is white pages information, and how closely related yellow pages information is to telephone service is in dispute. It is part of a bigger question of where and how to draw lines between regulated telephone utility monopolies and competitive businesses owned by the same company. The issues are complicated by the transition in the United States from a virtual telephone monopoly to a more competitive environment. The issues are briefly discussed in the section below entitled "Cautions and Concerns about the Charts."

TTGI, like information about individuals collected through other means, such as the census, credit bureaus, magazine subscriptions, and auto registration, can help characterize, identify, and locate people. It can also yield intelligence about network characteristics and the system configurations of network users. In some ways TTGI may be even more telling than census or other data in defining the characteristics of individuals. As Justice Douglas wrote:

In a sense a person is defined by the checks he writes. By examining them [one] gets to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the papers and magazines he reads, and so on ad infinitum. . . . [The] . . . transactions of an individual give a fairly accurate account of his religion, ideology, opinions, and interests.<sup>4</sup>

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<sup>4</sup> California Bankers Association v. Schultz. 416 U.S. 21 (1974) (Douglas, J., dissenting).

One could say the same of the telephone numbers he or she dials.

TTGI, therefore, has value apart from the transaction itself. It is a commodity that some would like to sell and others would like to buy. But it is also information with value when it is owned exclusively and not sold to others. And there are those who might consider the information personal, and would not like it used or sold at all.

### Types Of Telephone Transaction-Generated Information

#### White Pages Information

The alphabetical and reverse listings of the names, addresses, and telephone numbers for both residential and business telephone service subscribers.

#### Yellow Pages Information<sup>5</sup>

The names, addresses, and telephone numbers of businesses alphabetically organized under business headings, and published in Yellow Pages directories. Also information about the advertisements and information gleaned from contacts and interviews with customers.

#### New Telephone Service Orders

The name, address, and telephone number of a new telephone subscriber, including former telephone number, former residence, or business location.

#### Aggregate Telephone Traffic Information

Information concerning the volume, flow, and timing of telephone traffic over network facilities.

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<sup>5</sup> There is a significant gray area between yellow pages and white pages information. See the discussion in the section entitled "Cautions and Concerns about the Charts." See also footnote 8.



Calling Number Identification

Delivery of a caller's telephone number to the called party while the phone is ringing. Also automatic location identification to police and fire departments.

Other Network Information

CPE information, pay-phone information, calling card validation data, shared network facility arrangements, bulk calling line identification, and other information generated by telephone transactions or transactions related to telephone service.

Call Detail Records

Detailed records of exchange and interexchange phone calls including the date and time of call, the number called, the calling number, the geographic location of the called number, the duration of the call, and the charge.

Billing and Credit Information

Same as call detail records, but also includes billing address, payment history such as method and timing of payment, unlisted and unpublished telephone numbers, number of lines, type of dwelling, and gender of subscriber.

Stakeholders

RBOCs

The Regional Bell Operating Company (RBOC) category refers to the telephone operating companies owned by the seven "baby Bells" created by the AT&T divestiture.

IXCs

Interexchange carriers (IXCs) such as AT&T, MCI, US Sprint, and WilTel.

#### Non-RBOC Directory Companies

There are many relatively small directory publishers which are not affiliated with an RBOC, and approximately 10 to 15 medium-sized directory companies such as Teleconnect, DirectoriesAmerica, and Flagship Yellow Page Publishers. Then there is R.H. Donnelley, a subsidiary of the Dun & Bradstreet Corporation, which is the largest non-RBOC directory publisher and yellow pages sales organization in the United States.

#### Direct Marketers

Direct marketers are those who market products and services by attempting to elicit a direct response from the customer. Such methods are utilized by large retailers such as Sears and J.C. Penney, tobacco companies such as R.J. Reynolds, credit card companies, and financial services companies.

#### Manufacturers

Manufacturers of customer premises equipment, cellular telephones, computers, telephone switches, computer games and software, and other telephone and computer communications equipment.

#### Electronic and Print Information Providers

This category includes businesses that create information content which may be published electronically, such as newspaper, magazine, and book publishers, stock and bond analysts, credit reporting agencies, and list marketers. It includes companies that provide value-added transport of data between computers (sometimes referred to as enhanced service providers). It also includes gateway providers, which provide a number of different services designed to facilitate end-user access to electronic information such as directories of services, help screens, protocol conversion, routing and transmission, and billing services.

#### Customers

Both residential and business customers of telcos and others.

Using the Charts

The following is an example of how the charts can be used.

Suppose you wanted to know the stakes and legal levers of RBOCs and Non-RBOC Directory Companies in new telephone service orders.

The italicized text contains instructions for navigating around the charts.

*See Chart I, "Stakes of Parties in Telephone Transaction-Generated Information" and go to the "RBOCs" stakeholders row. Move to the "New Telephone Service Orders" column.*

At the intersection, five RBOC stakes in new telephone service orders are posited:

- Public trust
- Administration of telephone service
- Quicker access for competitive advantage
- Yellow Pages sales tool
- Marketing products and services
- Sell for revenue

*Move down the New Telephone Service Orders column to the row entitled "Non-RBOC Directory Companies."*

Two stakes in new telephone service orders are posited for Non-RBOC Directory Companies (NRDCs):

- Immediate low-cost access in convenient format to publish competing directories, and
- Immediate low-cost access in convenient format to compile consumer and business marketing databases and lists.

*Compare the stakes of RBOCs in new telephone service orders to the stakes of non-RBOC directory companies.*

RBOCs' primary stake in new telephone service orders is in the administration of telephone service to the public. They have also, without exception, made statements that they have the public interest at heart regarding the privacy issue. Generally, RBOCs seem to be aware that they have a public trust stake in TTGI. If it is perceived that they are violating that trust, regulators stand ready to enforce a different approach. The primary stake of non-RBOC directory companies in new telephone service orders is access to publish competing directories and to compile consumer and business marketing databases and lists.

But the yellow pages is a very profitable business for RBOCs (see Chart I, RBOCs row, Yellow Pages column), and new telephone service orders are a yellow pages sales tool. NRDCs claim that while RBOCs clearly have an incentive to sell new service orders for revenue, RBOCs have a greater incentive to restrict the access of yellow pages competitors to TTGI in favor of their own yellow pages subsidiaries. NRDCs claim that RBOCs have a stake in quicker access to new telephone service orders for competitive advantage.

RBOCs counter that some NRDCs (R.H. Donnelley is a prime example) are in the list marketing business as well as the yellow pages business. Although their access arguments (see the intersection of non-RBOC directory companies and new telephone service orders in Charts II and III) portray their stake in new telephone service orders as primarily that of a directory publisher, they have sought the removal of any restrictions on the use of the information they obtain from RBOCs, and would like to use new telephone service orders to construct databases for list marketing and other applications.

NRDCs point out that RBOCs increasingly are in businesses other than basic telephone service, and therefore, RBOCs have a stake in new telephone service orders similar to that of NRDCs. They both want to use the information to market products and services. For example, a new telephone service order could indicate a new business whose owner might be a good prospect for cellular service. Or perhaps an individual who

has just ordered new telephone service has recently moved, is likely to buy a new car, and will be in the market for cellular service.

*See Chart II, "Legal Levers on Telephone Transaction-Generated Information" and go to the "RBOCs" stakeholders row. Move to the New Telephone Service Orders column.*

There are two RBOC legal levers concerning new telephone service orders:

- **Ownership**

RBOCs can claim any party to a transaction has right to retain record of that transaction.

- **Privacy**

Can claim consumers critical of plan to sell to marketers. Tool against access, but might restrict access by own subs.

Customer ownership and control of new telephone service orders is already limited by ownership rights of RBOCs and access rights of the government and RBOC competitors. Generally, unless they agree otherwise in an enforceable contract, both parties have a right to make public the specifics of a contract. An RBOC could argue that customers are purchasing a service, and have no right to restrict what it can do with that information. Under certain circumstances the government has a right of access to TTGI -- no matter what is agreed between the telco and a customer. The Supreme Court has held that "[W]hen a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information to law enforcement authorities."<sup>6</sup> RBOC

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<sup>6</sup> Securities and Exchange Commission et al. v. Jerry T. O'Brien, Inc., et al. 467 U.S. 735 (1984); see also United States V. Miller 425 U.S. 435 (1976).

competitors can demand access to new telephone service orders under the "bottleneck" doctrine of antitrust law.<sup>7</sup>

In 1986, when Pac Bell announced plans to sell information, such as new telephone service orders to marketers, it received more than 75,000 customer protests<sup>8</sup> and was forced to drop its plans. Clearly, the privacy issue and the harsh criticism RBOCs have received regarding it are real. This issue has interfered with RBOC business plans and has put public trust and a positive RBOC corporate image at risk. However, some stakeholders have alleged that RBOCs are taking advantage of customer privacy and ownership rights to secure preferred access to the information for themselves. Such charges have been made in the context of FCC Open Network Architecture Customer Proprietary Network Information (CPNI) filings. RBOCs have proposed giving their customers the opportunity to opt out of the pool of names that will be used internally for marketing purposes and sold to other companies. Other stakeholders have objected that the wording of the opt out letters will necessarily result in RBOC preferred access. They want to know more about RBOC plans for the information so that they can demand access on an equal basis with RBOC subsidiaries. Thus, RBOCs can claim that consumers are critical of plans to sell the information to marketers; in such a situation, privacy could be an RBOC tool against access by others but might also restrict the access of an RBOC's own subsidiaries.

*Move down the New Telephone Service Orders column to the "Non-RBOC Directory Companies" row in Chart II.*

There is one NRDC legal lever concerning new telephone service orders:

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<sup>7</sup> See David J. Gerber, Rethinking The Monopolist's Duty To Deal: A Legal And Economic Critique Of The Doctrine Of Essential Facilities, 74 Va. L. Rev. 1069 (September 1988).

<sup>8</sup> "Pac Bell backs-off selling lists," Alameda Times Star, April 16, 1986, p. 16.

- **Access**

Can claim that RBOCs give own subs more frequent, convenient, and lower-cost access and ask for equal access.

*See Chart III, "Sample RBOC Interactions with Other Stakeholders Over Telephone Transaction-Generated Information." Go to the "Non-RBOC Directory Companies" row. Move to the New Telephone Service Orders column.*

The following interactions are cited:

- R.H. Donnelley demands access in complaints before Calif., N.J., Pa., utility regulators
- Bill backed by Donnelley before Calif. state legislature to provide directory competitors access

The basis for Donnelley's demands for access before state regulators, for legislation it is sponsoring in California, and for antitrust suits filed in the context of yellow pages publishing (move to the left one column) is that RBOCs give their own subsidiaries more frequent, convenient, and lower-cost access to what Donnelley calls "subscriber information."

**Cautions and Concerns about the Charts**

All generalizations are oversimplifications to one extent or another. Lawyers, philosophers, logicians, and policy-makers know that the way something is defined can be of critical importance in a dispute. They labor many hours describing the "facts" in legal briefs, not to misrepresent them, but to slant the unavoidable oversimplifications in favor of their clients. Very often the "facts" presented by opposing parties bear little resemblance to each other even though they describe the same events.

Unlike the arguments of lawyers, this analysis is intended to be neutral. Nonetheless, there are two aspects of the charts that the reader should approach with some caution, lest they be accepted as undisputed facts, or as the only way to analyze the situation. One is

the way in which TTGI is broken down into sub-definitions, in particular the white pages and yellow pages categories, and the other is the author's decision not to include RBOC yellow pages subsidiaries as a separate stakeholder category.

#### TTGI Categories

Some reviewers of this report's draft suggested that rather than distinguishing between white pages and yellow pages information, it would be more useful to distinguish between information generated from competitive services and from a regulated telephone monopoly. Those reviewers have a valid and instructive point.

The distinction between "White Pages Information" and "Yellow Pages Information" is a matter in dispute among stakeholders, a dispute that has a lot to do with the ongoing political and economic transition of telecommunications in the United States from a monopoly to a competitive environment.

For example, R.H. Donnelley's complaint to the California Public Utility Commission regarding access to directory information makes no distinction between white and yellow pages information. Instead, Donnelley demands access to what it calls "subscriber information," a category which subsumes the white and yellow pages information categories, the new telephone service orders category, and the billing and credit information category into one. Donnelley argues that it has a right of access to this information because ratepayers pay for acquiring and storing it through the regulated telephone utility monopoly. Donnelley asserts<sup>9</sup>

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<sup>9</sup> Complaint filed before the Public Utilities Commission of the State of California by the Reuben H. Donnelley Corporation and Dun & Bradstreet Information Resources, a Division of Dun & Bradstreet, Inc. v. Pacific Bell, p. 10, paragraphs 15, 16, and 17.



15. In the regular course of its business, Defendant [Pac Bell] necessarily compiles a substantial body of data concerning its subscribers. In the case of business subscribers, these data typically include the names(s) of the business(es), listed address(es), billing address(es), telephone number(s), principal line(s) of business, SIC code(s), other businesses or locations under common ownership, credit information, and directory delivery instructions.... Complainants are informed and believe and therefore allege that the expense of this data acquisition and storage process is borne by Defendant's telephone service ratepayers. [emphasis added]

16. In its role as telephone directory advertising sales agent for numerous telephone companies, Complainant Donnelley is particularly knowledgeable concerning the customary practices of local exchange telephone companies (and their directory publishing affiliates) with respect to the use of these subscriber data in the production of classified telephone directories. Each and every one of the above-listed data elements is useful -- and economically valuable -- to a classified directory publisher's operations.

17. Customarily, telephone companies provide these service order data to their directory publishing operations on a daily basis. Such immediate access to the data is very valuable to the directory publisher because it permits continual and efficient updating of listings and delivery records.

On January 24, 1990, the California Public Utilities Commission consolidated the above proceeding into an investigation to consider what "customer information" possessed by public utilities in California should be made available to other utilities and to competitors, and what measures should be taken to protect the privacy of customer information. The PUC consolidated proceedings regarding access to directory listing information and privacy issues with the central question of ownership. The Order Instituting Investigation<sup>10</sup> states

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<sup>10</sup> "CPUC" Investigation of Access to Utilities Customer Information," PUC News (California Public Utilities Commission News Release), January 24, 1990.

The question of who owns the information is crucial. If the customer owns the information, the customer should have a say in who can have access to this information, at what price it can be sold, and what should be done with the profits. If the utility owns the information, it should be able to make such decisions, with regulatory approval. The Public Utilities Code requires that customer permission be given for access to many types of information. However, no permission is necessary to sell or rent other information, such as directory information.

Public Utilities Code Section 2891 prohibits telephone companies from making a residential customer's calling patterns, credit information, services, or demographic information available unless that customer has given written consent to do so with the exceptions of information provided for inclusion in a directory, for directory assistance, zip code information, certain information provided to collection agencies, emergency service information, and information provided to law enforcement agencies under a court order.

The fact that the PUC framed the investigation as a consideration of what should be done with "customer information" is significant. In competitive businesses, information collected about customers is not generally considered to be owned by the customers. It is primarily in a monopoly situation, where the expense of data collection is arguably borne by telephone ratepayers, that ownership comes into question. Therefore, a major issue likely to be discussed during the California PUC's investigation is how to distinguish between information generated from competitive services and information generated from a regulated telephone monopoly.

However, the question of what is and what is not a competitive business, and in what manner information derived from a monopoly can be distinguished from and combined with information generated by an

unregulated subsidiary in a competitive business without the risk of cross-subsidization are beyond the scope of this report.<sup>11</sup>

### Stakeholder Categories

A preliminary reviewer has suggested that RBOC yellow pages publishing subsidiaries be included as a separate category on the charts. The reasons for doing so are admittedly plausible. First, unlike the BOCs, these subsidiaries can be considered to be in an unregulated competitive business. Second, as explained earlier in this report, the sharing of information between regulated monopolies and unregulated subsidiaries, and related antitrust and unfair competition claims, is a major underlying theme running through the charts.

However, the author decided not to include RBOC directory subsidiaries on the charts for the following reasons:

- 1) RBOCs and their directory subsidiaries are part of the same company. The charts are about stakes, legal levers, and interactions among separate companies.
- 2) Yellow pages subsidiaries are by no means a homogeneous group. RBOCs have structured their yellow pages subsidiaries quite differently, and state regulatory agencies have responded differently.
- 3) Other variations have to do with the specific agreements between RBOC directory affiliates and BOCs. The validity of some of those agreements is in question, and there are substantial variations among them.

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<sup>11</sup> Every telephone subscriber, except those who pay for unpublished or unlisted numbers, is included in a white pages directory. Business subscribers are provided with a free listing in a Yellow Pages directory as well.

Where RBOC directory subsidiaries exist, BOC "license agreements" (which detail the amount to be paid to BOCs by directory subsidiaries for the exclusive right to publish BOC directories and other considerations) by and large state that the BOC "owns subscriber lists," but that the directory subsidiary owns and may copyright the white and yellow pages directories.

Some RBOC directory subsidiaries independently verify information regarding business subscribers and also ask a series of questions that the BOC business office does not. There is a plausible argument,

- 4) The boundaries between white pages and yellow pages operations have not yet shaken out within most RBOCs. Those discussions are beyond the scope of this paper.

#### Research Method

The charts were written during the author's residence at the Harvard Program on Information Resources Policy (PIRP) and aim to adhere to the program's principles of neutrality. A short prospectus describing the project was mailed to likely stakeholders; many responded either by phone, in writing, or by a personal visit. Interviews were informal, and were conducted for background -- not for specific attribution or quotes. In all interviews, the author identified himself as an employee of Ameritech Publishing, Inc., on special sabbatical as a visiting researcher at PIRP. Much of the other background research was done on-line using Mead Data Central, Inc.'s, Lexis and Nexis databanks.

What you see in the chart cells is either what a stakeholder said or what someone said about him.

#### Conclusion: More of the Same

The diversity of conflicting stakes regarding TTGI, the variety and number of stakeholders, and the availability of legal levers that they

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therefore, that RBOC shareholders (through the unregulated subsidiary), not ratepayers, own such information. The three-part argument is a hybrid of separate strains of ownership rights:

- Part one is based on the list marketing industry practice that a "rented" name can only be used once unless the marketer receives a "response" at which point he "owns" the name. The directory subsidiary argument is that when it contacts customers and independently verifies information, it has received a "response" from a customer whose name was rented via the "license agreement."
- Part two is based on the "sweat of the brow" copyright notion that since the directory subsidiary went to the great effort of contacting new business connects and "enhancing" the data by asking a series of questions that the business office does not ask, the directory subsidiary owns that information.
- Part three maintains that the directory subsidiary owns the yellow pages book and the BOC has no right to rent or sell that information once it has been conveyed to the directory subsidiary.

can bring to bear on TTGI make it unlikely that we will see agreement among stakeholders any time soon. In fact, it appears that stakeholders are becoming more polarized as the telephone business continues the transition from a monopoly to a competitive environment. It is likely that ownership and access to TTGI, and related privacy implications, will become even more significant in the guerilla warfare-like public policy debate surrounding that transition.

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Reviewers of this report's draft have suggested the following questions to help distinguish between utility-derived information and information derived from competitive services:

- Is the information necessary in order to obtain basic telephone service?
- Can the information be obtained elsewhere than from the utility?
- Is it information that a subscriber provides voluntarily?
- Is the information generated from a non-basic telephone business?
- Is the information collected by a separate subsidiary?
- Who has access to the information?

## **APPENDIX 1**

### **TTGI IN CONTEXT**

- 1. Fragmentation**
- 2. Database Marketing**
- 3. Market Feedback**
- 4. Postal and Census Data**
- 5. TTGI in Context**

## 1. Fragmentation

Advertising could not be understood as simply another form of salesmanship. It aimed at something new -- the creation of consumption communities. As advertising displaced salesmanship, different arguments became effective.... The primary argument of the salesman was personal and private: this hat is perfect for you (singular). His focus was on the individual.... The primary argument of the advertisement was public and general: this hat is perfect for you (plural).<sup>1</sup>

-- Daniel J. Boorstin, The Americans

Company X' computer system knows that Mrs. Smith and Mrs. Jones live next door to each other. It also knows that Mrs. Smith is a divorced teacher with two children who rent videotapes, and that Mrs. Jones is a married housewife whose children are away at college. This is the kind of microscopic view that went out when mass marketing made the street peddler obsolete. It's back. Through data bases, mass marketing can "simulate the turn of the century general store for literally millions" of customers.<sup>2</sup>

-- Nancy Youman, Adweek

In 1972, Alvin Toffler wrote a report for the senior management of AT&T in which he observed the fragmentation of AT&T's products and services, organization, and procedures, and of the communications market as a whole. That fragmentation, Toffler cautioned, "can only be properly understood when it is recognized to be a specialized example of a much larger revolutionary process."<sup>3</sup> Toffler labeled this

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<sup>1</sup> Daniel J. Boorstin, The Americans: The Democratic Experience, New York, Random House, 1974, p. 145.

<sup>2</sup> Nancy Youman, "The Data-Base Age Arrives: Cost, Interest are High," Adweek, Southwest Edition, Feb. 29, 1988.

<sup>3</sup> Alvin Toffler, The Adaptive Corporation, New York: Bantam Books, 1985, p. 33.

revolutionary process the "destandardization of the social context,"<sup>4</sup> by which he meant a trend towards diversity in all aspects of society. He identified the sources of destandardization as high U.S. living standards and a "revolutionary switch" in the nature of technology itself. He wrote: "Throughout the Industrial Age, technology exerted a strong pressure towards standardization, not merely of output, but of work and the people who performed it. Now a new type of technology is emerging that has quite the opposite effect."<sup>5</sup>

In post-divestiture 1989 the trend toward fragmentation and destandardization appears to be, if anything, accelerating. Because of computers, marketers follow the microscopic trail of records left as each individual engages in transactions with various organizations in society. Computers enable a company to "know" someone based on its own record of transactions with that person, and based on the transactions that person has had with other organizations.

There is a shift taking place in the marketing of products and services in the United States. Reacting to a perceived fragmentation of both the audiences that advertisers seek and the media that might reach them,<sup>6</sup> advertising firms are now promoting "alternative" marketing methods along with the traditional mass media "advertising" approach. These methods include couponing and other price promotions, store events, civic events, public relations, and the commercialization of new media such as home video.

Direct marketing has been growing at an average 12% annual rate for the past four years compared to 8% to 9% for traditional advertising. Billings of marketing-related services are growing faster than billings

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<sup>4</sup> Id. at p. 33.

<sup>5</sup> Id. at p. 38.

<sup>6</sup> Benjamin M. Compaine, ed., Understanding New Media, Cambridge, Ballinger Publishing, 1984.



of the traditional advertising industry as a whole.<sup>7</sup> Most larger advertising firms have started, acquired, or affiliated with sales-promotion companies, direct marketing, public relations, and even grocery store shelf management firms. Young & Rubicam calls its services "The Whole Egg," Ogilvy & Mather sells "Orchestration," Omnicom promotes "The Networking Concept."<sup>8</sup>

In 1973, access to a customer name, address, and purchase history on a computer cost \$7.14. In 1989 the same access costs about \$.01. Hardware costs have declined in price 20-25% per year for about a generation, and it seems reasonable to expect that decline to continue. If auto technology had matched computer technology over the last 40 years, a Rolls Royce today would cost \$2.50 and get 2 million MPG.<sup>9</sup>

A person becomes part of a "market" by virtue of the fact that he shares common characteristics with others, so that in the aggregate they are more likely to purchase a product or service than a cross-section of the population. If significant characteristics can be identified and the "message" or utility of a product can be tailored to address those characteristics, the probability of making a sale increases. In this context, a computer is like a microscope. There is a world of detail which was impossible to observe before the microscope. There is now a world of observable detail regarding the "mass" market that was not visible before the computer. The fragments were there all the time. There was just no way to see them.

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<sup>7</sup> Gary Levin, "The Ad Factor," Advertising Age, Nov. 9, 1988.

<sup>8</sup> Rebecca Fannin, "The Umbrella Principle; Advertising Agencies Diversify," Marketing and Media Decisions, July 1, 1988.

<sup>9</sup> Skip Andrew, "Database Marketing: The New Profit Edge," from The First Annual Conference on Database Marketing, Miami, Florida, December 13-15, 1988.

## 2. Database Marketing

In December of 1988, I spent a very informative few days attending what was billed as the first annual conference of the National Center for Database Marketing.<sup>10</sup> The conference was titled, "Database Marketing -- The Revolution." As I walked around the conference, listened to the speakers, and talked to my fellow attendees, I learned that I could buy a list of names of people interested in just about anything and that the lists are available because they are used in direct mail.

Lists can be divided into four categories<sup>11</sup>:

### Response Lists

Response lists include the names and addresses of people who have actually responded to some kind of an offer either through the mail or over the telephone. There is a difference between someone who has "responded" to an offer, perhaps by returning a pre-paid post card asking for more information, and someone who has actually purchased a product. The latter category is often referred to as "respondent buyers."

### Subscriber Lists

Subscriber lists are derived, as the name indicates, from publications. Someone who subscribes to a professional magazine for accountants might have an interest, for example, in a new computer software program developed for accountants. As magazines focus more on targeted groups as opposed to mass audiences, their subscriber lists become more valuable for targeted mailings or telemarketing campaigns.

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<sup>10</sup> The May 1988 Direct Marketing Association Conference in Washington, D.C., also reportedly spent a good deal of time focusing on the database marketing concept. Stephen Belth, "Database Ventures Feed Industry Appetite," Direct Marketing News, April 15, 1988.

<sup>11</sup> Peter Finch, "The Direct Marketing Data Base Revolution," Business Marketing, 1985.

### Compiled Lists

Compiled lists are put together from a variety of sources including yellow pages and white pages directories, automobile registration records, new incorporations, sales tax licensees, directories of business executives, birth records, property transfer records, and court records.

### Hot-line Lists

Hot-line lists are actually subcategories of response lists. Made up of people who have recently responded to an offer, hot-line lists are highly valued as indicating those who are likely to purchase again.

In the traditional list marketing business, the "list owner" hires an agent, known as a "list manager," to locate buyers for a particular list. A "list broker" acts as the agent for the direct marketer who wishes to rent a list. In practice, the list broker often has a close relationship with the list manager, and may even be a part of the same company.

At the database marketing conference, I learned that the difference between "list marketing" and "database marketing" is a few years and a few advances in information technology. Not too long ago, lists were supplied on mailing labels. There was no mechanism for doing anything but using the lists for a single mailing. As time went on, simple "merge-purge" computer programs were developed to bring together more than one list and create a single output list. The original purpose, according to the president of a merge-purge computer service company, was to obtain an unduplicated series of names so that people wouldn't get identical pieces of mail from the same mailer.<sup>12</sup> The merge-purge program also enabled a mailer to keep track of which list supplied the most names that made up the output file. This allowed a mailer to determine which list had produced the most unduplicated names, giving

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<sup>12</sup> Judith Naomi Oppenheimer, "State of the List Industry," Direct Marketing Magazine, February 1986.

him the option to rent only the most productive list the next time around.

Database technology has transformed what is even meant by a "list." A list no longer has to be insular. One way of describing it is that a database is a place where many lists are held together. Rather than being limited by the efficacy of any particular list, it is now possible to select a group of names from a variety of lists based on variables that are considered significant. If assumptions regarding significant variables are correct, the output list will lead to more responses than the mailing of any single dimension "list" in that database.<sup>13</sup>

I learned that the term "database marketing" is meant to capture an idea a bit more expansive than the term "direct mail" or "direct marketing." The concept of database marketing is rooted in the idea that the first step in serving your customers well is knowing who they are. Database marketing is the notion that the computer is a revolutionary tool for identifying, locating, and characterizing customers. It is the belief that if you understand the characteristics of a customer, you can find other people with similar characteristics and make them customers, too. Most of all, it involves a synthesis of internal customer information with externally available information as part of a system for communicating with and obtaining feedback from the market.

A speaker at the conference described the relationship between information technology and database marketing:

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<sup>13</sup> Phillip N. Dresden, "Impact of Database Technology on List Life and List Usage," Direct Marketing Magazine, September 1983.

[C]orporations are following up on the successes achieved through the medium of direct marketing. They are going a step further and are harnessing information systems technology to bring their direct marketing efforts in-house. In the process they are finding that by building a central marketing database..., information learned in any single selling channel can be shared by other sales and marketing groups and the corporation as a whole.... With the help of a database, the various sales and marketing operations become part of a unified process in which leads are identified, move through the qualification cycle, are transformed into customers, and then, as accounts, continue to be managed for additional business. Ideally, the process provides feedback for analysis and planning.<sup>14</sup>

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<sup>14</sup> "The New Selling Mix: Using Database Marketing To Integrate Channels," National Center for Database Marketing 1st Annual Conference workbook. Prepared comments of Harriette L. Chandler, Ph.D., Principal, Adelle Corporation, Cambridge, MA.

### 3. Market Feedback

Describing the beginnings of modern market feedback in the late 19th century, Daniel Boorstin wrote:

When the seller no longer met the potential buyer face to face as craftsman or seller, but only indirectly through advertising, it was harder than ever for him to know what the buyer wanted, or even to know who the buyer was. The old direct democracy of demand -- the customer telling the cobbler the style of shoe to make for him -- had disappeared.... The vast market of unseen buyers gave rise to a new science for sampling the suffrage of consumers.<sup>15</sup>

The "vast market of unseen buyers" of the late 19th and early 20th centuries to which Boorstin refers has become a lot more visible in the late 20th century and promises to become still more visible. One reason is the effect computers have had on the record keeping process. The transaction record, instead of standing alone, has become an integral part of a system of records, and only the latest twist to a long line of what James Beniger has called market feedback methods:<sup>16</sup>

- Ad testing (1906)
- Systematic retail statistics (1910)
- Questionnaire surveys (1911)
- Coded mailings (1912)
- Audits of publishers' circulations (1914)
- Specialized market research and house-to-house interviewing (1916)
- Research textbooks (1919)
- Saturation (1920)

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<sup>15</sup> Daniel J. Boorstin, The Americans: The Democratic Experience, New York, Random House, 1974, p. 148.

<sup>16</sup> James R. Beniger, The Control Revolution: Technological and Economic Origins of the Information Society, Cambridge, Harvard University Press, 1976, pp. 378-380.

- Dry waste surveys (1926)
- Census of distribution (1929)
- Polls of newspaper reading habits (1920)
- U.S. Census Bureau sampling theory for large-scale surveys (1930)
- Field manuals (1931)
- A.C. Nielsen retail sales indices (1933)
- National opinion surveys (1935)
- Audimeter monitoring of broadcast audiences (1935)

James Beniger, who catalogued the above market feedback innovations and dates, defines it as the "flow of information from retailers and consumers back to advertisers and others seeking to control mass behavior." He notes that it "can take several major forms: information on sales of advertised products or of an industry in general; other characteristics of industries or retail establishments; surveys of mass media audiences or of consumers generally."<sup>17</sup>

In the United States, systematic market feedback came about as the result of a revolution in transportation and communication during the mid-19th century. The railroads changed forever both the speed at which goods could be distributed throughout the United States and the speed of communications. The railroads and telegraph advanced together, connecting the towns and villages of America. The telegraph used the right-of-way of the railroads through the countryside to string its wires, and the railroads used the telegraph to direct the unprecedented speed and capacity of the traffic flow.<sup>18</sup> As the railroad network grew, it carried long-distance mail, resulting in the sharpest reduction of

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<sup>17</sup> James R. Beniger, The Control Revolution, p. 378.

<sup>18</sup> Alfred D. Chandler Jr., The Visible Hand: The Managerial Revolution in American Business, Cambridge, Belknap Press of Harvard University Press, 1977, p. 81.

rates in postal history.<sup>19</sup> All of these systems -- the railroads, the telegraph, the postal service, and eventually the telephone -- were operated by another innovation: the manager.<sup>20</sup> In furtherance of planning and administration, professional managers began to pay particular attention to "regularity in data collection, to formalization of information processing and decision rules, and to standardization of communication with feedback."<sup>21</sup> In the markets created by the new transportation and communications infrastructure, market feedback enabled managers to define and quantify markets, and to evaluate and modify strategies based on that feedback.

Market feedback methods, such as George Gallup's poll for measuring readership, created the potential for managers to analyze markets free of the screen imposed by their own preconceptions and bias. It came as a surprise to editors of newspapers, for example, that more people read the comics than their editorials and that captions under photographs were read by more people than the articles over which they labored.<sup>22</sup>

Conceptually, most of the market feedback methods in Beniger's list are very similar to "new" innovations in market feedback and have some of the same problems. For example, the coded mailings of 1912 and modern "800 numbers" have some interesting similarities. In a type of coded mailing known as a "keyed" advertisement that first became popular in the 1920s, a coupon offering a free sample or a price premium was

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<sup>19</sup> Id. at p. 195.

<sup>20</sup> "No one could, however, have mistaken the new business enterprise, as it arose in the third quarter of the nineteenth century, for a direct continuation of the old and traditional business firm.... For one, the new business enterprise -- the long distance railroad as it developed in the United States...or the trusts such as United States Steel..., were not run by the owners. Share ownership is, of necessity, separate from control and management.... This new corporation was a genuine innovation. Peter F. Drucker, The Frontiers of Management, New York, Truman Talley Books, 1986, pp. 169-170.

<sup>21</sup> James R. Beniger, The Control Revolution, p. 224.

<sup>22</sup> David Ogilvy, Ogilvy on Advertising, New York, Crown Publishers, 1983, p. 162.



included with a particular advertisement. A different post office box number or some other code was printed on the coupon, enabling tabulators to evaluate the relative "pulling power" of the advertisement. There was a great deal of argument in those days as to whether the people who returned coupons were representative of the whole readership of a publication.<sup>23</sup> In an "800 number poll," a person is prompted by the television to call a certain number to register an opinion by way of a Touch Tone key pad, usually in the form of "yes" or "no." The 800 number is a code similar to a post office box code and can be changed to try different questions at different times of the day and can be prompted by different media. But 800 polls suffer from the same problem as "keyed advertisements"; rather than being chosen scientifically as representative of an entire population or even of an entire viewing audience, an individual is volunteering his opinion and may have his own reasons ranging from impulse to bias for making the call.<sup>24</sup>

Toll free numbers are a significant and growing modern market feedback method. In 1967 only 653 businesses had 800 numbers which handled a total of 7 million phone calls. By 1989, more than 535,000 toll free numbers handle about 6.3 billion calls every year.<sup>25</sup> Market feedback applications for 800 numbers are still taking shape, but one such application is "name acquisition media."<sup>26</sup> It means running a television or radio commercial offering an opportunity to obtain a catalog or buy a product, and instead of paying the network or station for the air time, payment is based on the number of customers or "names" acquired. Such "per inquiry" pricing for air time has come about in part because of the proliferation of alternatives to broadcast media.

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<sup>23</sup> Roland Marchand, Advertising The American Dream, Berkley, University of California Press, 1985, p. 65.

<sup>24</sup> Brock Power, "The Pernicious Power of the Polls," Money Magazine, March 1988.

<sup>25</sup> Sid Moody, "Buying by Mail," Associated Press Wire Services, May 15, 1988, BC cycle.

<sup>26</sup> Nancy Reider, "Where to Find New Names," Direct Marketing, July 1988.

Cable channels aimed at narrowly defined audiences are particularly significant. One marketing company notes that one of its catalog clients "consistently picks up 650 names a day running per inquiry on one cable TV network."<sup>27</sup>

The preceding paragraphs point out that market feedback methods have traditionally played a significant role in American business, and that database marketing is simply one of the latest techniques for gathering and using information about customers. Market feedback methods are being profoundly affected by the advent of intelligent telephone networks and the general integration of computer and telecommunications technology. The result is that TTGI has begun to play an increasingly important role in everyday business.

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<sup>27</sup> Id. at p. 42.

#### 4. Postal and Census Data

It is a well-known secret in the direct marketing business that a great deal of the information used in direct marketing originates with the government. Although direct marketers are using more and more non-governmental transaction-generated information, they traditionally have used a combination of postal data, census data, and other government records, such as automobile registration, to analyze the population of the United States for marketing purposes.

Ed Burnett, a well-known expert in the marketing of lists, estimates that there are approximately 20,000 commercially available lists and more than 1 million lists in use.<sup>28</sup> He was once asked by the New Yorker magazine how one stays off mailing lists. He advised that dying would not do it because the name would undoubtedly still remain on a list somewhere. Instead, he recommended that one should move to a very small town, leave no forwarding address, and be very careful not to

- Buy a car or rent a home
- Get a listed phone number
- Register to vote
- Join a club or church or enroll in school
- Open a charge account or use a credit card
- Subscribe to a magazine or buy a product by mail
- Give away money to a charitable cause

#### Postal Data

The Postal Service generates the best system for direct marketing geographic analysis, namely Zip and carrier route postal codes. It is also the most convenient system for direct marketers to use because postal codes can also be used to pre-sort promotional material, qualifying the mailer for postal discounts.

In 1963, Zip codes were introduced by the United States Postal Service for the purpose of automating and streamlining the awesome task of mail delivery. Few people pause to consider the magnitude of the job

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<sup>28</sup> Ed Burnett, The Complete Direct Mail List Handbook, Englewood Cliffs, Prentice Hall, 1988, p. 35.

of mail delivery in this country. Each day approximately 500 million pieces of mail reach their destinations in the United States. More than 35 billion stamps are sold each year by the postal service, enough to circle the earth 22 times. Last year, more than 3.4 billion pieces of mail that the Postal Service handled were found to be undeliverable as addressed and had to be destroyed. The Postal Service is the largest civilian employer in the United States, well ahead of giants such as General Motors.<sup>29</sup>

The Postal Service code system is very successful. But Zip codes were more than a successful innovation in mail delivery. For the first time, marketers had the makings of a system to identify people with similar demographic characteristics and to locate them geographically. An insurance executive was one of the first to appreciate the marketing implications of Zip codes. His employer sold life insurance through the mail. As vice president of Marketing, he was frustrated by the fact that sales patterns could be analyzed only by counties or states. "All of these businessmen were complaining about the fact that beginning in 1967 all third-class mail had to be sorted by Zip code. I decided to look for a silver lining."<sup>30</sup> The executive published an article in the Harvard Business Review in 1967 that suggested that Zip codes would provide direct marketers with a better response in their marketing efforts.

Since then, many businesses have analyzed the demographics of the geographic areas covered by Zip codes. The applications for a service like this go beyond direct marketing. Among other things, the analysis is used to locate optimum sites for retail stores, to help manufacturers decide where to test new products, and to help politicians gauge the likelihood of support for their message in a particular area. One company that provides this service merges Zip codes with census data to

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<sup>29</sup> Jake Page, "One in 500 Million: Tracking a Letter Across Country," The Smithsonian, September 1988, Vol. 19, No. 6, p. 96.

<sup>30</sup> Martin A. Baier, quoted in "Archives of Business: The Zip Code; Revolutionizing Mail and Marketing," The New York Times, July 17, 1988.

divide the nation's 43,000 Zip codes into 40 distinguishable "clusters" with creative names such as "Money and Brains" or "Shotguns and Pickups."<sup>31</sup> The Census Bureau has made such "geo-demographics" a bit easier over the last 15 years by placing its census tracts within Zip codes instead of overlapping them. Data collected in the census can now quite easily be compared to Zip codes.

The trouble is that Zip codes are an improvement, not a solution, to the marketers' problem of locating people with similar demographics. Many Zip codes are almost as irrelevant as a county or state for demographic analysis of inhabitants. For example, I grew up in the 11968 Zip code in Southampton, New York. I lived in a middle class neighborhood. One mile south of my house is the "estate district" where some of the wealthiest people in the United States have homes. One mile north of my house (literally across the railroad tracks) is a neighborhood composed of black people who are primarily descendants of migrant farm workers. Their homes bear no resemblance to the homes in the estate district. One mile east of my house is a Polish neighborhood made up primarily of older people. One mile west of my house is a brand new housing development designed to attract "yuppies" in flight from New York City. A direct marketing company would be hard pressed to come up with a meaningful label for 11968. Of course, some Zip codes do approach homogeneity, which is why direct marketers use them. But at best, they are a blunt instrument for marketing.

Another postal innovation, the U.S.P.S. Carrier Route Information System (CRIS), is beginning to supplant Zip codes in importance to direct marketers. Many letters now arrive addressed to the mysterious "Cart R Sort," and some of us have wondered who he is. Cart R Sort is, of course, not a person but simply refers to a group of letters that have been sorted by carrier route before placement with the Postal Service for delivery. Pre-sorting by carrier route qualifies the mailer for a significant postal discount.

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<sup>31</sup> Claritas Corp.

A carrier route is impermanent. Some 10% of them change each year, depending on variables such as new building developments. The Postal Service makes its CRIS available on magnetic tape, hard copy, and microfiche. It is a listing of carrier-route schemes in a standardized format for all post offices. The data are formatted by Zip code, street name, and street number range.<sup>32</sup> A carrier route is small enough so that it could serve marketers' needs for a homogenous marketing unit. Because of that, carrier routes have been called the "wave of the future for geographical selection."<sup>33</sup>

The discount came about because each mail carrier spends from one-third to one-half of each day doing what is known as "casing" the mail. The mail is sorted at Sectional Center Facilities (referred to by the first three letters of the Zip code), depending on variables such as whether or not the address can be read by an optical character reader. Mail finally arrives at the mail carrier level from many different streams. The mail carrier must sort the mail from these various bundles into slots in a large vertical "case" according to the order in which he will walk his route. This process involves knowledge of all houses and buildings on a particular route. A mail carrier can typically deliver mail to about 420 households in one day. There are approximately 220,000 carrier routes throughout the country.<sup>34</sup>

Applications include a "carrier route directory," which a company designed to describe every residential neighborhood in the country in terms of demographics and lifestyle. The directory describes carrier routes using 50 lifestyle factors (interests/activities), which are determined by household surveys and supplemented with census data.<sup>35</sup>

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<sup>32</sup> Michael Thoryn, "How the USPS Can Help Mailers," Direct Marketing News, August 1, 1988.

<sup>33</sup> Ed Burnett, The Complete Direct Mail List Handbook, Englewood Cliffs, Prentice Hall, 1988, p. 165.

<sup>34</sup> William Olcott, "New Information Services Aim at Broad Markets with Precision," Fund Raising Management, November 1985.

<sup>35</sup> Ibid.

Census Data

The year 1990 will mark the bicentennial of the United States census. The method of taking the census in the United States has been revised each time it has been undertaken. Changes have been made in who conducts the census, the number of questions, the types of questions, the methods of enumeration, the systems used for processing, and the channels and formats chosen for disseminating the results.<sup>36</sup> However, the Census Bureau's commitment to confidentiality has not changed. Since 1919, misuse of data supplied to the census has been a felony.<sup>37</sup>

In July of 1988 some 32,000 Census Bureau workers began the door-to-door procedure of compiling addresses in preparation for the 1990 census. About 132 million addresses are expected to be collected in this manner. Another 56 million addresses are expected to be purchased from mailing list companies.<sup>38</sup> The total list will be used as the control list for the census mailing and all census operations conducted by the district offices.

The census is the source for most demographic information used and sold by marketers in the United States. It is a measure of the importance of the census for marketing that the current Census Bureau director holds a business administration undergraduate degree and a master's degree in marketing.<sup>39</sup>

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<sup>36</sup> 1980 Census of Population and Housing, User's Guide Part A., U.S. Department of Commerce, Bureau of the Census, text issued March 1982 (hereafter, Census Bureau, 1980 Census).

<sup>37</sup> Census Act of March 3, 1919.

<sup>38</sup> Ed Burnett, "Give us the Tools and We'll Deliver," Direct Marketing News, Aug. 15, 1988.

<sup>39</sup> "Census Bureau Run by Indiana Native," United Press International Wire Service, June 16, 1986, BC Cycle.

Some 300 pieces of census data are used by businesses for marketing analysis.<sup>40</sup> These data elements range from the more familiar age, gender, race and occupation to the type of plumbing facilities and heating equipment present in a particular residence. The census covers a range of statistical/administrative areas:<sup>41</sup>

Regions/Divisions: The U.S. is composed of four census regions (West, South, Northeast, and North Central). The South contains three census divisions; the others contain two.

Standard Metropolitan Statistical Areas (SMSAs): The majority of SMSAs are cities with a population of 50,000 or more.

Urbanized Areas (UAs): An Urbanized Area is usually made up of a city and its closely settled surrounding territory. Population and population density delineate urbanized area boundaries, which usually also delineate rural and urban territory.

Census County Divisions and Census Designated Places: These designate very rural or very small unincorporated areas with population.

Census Tracts: Census Tracts are statistical areas that average about 4000 people. For purposes of comparison, census tract boundaries are not usually changed from one census to the next.

Neighborhoods: Neighborhoods are a relatively new type of recognized sub-area, distinguished by some type of "citizen participation." The statistics are available only for those areas that requested the right to participate in the program.

Enumeration Districts (EDs): EDs are subject to wide variation in population size but average approximately 600 people. EDs are used for data collection and tabulation in the areas where block groups are not defined. They are "administrative units" -- their boundaries are generally not the same from one census to the next.

Block Groups: Groups of blocks average about 1100 in population. Where block statistics are prepared, block groups take the place of enumeration districts. When block groups and enumeration districts are combined, they cover the entire country.

Blocks: The smallest type of census area, blocks average about 70 people within a small rectangular area bounded by four streets. Block statistics are published for the entirety of each urban area, and for incorporated municipalities with a pop. of 10,000 or more.

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<sup>40</sup> Stephen Belth, "Another Controversial Database from TRW?", Direct Marketing News, June 15, 1988.

<sup>41</sup> Census Bureau, 1980 Census.



## 5. TTGI in Context

What makes the Bell System unique and what will with the divestiture of the BOCs be substantially lost is the integration of the organizations producing its technology with the organizations responsible for applying that technology to customer service. With Long Lines, of course, that relationship will continue. Lost, however, will be what till now has both informed and inspired the service process -- the millions of transactions with customers that the operating companies carry out every day on the basis of which the Bell System has been able to sense, in real time, the public's appraisal of its service and how tomorrow it might serve better. It is on the basis of its experience of these transactions that the Bell System develops its annual construction programs and Western Electric programs its production. And it is the experience of these transactions that prompts the laboratories to developments that in this way or that will expand the network's capacity, enhance its capabilities, improve its efficiency.<sup>42</sup>

-- Alvin von Auw, Heritage and Destiny

TTGI is the information generated by telephone usage, and transactions related to telephone service. Prior to divestiture, as von Auw notes above, TTGI was entirely the province of AT&T and, although there were those who wanted access to it, no one really questioned AT&T's right to control it. It was used internally in research and development, in planning products and services, and in later years in marketing as well. Divestiture meant the introduction of competition and the fragmentation of telephone service. The new competitors want to use TTGI for the same purposes as AT&T used it, and to sell it to others.

The increasing availability of telephone transaction-generated information is an effect of the merger of computer and

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<sup>42</sup> Alvin von Auw, Heritage and Destiny: Reflections on the Bell System in Transition, Praeger, New York, 1983, p. 181.

telecommunications technologies; telephone networks, now more than ever, are capable of generating as well as carrying information. Telephone companies collect information about businesses and consumers as an integral part of providing telephone service. In an effort to better serve their customers and to market products and services, telephone companies are stepping up their analysis of customer data.

The increasing demand for TTGI by non-telephone companies should be understood in the context of a continuing trend toward diversity in all aspects of society. Many organizations -- be they business, government, or other -- can and do put transaction-generated information to use in characterizing, identifying, and locating their constituencies. Database marketing, which makes use of TTGI, is simply the latest in a long line of market feedback methods used in the United States. TTGI is just one more type of transaction-generated information; like credit card data, magazine subscriptions, and other offer-response data, combined with postal and census data, it is the marketer's stock in trade.

## APPENDIX 2

### PRIVACY, ACCESS, AND OWNERSHIP OF TTGI

1. Privacy, Access, and Ownership of TTGI
2. Privacy
3. Privacy and Access
4. Ownership of TTGI?
5. What is Ownership?
6. Ownership of Intellectual Property
7. Copyright of TTGI: A Question of Policy
8. Policy and Copyright of Telephone Directories

1. Privacy, Access, and Ownership of TTGI

Large groups -- racial, economic, sectional, social -- press for the recognition of their "rights"...realizing very vaguely, if at all, that the realization of their demands will involve the imposition of duties on others, that the granting of new privileges to some necessitates the extinguishment of the rights of others.

[W]hen one is fighting for a "right," he is asking the state...to create and enforce a "duty" on another and...when he is fighting for a "privilege" he is asking the state to deprive another of an existing "right." Of course, like a bandit or a hound, we can fight for a "bone," without any reference to law or "rights."<sup>1</sup>

-- Arthur L. Corbin

The telephone number was born in Lowell, Massachusetts, in 1879. As the town struggled under an epidemic of measles, a local physician worried that if all four of the town's operators took sick, telephone service would be paralyzed. He was concerned that substitutes would have trouble remembering which name went with each of the 200 jacks on the switchboard. He recommended to local Bell company management that numbers be used instead of names. Management took the doctor's advice, and the telephone number, an element of Telephone Transaction-Generated Information (TTGI), came into being.<sup>2</sup>

The telephone had a revolutionary impact on society, becoming central to both social and business interactions. It didn't take long before TTGI, such as the telephone number, the telephone directory listing, the telephone bill (complete with the billed number, the called numbers,

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<sup>1</sup> Arthur L. Corbin, Foreword in Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, Yale University Press, New Haven and London, 1919, p. xi.

<sup>2</sup> John Brooks, Telephone: The First Hundred Years, New York, Harper & Row, 1975, p. 74.

cities called, and time and duration of the calls), became an automatic and familiar aspect of telephone service.

The telephone directory became a brand new medium for advertising, taking its place with the newspaper, the magazine, and the catalog. As for other published information, ownership of the information in telephone directories became a matter of intellectual property, specifically copyright law. Other TTGI became the province of AT&T and independent telephone companies. They used it to provide good service, for network planning, and eventually for marketing as well.

Beyond copyright law, few laws address ownership of TTGI. In the virtual monopoly that preceded divestiture, there were few disputes regarding ownership and access to TTGI. Today, however, divestiture and two significant trends might be causing that situation to change.

Divestiture fragmented telephone service and ownership of the network, complicating issues involving who should have access to what network information. The equal access provisions of the MFJ have controlled some of that transition, as have the federal and state regulations. However, in some important instances stakeholders are unsatisfied with the information they receive or don't receive from RBOCs.

One such area is pay phone equal access. For example, the Operator Service Providers of America complained to the FCC that RBOC pricing of calling card validation data fails to provide equal prices, terms, and conditions to all parties.<sup>3</sup> That organization and others argue that AT&T has preferential access. It proposes that RBOCs allocate costs for the information based on call volume, as measured by billing records. Visa U.S.A., Inc., declared that with one exception, RBOC pay phone equal access proposals "fail in spirit and in letter to meet the equal access and non-discrimination requirements of the consent decree."<sup>4</sup>

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<sup>3</sup> Telecommunications Reports, January 30, 1989, p. 32.

<sup>4</sup> Ibid.

In another area, MCI claimed that section 211 of the Communications Act, which requires carriers to file all contracts, agreements, and arrangements with other carriers, requires AT&T and the BOCs to file all copies of shared network facility arrangements (SNFAs). MCI complained that failure of BOCs to provide access to that information has prevented it from securing equal rate treatment.<sup>5</sup> MCI's claim was upheld, and all SNFAs were produced.

MCI also claimed under the Freedom of Information Act that it is entitled to access to the confidential versions of regulated and non-regulated investment forecasts that BOCs provide to the FCC. RBOCs such as USWest and Nynex claim that access to the information would allow competitors to penetrate their markets in an unfair manner.<sup>6</sup> Whatever the outcome of these access claims, they are likely to get more complex as the number and the power of competitors increase in the post-divestiture telephone business.

In addition to divestiture, two significant trends are having an impact on ownership and access to TTGI. First, because of the integration of computer and telecommunications technology, TTGI is easier to create, store, access, and transfer to others. Second, there appears to be a trend toward diversity in all aspects of society that is in part fueled by computers, new media, and new information technologies. The latter trend, evidenced by a breakdown in mass markets, is making it all the more critical to identify, locate, and characterize customers and constituencies, something that TTGI does very well. An effect of the two trends is to increase both the supply and demand for TTGI. Since there are more stakeholders in TTGI than ever before, and more uses for it, more disputes are inevitable; and where there are disputes, law is created to resolve them.

As of yet, few laws specifically address TTGI. However, there is precedent in areas that have certain structural similarities. Those

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<sup>5</sup> Telecommunications Reports, February 13, 1989, p. 43.

<sup>6</sup> Ibid., p. 40.

laws may serve as analogs for arguments about TTGI and as models for possible regulatory, legislative, and judicial controls that may result.

Privacy rights limit the power of government. A great deal of privacy precedent has to do with the records government keeps about people, the circumstances in which government may gain access to records people and organizations keep about each other, and also the records government may create or not create. Not only are government privacy laws an important analog for the private sector to consider, but because of overlap between the two sectors, there is substantial overlap between public and private sector privacy laws.

Generally, people and organizations have a right to make records of transactions to which they are a party, and they have control over those records. In a sense, when two parties enter into a contract, each party owns the records he or she keeps in the ordinary course of business. They could agree, within limits, to keep the transaction confidential. However, that freedom of contract is limited by non-contractual rights and restrictions, which can control as much as the agreement itself.<sup>7</sup>

The rights and restrictions that can affect transaction records generally have to do with privacy and access. To a great extent, the degree to which these rights can affect the records varies with the relationship of the parties; examples are government-citizen, attorney-client, employer-employee, doctor-patient, and consumer-creditor relationships.

The right to control property and the right to exclude the access of others to property are essential elements of the concept of ownership. Ownership is defined as

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<sup>7</sup> Fredrich Kessler, Grant Gilmore, Contracts: Cases and Materials, Little, Brown, and Company, 1970, p. 2.

[The] right of one or more persons to possess and use a thing to the exclusion of others. The right by which a thing belongs to someone in particular, to the exclusion of all other persons. The exclusive right of possession, enjoyment, and disposal involving as an essential right to control, handle, and dispose.<sup>8</sup>

If a telco owned TTGI, the telco would have a right to deny or provide access to others. The telco could, as it chooses, sell the information or not sell it, use it or not use it. However, if the telco provides access, there are privacy implications for customers. If access is not provided, there are antitrust and regulatory implications for competitors. By the same law, one party has a right; the other is restricted. If a customer has a right to privacy, he can restrict the access rights of others. If a telco competitor has a right of access, he can restrict telco ownership rights and the privacy rights of others. Rights and restrictions are related.

The following sections consider privacy, access, and ownership in greater depth.

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<sup>8</sup> Black's Law Dictionary, Henry Campbell Black, St. Paul Minnesota, West Publishing Company, 1979.



## 2. Privacy

Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.<sup>9</sup>

-- Alan F. Westin

The makers of our Constitution...recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.<sup>10</sup>

-- S. Warren and L.D. Brandeis

The quotes above address two aspects of privacy: the right to control information about oneself, and the right to be let alone. Two recent surveys show that public concern about these aspects of privacy is still very much alive.

In December 1988, the president of American Express' Direct Marketing Group revealed the results of American Express' latest annual privacy survey of card members.<sup>11</sup> Results show that of card members surveyed

- Most believe that their mail volume has increased and respect for consumers is declining;
- Ninety percent do not think companies disclose enough about their list practices;

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<sup>9</sup> Alan F. Westin, Privacy and Freedom, Atheneum, New York, 1970, p. 7.

<sup>10</sup> S. Warren and L.D. Brandeis, "The Right To Privacy," 4 Harvard Law Review 193 (1890).

<sup>11</sup> "Privacy Study Reveals Lack of Consumer Confidence," Direct Marketing, December 1988, p. 8.

- Eighty percent believe consumer information gathered by one company should not be given to another company for a different purpose without the consumer's permission;
- More than one-third believe the federal government should restrict the use of lists.

A 1988 survey conducted by the Massachusetts Executive Office of Consumer Affairs found that the two top consumer complaints were about telemarketing and promotional mailings, beating out past favorites such as car repair shops, insurance companies, and new car dealers. The state noted that consumers believe the privacy of their homes is being invaded by marketing strategies adapted from new technologies.<sup>12</sup>

We should not be too surprised that the American public apparently has such strong feelings about the privacy issue. The right to privacy is a notion deeply embedded in the American political system and the American character. Hobbes, Locke, and Rousseau, whose philosophies greatly influenced the architects in the United States, all viewed the relationship between the individual and the state as a kind of contract.<sup>13</sup> In return for giving up some rights and freedoms, we are protected from those who might harm us while enjoying their freedom. The rights we don't give up to the state we retain. This is a fundamentally different approach from that of a monarchy, a communist state, or a theocracy, where the individual has no rights except those granted by the state in the name of the people or God.

Privacy is a broad and complex subject. Though there is no explicit reference to privacy in the Constitution of the United States, it serves as a constitutional restraint on the laws our government may impose on personal liberty.<sup>14</sup> This report will not touch at all on the

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<sup>12</sup> Kathryn Marchocki, "Prize letters, phone spiels top list of consumer beefs," The Boston Herald, January 5, 1989, p. 47.

<sup>13</sup> Colin Mellors, "Governments and the Individual--Their Secrecy and His Privacy," in Privacy, John B. Young, ed., John Wiley and Sons, Ltd., Chichester, 1978, p. 88.

<sup>14</sup> Griswold v. Connecticut, 381 U.S. 479 (1965).

constitutional law of privacy, which in the main has to do with rights to abortion, contraception, and the freedom to engage in certain sexual acts. The concept of a "reasonable expectation of privacy" limits the government's powers of search and seizure.<sup>15</sup> We will only discuss search and seizure where that body of law intersects with government access to personal records. Privacy torts impose liability on those who violate the privacy of others in certain limited circumstances. Privacy torts are listed but not discussed in Appendix 3.

The last high-profile government study of the privacy issue, the Privacy Protection Study Commission report of 1977, included a statement that is, if anything, more true today than it was then. The statement describes the aspect of privacy we are exploring here: "Every member of a modern society acts out the major events and transitions of his life with organizations as attentive partners. Each of his countless transactions with them leaves its mark in the records they maintain about him."<sup>16</sup>

This report surveys privacy as it might relate to transaction records.

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<sup>15</sup> Katz v. United States, 389 U.S. 347 (1967).

<sup>16</sup> Privacy Protection Study Commission, Personal Privacy In An Information Society, Superintendent of Documents, U.S. Government Printing Office, Washington D.C., 1977, p. 13.

### 3. Privacy and Access

Bernstein had several sources in the Bell system. He was always reluctant to use them to get information about calls because of the ethical questions involved in breaching the confidentiality of a person's telephone records. It was a problem he had never resolved in his mind. Why, as a reporter, was he entitled to have access to personal and financial records when such disclosure would outrage him if he were subjected to a similar inquiry by investigators? Without dwelling on his problem, Bernstein called a telephone company source and asked for a list of Barker's calls.<sup>17</sup>

-- Carl Bernstein and Bob Woodward,  
All the President's Men

Our society attempts to strike a balance between personal privacy and access to information. But striking that balance is not easy. Privacy and access are like two sides of the same coin; it's difficult to observe both at the same time.

Transaction-generated information, such as credit card and telephone records, plays a central role in many criminal investigations, and in investigative reporting as well. It was certainly important to Watergate. Both the press and the government sought access to it, the main difference being that the government obtained access by subpoena and warrant, while the press obtained access through confidential sources such as Bernstein's friend at the telephone company. Bernstein no doubt believed that under the circumstances the need for access outweighed privacy considerations.

Compare the above with a more recent incident involving the press. It led to federal legislation limiting access to a certain type of information by the press or anyone else. During Judge Robert Bork's confirmation hearings for appointment to the Supreme Court of the United

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<sup>17</sup> Carl Bernstein and Bob Woodward, All the President's Men, Simon and Schuster, Inc., New York, 1974, p. 35.

States, the City Paper, a small weekly, ran a tongue-in-cheek article describing the films Judge Bork liked to watch at home on his VCR.<sup>18</sup> A reporter had obtained a list of the Bork family's rentals from a local video shop. As it turned out, Judge Bork's taste in film was quite mainstream, but the incident attracted the attention of lawmakers who perhaps wondered what kind of a story their own video rentals would make. The result was the Video Privacy Protection Act of 1988.<sup>19</sup> It states that a videotape service provider that knowingly discloses to any person information concerning any consumer shall be liable. The law makes an exception where the consumer has expressly given his permission, and where a law enforcement agency has a warrant or a court order. After intense lobbying by the Direct Marketing Association, an amendment was included that allows access by any person to the names and addresses of renters provided the consumer had the opportunity in a clear and conspicuous manner to prohibit such disclosure, and the disclosure does not identify the title, description, or subject matter of any videotape.

In the Watergate situation, access outweighed privacy. In the Bork situation, legislators clearly felt that privacy outweighed the need for access.

The balance between privacy and access to another type of record, motor vehicle registration and driver-license lists, appears to be tilting toward privacy. Nine states introduced legislation in 1989 to join the 15 states that already restrict access by commercial interests to motor vehicle lists. A spokesperson for R.L. Polk & Co., which is in the business of compiling auto registration data for marketing purposes, was quoted in an interview with Direct Marketing News as saying

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<sup>18</sup> "Private Screenings," The Economist, March 12, 1988, p. 31.

<sup>19</sup> Arthur Winston, "The Effects of the Video Privacy Protection Act," Direct Marketing News, January 15, 1989, p. 36.

We're keeping an eye on the bills and talking to the appropriate [legislative] sponsors. I'm not sure that there's a sudden move afoot. There's always a presence of a concern about the use of public records for any type of a commercial purpose. It's a balancing between privacy issues and the public's right to records. These have always been tough issues.<sup>20</sup>

In a related development, three Massachusetts citizens sued to restrict the sale of their motor vehicle records and won.<sup>21</sup> One of the plaintiffs, over 40 and unemployed, complained that potential employers would discriminate against him should they learn his age. The other two, a man and a woman, were each involved in a relationship with younger partners and expressed fears of embarrassment and harassment if their birth dates were released.

They alleged that the records are personal data which may not be disclosed under the Massachusetts Fair Information Practices Act. Personal data is defined in that Act as any information concerning an individual which, because of name, identifying number, mark, or description can be readily associated with a particular individual, provided that such information is not contained in criminal records that are public.

For years, the Massachusetts Registrar of Motor Vehicles has been making the name, address, social security number, date of birth, and height of a car owner or driver available to anyone, including businesses. Massachusetts has relied on Direct-Mail Serv., Inc. v. Registrar of Motor Vehicles, 296 Mass 353 (1937), which held that a person in the business of selling information concerning registrations may make copies of all certificates and licenses of motor vehicles. In declining to follow that case, the Appeals Court of Massachusetts noted that Direct-Mail Serv.'s broad language was written prior to the advent

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<sup>20</sup> Jean Behrend, "Direct Marketer Access to Driver Lists under Attack in 9 States," Direct Marketing News, April 15, 1989, p. 1.

<sup>21</sup> John Doe & others v. Registrar of Motor Vehicles, 26 Mass. App. Ct. 415, 528 N.E. 2d 880 (1988).

of modern data processing technology, which permits the aggregation of pieces of personal information into large central databanks.

On appeal, the plaintiffs admitted that name and address of a car owner or driver is a public record, and its disclosure is not intrusive. Therefore, the appellate court's decision limiting personal and commercial access to automobile registration records did not prohibit the disclosure of name and address, only date of birth and height. Because of the expense of removing the intrusive information from records to be sold, however, the Massachusetts Registrar of Motor Vehicles has ceased selling its list of 8.2 million names entirely.

The balance between privacy and access is much more complex than the three cited examples convey. However, the examples do illustrate some important points. First, they illustrate the difficulty of striking a balance between privacy and access, and the fact that different situations can cause the scale to tilt in either direction.

Second, they illustrate the difference between privacy and security, two ideas that are often confused. Security of information only becomes an issue if the information is collected. Once it is collected, the question of who has access to it under what circumstances becomes as much a security as a privacy issue. It is probably doubtful that any reasonable security measures would have prevented Bernstein from obtaining access to telephone records, or another reporter from obtaining a list of Judge Bork's video rentals. If the information exists, with some ingenuity and persistence, people can often attain access to it.

A third major point conveyed by the examples is that privacy often becomes an issue only when information is used for purposes other than that for which it was collected. This is the position of some prominent direct marketers. Jo Anne Parke, editorial director of Target Marketing

Magazine, wrote an editorial on this subject that is worth reproducing in its entirety:<sup>22</sup>

The issue of consumer privacy will not go away simply because direct marketers don't confront it.

It was simmering on the back burner until last spring, when a new database appeared that can pinpoint consumers who have bank cards and the balances on those cards. Briefly, the controversy erupted only to simmer down again.

But, it will boil over again because the real privacy issue isn't about selling financial data on consumers.

Nor is it about knowing how much people owe on their credit cards or the balances on their home mortgages, or how many children they have, their children's ages, their preferences in beer, if they've been married, how many times, or even the state of their health.

This sort of information is legitimately obtained every day. But is it always legitimately traded?

The privacy question really is about trafficking in information that is freely obtained for one purpose and then sold for another.

When a consumer fills out a credit application, because he must do so in order to obtain a credit card, does he understand that this information will be traded, rented, sold? Is he given an option of whether or not that information may be revealed to others? Do lifestyle questionnaires include options as to whether or not that information may be revealed to marketers?

We must give consumers these options. They must be presented as positive options...not negative ones. This industry must protect itself. If we don't take the lead and deal with the privacy question. Congress could force us to deal with it on someone else's terms.

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<sup>22</sup> Jo Anne Parke, "The Real Privacy Issue", Target Marketing Magazine, November, 1988, p. 6.



Remember, newspapers are no friends of direct marketing. What a field day they could have with this issue, if Congress gets to it before we do. Let's not give them a chance.

A fourth point conveyed by the examples has to do with the relative weight given to various aspects of privacy and access. Without suggesting that there is a system for weighing privacy versus access rights, the three examples do indicate that the public and its representatives seem to put less weight on access to information for commercial purposes than access for other purposes. A commercial use may actually be less intrusive than that of the press or the government, but the reason for access, merely to sell products and services, may carry less weight with the public.

The type of personal information is also critical. In Judge Bork's situation, what was so intrusive about movie titles? It is no secret that VCRs enjoyed much of their initial popularity and success because they enabled people to view pornographic materials in the privacy of their own home. The underlying issue in Judge Bork's case was the possibility that private sexually-related information could have become public knowledge simply by purchasing or renting a product. Some information may be considered more personal than other information, and access to information about the films that one views may be considered more intrusive than information about the telephone calls one makes.

The examples show that consumers' control over information about their transactions may be a preferred legislative solution to privacy issues brought about by commercial uses of TGI. As in the video privacy legislation, the control has two elements: notice that the information is being collected, and an opportunity to prevent the information from being sold by opting out of the group of customers that give their consent.

Finally, the examples show that technology is changing privacy disputes, and precedent may be viewed as an insufficient guide for current issues and the proper formulation of future rights and

restrictions. In part, both the video privacy legislation and the Massachusetts automobile registry case were affected by new computer technology. In the case of the records of video rentals, it is the ease with which records can be collected, stored, and transferred using computer technology that arguably made the Bork situation such a threat. In the Massachusetts case, the court specifically mentioned that it believed technology had created new privacy issues since the early days of direct mail, where most of the precedent originated.

#### 4. Ownership of TTGI?

The FCC is busily trying to decide what, if any, restrictions should be placed on a telephone company's right to use, and to release or sell to third parties, proprietary information about your network.... At stake is the release of sensitive information such as your company's calling patterns, billing information, the design of your network, and what services you use. It could include any information that the telephone companies can derive from the not-insignificant amount of data that is kept in their existing customer databases.<sup>23</sup>

##### -- Data Communications

In its [MFJ information services line of business restriction] decree waiver request, the regional holding company said that it wants to process information originated by a customer on computers owned by the customer or by Bell Atlantic, but not by Bell Atlantic's telephone companies, and then to return that information to the customer. At all times, the information will remain the property of the customer.<sup>24</sup>

##### -- Bell Atlantic

Ownership disputes over information are generally resolved within the framework of intellectual property laws such as copyright, trade secret, and patent law. However, the right to demand access to property is an important ownership right. Therefore, other laws that can affect access rights, such as common carrier regulation and antitrust, are as relevant to a discussion of ownership of TTGI as the law of intellectual property.

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<sup>23</sup> Data Communications, June 1988.

<sup>24</sup> "Bell Atlantic Seeks Decree Waiver of Information Services Restriction, Permitting Non-Telco Subsidiaries to Offer Variety of Data Processing Services; RHC Says Prompt FCC Action on 'CEI' Plan Will Be Highly Relevant to Court Action on Waiver Request," Telecommunications Reports, June 12, 1989, p. 1.

The first quote above refers to Customer Proprietary Network Information (CPNI), a significant bone of contention in the FCC's Open Network Architecture Proceedings. The second quote is from Bell Atlantic's MFJ information services request of early June 1989. The quotes suggest that differentiating between information owned by the network and the customer, determining rights of access to that information by competitors of both the network and the customer, and access by those who are neither and would use the information for marketing purposes, will continue to be critical tasks for those who oversee and regulate the post-divestiture telephone industry.

CPNI is a kind of oxymoron -- a phrase that, like "jumbo shrimp" or "open secret," is a convenient formula for expressing contradictory ideas. It is arguable that the words "proprietary" and "network" are contradictory. "Proprietary" refers to information that the customer owns. Ownership means, among other things, the right to deny access to others. The purpose and function of a network is to exchange information. There is always a calling party and a called party, and records about each are created, stored, and transferred in the ordinary course of business. The network already has access to the information. The called party has access rights under certain circumstances, and the government has the right to obtain access as well. Network records cannot be completely proprietary to anyone. At the same time, customers clearly have a legitimate privacy stake in somehow restricting the access of others to their records.

The antitrust doctrine of essential facilities,<sup>25</sup> also known as the "bottleneck doctrine," has to do with "facilities that can obstruct a users production or access to a market," and is often cited as the reason telcos cannot own and must provide access to TTGI. A metaphor often used is that of a privately-owned single bridge with a community of consumers on one side eager to purchase products, and manufacturers and distributors on the other eager to meet their needs. Courts

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<sup>25</sup> David J. Gerber, "Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of Essential Facilities," 74 Va. L. Rev. 1069, at 1072, September 1988.

generally find antitrust liability where the owner of the essential facility competes with the facility user (the manufacturer or distributor) in other markets.<sup>26</sup>

Ownership of any type of property is a matter of policy, whether that policy is realized through a property rights model or a regulatory model. The FCC's review of CPNI, and ongoing MFJ proceedings, are part of a policy-setting process that not only can distribute property rights, but can actually define the property as well.

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<sup>26</sup> Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

## 5. What is Ownership?

Ownership is a compromise among competing rights, and is very rarely an exclusive and absolute right. One doesn't own property; one stakes a claim to certain rights regarding property, and because of the rights of others one must accept certain restrictions along with those rights.

Lawyers are taught that property is the push and pull of legal relationships among people in regard to a thing, not the thing itself. The focus is not on the property but on the ownership of competing rights and restrictions regarding the property. A parcel of real estate, for example, very often has an assortment of rights and restrictions associated with it. Most are not easily understood because the language describing those rights is archaic, having been handed down from feudal times.<sup>27</sup> Suffice it to say that the closest thing to absolute ownership of real estate, a fee simple absolute, is only one form of ownership in that system, and there are many others.

There are additional layers of rights and restrictions associated with real estate. You may own the property, but if you have a mortgage the bank has an interest in it. As the owner of real estate you have a right to bring an action in trespass if someone intrudes on your land, but your right may be restricted by conflicting property rights such as easements that assure access by non-owners to the property.<sup>28</sup> You could lose your ownership rights altogether if you knowingly let a non-owner occupy your land for a period of time.<sup>29</sup> The local community has a say in the acceptable uses of your property and enforces its views through zoning restrictions. Finally, the state has eminent domain over real

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<sup>27</sup> Richard R. Powell, The Law of Real Property, Matthew Bender (1988).

<sup>28</sup> "An easement is a property right in a person or group of persons to use the land of another for a special purpose not inconsistent with the general property right in the owner of the land." John E. Cribbet, Principles of the Law of Property, Foundation Press, 1975, p. 335.

<sup>29</sup> The notion of "Adverse Possession."

estate, and has the power to take it from you against your will for the good of the state.

Those rights and restrictions define a parcel of real estate every bit as much as latitude and longitude define its physical boundaries. The rights and restrictions define what is actually owned. But unlike fixed boundaries, property boundaries are in a constant state of reformulation as part of our system for distributing resources in society. The common law, described below, is a good metaphor for the way the system works:

How can a system of law, a system of ideas whose hypothesis is that rules are constant, adapt itself to a changing world? It has not been the ordered development of the jurist or the legislator, of men thinking about law for its own sake. It has been the rough free enterprise in argument of practitioners thinking about nothing beyond the immediate interest of each client; and the strength of the system has been in the doggedness, always insensitive and often unscrupulous, with which ideas have been used as weapons.... The life of the common law has been in the unceasing abuse of its elementary ideas.<sup>30</sup>

In the United States we tend to think of property rights as separate from government regulation or administration. Law schools teach the law of government separately from the common law of contracts and tort and property. Popular American economic and political philosophy not only argues that we should prefer ordering our affairs through a property rights model to government regulation, but that the two are totally unrelated. Yet allocation of resources through an administrative mechanism such as government regulation and allocation through a property-based market mechanism are both systems for ordering the

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<sup>30</sup> Milsom, Historical Foundations of the Common Law xi (1969), as quoted by Grant Gilmore, The Ages of American Law, Yale Univ. Press, 1977, p. 2.

relationships of people and organizations in society.<sup>31</sup> Both require government administration of one type or another, and allocation of resources through a property rights model is only successful because the government decides disputes.<sup>32</sup> In terms of their effect, it matters little whether the rules are formulated by judges resolving property disputes or legislators devising new regulatory schemes.

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<sup>31</sup> Matthew L. Spitzer, Seven Dirty Words and Six Other Stories: Controlling the Content of Print and Broadcast, Yale University Press, 1986.

<sup>32</sup> Jonathan Weinberg, "1988 Survey of Books Relating To The Law," 86 Michigan Law Review 1269 (May, 1988).



## 6. Ownership of Intellectual Property

[A]ll intellectual property systems basically concern policies involving the use and flow of information.<sup>33</sup>

-- Office of Technology Assessment

Intellectual property systems all concern policies involving the use and flow of information. Authors and inventors are rewarded for their contributions with the right to own or control their works. However, they are not given complete control of the works they create. There are also significant differences in the control of information among the intellectual property systems of copyright law, patent law, and trade secret law.

The Constitution grants Congress the power to "promote the Progress of Science and Useful Arts by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>34</sup> A significant copyright case notes that copyright is a

limited grant...a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.<sup>35</sup>

Real estate and personal property laws determine ownership of things. Intellectual property law decides who owns the particular form or expression embodied in things. Copyright is "the exclusive right to make copies of particular tangible expressions of information, and a

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<sup>33</sup> U.S. Congress, Office of Technology Assessment, Intellectual Property Rights in an Age of Electronics and Information, OTA-CIT-302, Washington, D.C.: U.S. Government Printing Office, April 1986, p. 32.

<sup>34</sup> U.S. CONST. art. 1, Section 8, cl. 8.

<sup>35</sup> Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

patent is the exclusive right to make, use, or sell a particular application of an idea."<sup>36</sup>

Patent law is designed to disseminate science and technology by rewarding inventors, and only an inventor or patent holder has the right to make, use, or sell the invention. However, patent applications must disclose enough information to allow reconstruction of the invention by anyone after the 17-year period of patent protection has passed.<sup>37</sup> A trade secret, on the other hand, is something known only to one or a few people. Trade secret law is designed to restrict the flow of certain types of information indefinitely, and to give the trade secret owner a competitive advantage in the marketplace.<sup>38</sup>

TTGI cannot be patented since it is not an invention. Trade secret law is not applicable since a great deal of the value of TTGI is in making it available to others. The law of intellectual property most relevant to TTGI is copyright.

Rather than seeking to provide the owner with a competitive advantage like trade secret law, copyright law is intended to stimulate writing and invention and ensure public access to information by rewarding authors.<sup>39</sup> Copyright provides authors a monopoly over the works they

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<sup>36</sup> U.S. Congress, Office of Technology Assessment, Intellectual Property Rights in an Age of Electronics and Information, OTA-CIT-302, Washington, D.C.: U.S. Government Printing Office, April 1986, p. 60.

<sup>37</sup> Melville Nimmer.

<sup>38</sup> Some factors to be considered in determining whether given information is a trade secret are the following: 1) the extent to which the information is known outside of the owner's business, 2) the extent to which it is known by employees and others involved in the owner's business, 3) the extent of measures taken by the owner to guard the secrecy of the information, 4) the value of information to the owner and to his competitors, 5) the amount of effort or money expended by the owner in developing the information, and 6) the ease or difficulty with which information could be properly acquired or duplicated by others. International Election Systems v. Sharp, 452 F.Supp 684 (1978 DC PA).

<sup>39</sup> Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

create, which extends throughout the lifetime of the author -- plus another 50 years. In the case of works made for hire, the copyright expires 75 years after publication, or 100 years after creation, whichever comes first.<sup>40</sup>

Section 102 of the Copyright Act<sup>41</sup> provides three basic criteria for determining whether a work qualifies as a copyrightable subject matter:

- 1) It must be an "original [work] of authorship."
- 2) It must be "fixed in [a] tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced or otherwise communicated either directly or with the aid of a machine or device."
- 3) Copyright protection of the subject matter may not extend to "any idea, procedure, process, system, or discovery...embodied in such work."

The concept of originality serves as the dividing line between protected and unprotected works. An author is simply "he to whom anything owes its origin."<sup>42</sup> As Professor Nimmer wrote, "originality...may be said to be the essence of authorship."<sup>43</sup>

The Act lists seven categories of works of authorship that are afforded copyright protection include the following: 1) literary works, 2) musical works, 3) dramatic works, 4) pantomimes and choreographic works, 5) pictorial, graphic, and sculptural works, 6) motion pictures and other audiovisual works, and 7) sound recordings. The list of works of authorship is inclusive rather than exclusive, and even on the face of the statute it extends protection to future works of authorship expressed in currently unknown media.

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<sup>40</sup> 17 U.S.C section 302.

<sup>41</sup> 1976 Copyright Act, 17 U.S.C Sections 101 et seq.

<sup>42</sup> Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1984).

<sup>43</sup> M. Nimmer, Nimmer on Copyright, Section 1.06 [A], at 1-37 (1988).

Congress delineated five exclusive fundamental rights of a copyright owner,<sup>44</sup> the right to

- 1) Reproduce the copyrighted work
- 2) Prepare derivative works based on the copyrighted work
- 3) Distribute copies to the public by sale, rent, lease, or lending
- 4) Perform the copyrighted work publicly
- 5) Display the work publicly.

Theoretically, U.S. statutory copyright protection is self-executing and the author's copyright vests as soon as he fixes the work in a tangible medium. However, a copyright owner cannot sue for infringement until he has registered the copyright.<sup>45</sup>

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<sup>44</sup> 17 U.S.C. Section 106.

<sup>45</sup> 17 U.S.C. Section 411(a).

7. Copyright of TTGI: A Question of Policy

If copyright is to be granted to machine-produced works, it would signal a new role for copyright, and a departure from its traditional role as an incentive for authors. This raises the issue of whether copyright, in addition to providing incentives for authorship, skill, or diligence should also serve as a method of protecting a return on capital investment in an information-conversion business. In the information age, copyright may increasingly be called upon to serve as an economic regulatory device that establishes proprietary rights in the products of automated processes.<sup>46</sup>

-- Office of Technology Assessment

To say that copyright is property...would not be boldly misdescriptive if one were prepared to acknowledge that there is property and property, with few if any legal consequences extending uniformly to all species and that in practice the lively questions are likely to be whether certain consequences ought to attach to a given piece of so-called property in given circumstances.... But characterization in grand terms then seems of little value: we may as well go directly to the policies actuating or justifying the particular determinations.<sup>47</sup>

-- B. Kaplan, An Unhurried View of Copyright

Mark Twain, unsettled by the social changes wrought by telephony, once wished everlasting peace and bliss to everyone except the inventor of the telephone.<sup>48</sup> Fast technological change unsettles the law quite

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<sup>46</sup> U.S. Congress, Office of Technology Assessment, Intellectual Property Rights in an Age of Electronics and Information, OTA-CIT-302, Washington, D.C.: U.S. Government Printing Office, April 1986, p. 76.

<sup>47</sup> B. Kaplan, An Unhurried View of Copyright, 1967, p. 72.

<sup>48</sup> "It is my heart-warm and world-embracing...hope and aspiration that all of us, the high, the low, the rich, the poor, the admired, the despised, the loved, the hated, the civilized, the savage -- may eventually be gathered together in a heaven of everlasting rest and peace and bliss -- except the inventor of the telephone." Mark Twain, "The Annals of Iowa," The New York World, Christmas 1890.

as much as it unsettles people.<sup>49</sup> Law changes in response to significant shifts in the technological, political, and cultural organization of our society.<sup>50</sup> In his famous book The Nature of the Judicial Process, Supreme Court Justice Cardozo wrote that when precedent is insufficient or unsatisfactory as a guide, it is the responsibility of judges to take into account the effect of a decision on social and economic conditions, and let principles that have served their day expire.<sup>51</sup> In other words, judges should consider the policy implications of their decisions; certainly, legislators must.

The first difficulty in applying copyright law to TTGI is that TTGI has no author. It is not the result of a creative imagination, but rather a compilation of facts. However, compilations have traditionally enjoyed copyright protection. There are two basic theories in support of the copyright of compilations of facts. The first is the idea that although each fact in a compilation might be in the public domain and uncopyrightable, the arrangement of those facts deserves copyright protection.<sup>52</sup> The second is the so-called "sweat of the brow theory," that "the effort of authorship can be effectively encouraged and rewarded only by linking the existence and extent of protection to the total labor of production."<sup>53</sup>

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<sup>49</sup> Grant Gilmore, The Ages of American Law, Yale Univ. Press, 1967, p. 65.

<sup>50</sup> Grant Gilmore, The Death of Contract, Ohio State Univ. Press, 1974, p. 9.

<sup>51</sup> Cardozo, The Nature of the Judicial Process, 1921.

<sup>52</sup> Financial Information, Inc. v. Moody's Investor Service, Inc., 751 F.2d 501 (2d Cir. 1984). See also West Publishing v. Mead Data Central, Inc., 799 F.2d 1219 (1986), where the Eighth Circuit cited the arrangement theory to support its judgment that although court opinions are not copyrightable, that page numbers associated with case arrangements are copyrightable.

<sup>53</sup> Denicola, "Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works," 95 Colum. Law Rev. 516 (1981).

TTGI is often stored on computers. The arrangement or organization of facts can change with each computer output. Protecting the arrangement of facts is not much protection when any number of arrangements will convey the substance of the information, and different arrangements are available at the push of a button. Perhaps, as the sweat of the brow theory of copyright may demonstrate, copyright is not simply about property rights of an author, but rather is about the encouragement of certain types of capital investment.

Whatever the outcome, new technologies are creating new copyright issues, and copyright is best understood as a mechanism to effect policy ends, not as property.

## 8. Policy and Copyright of Telephone Directories

As the following passage from a telephone directory copyright suit in 1930 demonstrates, from the very beginning disputes regarding the allocation of ownership rights in telephone directories involved business interests arguing that their ownership was in the best interests of the public. The judge in this particular case saw no public benefit in allowing anyone other than the telephone company to publish a directory. Though he was supposedly only applying principles of copyright clearly delineated by statute, the judge engaged in an unabashed discussion of the policy reasons for his decision:<sup>54</sup>

I think there is somebody else interested in this proceeding; that is, the public. It has been stated that the telephone company is a quasi-public corporation. The telephone has ceased to be a luxury and has become a necessity in all business houses and in substantially all homes.... Therefore, to get out a list of this kind and represent that it is an accurate list of the numbers in the telephone book, no doubt, does lead to confusion and results in extra maintenance cost that has been referred to by the officers of the company, and...every subscriber has to pay for the maintenance of his telephone service, and...more operators would have to be employed to take care of the confusion caused...and, of course, the telephone company...would apply for higher rates. [T]hese lists...do not contain any new numbers or addresses and are no aid to the public or the subscribers. They do not seem to me to be of any assistance to anybody, save only as mediums of advertising for such profit as these defendants can make out of them.

More recent decisions involving copyright and telephone directories are more circumspect in their discussion of policy, but such discussion often finds its way into opinions, if only in the form of "dicta."<sup>55</sup>

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<sup>54</sup> Cincinnati & Suburban Bell Telephone Co. v. Brown et al., 44 F.2d 631 (1930).

<sup>55</sup> Dicta are observations, comments, or discussion by a judge that are non-essential to the decision but are included nonetheless. Such comments contribute to the development of the common law and sometimes



Hutchinson Telephone Company v. Fronteer Directory Company,<sup>56</sup> tried in the District Court of Minnesota and overturned on appeal, is an excellent example of the difficulty judges have had in applying copyright law to disputes involving telephone directories, and of the way in which policy as much as law is part of the decision-making process.

Hutchinson, a provider of telephone service, claimed that Fronteer violated the copyright laws by copying the white pages section of Hutchinson's telephone book.

The District Court Judge quoted Professor Nimmer:

[T]he authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the copyright monopoly is a necessary condition to the full realization of such creative activities. Implicit in this rationale is the assumption that in the absence of such public benefit the grant of a copyright monopoly to individuals would be unjustified.<sup>57</sup>

The District court found that since Hutchinson is required by law to publish its white pages, allowing copyright protection "would only extend the benefit of Hutchinson's telephone monopoly and would not serve any purpose of the Copyright Act." The court held, therefore, that white pages do not constitute original works of authorship, and are therefore not copyrightable.

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find their way into new rules of law articulated by the courts. Lawyers will often characterize an aspect of a decision that argues against his client's case as "mere dicta."

<sup>56</sup> 586 F. Supp. 911 (1984) appealed and reversed 770 F.2d 128 (1985).

<sup>57</sup> Quoting M. Nimmer, Nimmer on Copyright, Section 1.03[A] at 1-30.1 (1982).

The U.S. Court of Appeals for the Eighth Circuit reversed the judgment of the District Court and held that a directory assembled from data collected and constantly revised by the telephone company is copyrightable as an original work of authorship. The court stated that a white pages directory is copyrightable as a "work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."<sup>58</sup> The court noted that there was an unbroken line of cases in support of its decision.

More interesting than its citation of precedent is the fact that the Court of Appeals felt compelled, even though "no policy analysis [was] required," to make its own policy determination. The appellate court compared the District Court's finding to the so-called "double subsidy" argument that there should be a ban against government contractors owning copyrights on works produced under government contracts, an idea that Congress had already "clearly rejected."

The Court of Appeals relied on "common sense" to conclude that with or without state regulations, a telephone company would still find it necessary to publish a white pages directory. Finally, the court concluded that the District Court Judge ignored the fact that Hutchinson's monopoly power is limited by state regulation.

In the fairly recent telephone directory copyright case of BellSouth Advertising & Publishing (BAPCO) v. Donnelley Information Publishing,<sup>59</sup> the Federal District Court for the Southern District of Florida stated that although it is not clear which theory its own circuit has adopted, "it is clear...that BAPCO's directory meets both tests." The BAPCO court held that because precedent has established that the Yellow Pages are validly copyrightable, and because BAPCO had created a unique directory due to its method of selecting, coordinating, and arranging

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<sup>58</sup> 17 U.S.C. section 101.

<sup>59</sup> 719 F. Supp. 1551 (1988).

its material, BAPCO's compilation is an original work of authorship which is subject to a valid copyright.

The court stated that "BAPCO and its affiliates have expanded great efforts in collecting, assembling, compiling, and publishing its directories.... Donnelley does not claim to have used its own efforts in compiling the material published in its directory. There is no doubt, therefore, that BAPCO has met the 'Sweat of the Brow' test." The court describes the great efforts involved as the following:

BAPCO collects and assembles preexisting material in the form of names, addresses, telephone numbers and classified headings. The process begins when Southern Bell sends BAPCO the name, address, telephone number (and sometimes a free listing classification) from business telephone subscribers when they obtain service from Southern Bell. BAPCO receives this information randomly and not sorted by geographical area, area code, or telephone exchange. BAPCO then performs various acts of selection, coordination and arrangement of this information, which leads to the final, organized Yellow Pages.

Some "acts of selection" the court cited are the selection of the

- Geographical area to be covered by a directory
- Number of free listings to be provided
- Requirement that businesses use business telephone service in order to advertise in the BAPCO directory
- Headings (by the sales force) that will be recommended to a customer
- Classified headings that will be available for a particular directory
- Headings under which an advertiser's listing will appear
- Criteria under which advertisers may or may not be permitted to advertise under headings not related to their business
- Number of free listings to be provided by telephone subscribers
- Customers who will be contacted by premise sales personnel
- Date of closing of the directory.

The court offered the additional observation that BAPCO "arranged" the headings in its directory in alphabetical order but that BAPCO "could have chosen to arrange its listings according to the number of advertisers, or to arrange its listings under headings according to

which listing had been advertising under that heading for the longest period of time."

As much as the BAPCO court sought to avoid the appearance that it was doing anything but applying established law to the facts of the case, it still had to make at least one policy call regarding technology. The court found "no material difference" between photocopying an advertisement and entering the facts into a computer. The court stated that "although keying information into a computer and printing it out may not appear as egregious as photocopying, BAPCO's copied listings and headings still make up a substantial majority of Donnelley's directories."

In Central Telephone Company of Virginia v. Johnson Publishing Co.,<sup>60</sup> a Federal District court found, on many of the same grounds cited by the Court of Appeals in Hutchinson, that Central had a copyright in its white pages directories. However, in regard to Johnson Publishing's use of the Central's yellow pages "as a source and example of the information the business customer wished to advertise," the court found no infringement. The opinion states:

When Yellow page advertisements, published earlier in a copyrighted directory, are published later in another directory, the second directory will not usually infringe the first directory's copyright. In the absence of an agreement to the contrary, the ownership of, and the copyright on, the advertisements is not in the publisher of the first directory but resides in the advertiser who paid for preparing the advertisement and for its publication.

The Central court held that the plaintiff enjoyed a copyright in its compilation of advertisements, but not in the individual advertisements or the information contained within those advertisements. The court

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<sup>60</sup> 526 F.Supp. 838 (1981).

distinguished the case from opposing precedent<sup>61</sup> by noting that in those cases the second directory publisher had not "hired salesmen" and done an independent canvass after using the original directory as a source and example of the information the business customer wished to advertise.

The eleventh circuit court of appeals would solve the problem of allocating ownership rights in the information contained in telephone directories by using the common law principle of unfair competition. In Southern Bell Telephone and Telegraph Company v. Associated Telephone Directory Publishers,<sup>62</sup> the court stated that "protection of original research in the public domain is better afforded under an unfair competition theory."

The court appears to understand that by classifying a work under a particular part of the copyright statute it is making a policy determination. The court stated:

[C]lassification of a work as a compilation, a collective work, or a derivative work does not resolve the issue of whether a work is capable of being copyrighted or whether the copyright has been infringed. These classifications serve mainly to identify the scope of the protection afforded to the work and the parties who have an interest in the work protected by the copyright laws.

A few years earlier, the court in National Business Lists v. Dun & Bradstreet<sup>63</sup> suggested a similar framework for the copyright of compilations. It noted that what was framed as copyright analysis was more often an analysis of "economic incentives" and "the injustice of permitting one to appropriate the fruit of another's labor."

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<sup>61</sup> Southwestern Bell Telephone Co. v. Nationwide Independent Directory Service, Inc., 371 F.Supp. 900 (W.D.Ark. 1974); Jeweler's Circular Publishing Co. v. Keystone Publishing Co., 281 F. 83 (2d Cir.) (1922).

<sup>62</sup> 756 F.2d 801 (1985).

<sup>63</sup> 552 F.Supp 89 (1982).

The court stated:

Compilations, being more the product of diligent application and less the result of intellectual creativity than possibly any other form of protectable work, are at one end of a spectrum extending to art, poetry, and music. Diligent application has, through copyright, been accorded a measure of protection because that is the only protection which is meaningful. As we move up the spectrum from texts through non-fiction literary works, "form of expression" protection progressively becomes more meaningful and diligent application appears progressively less entitled to protection if it may adversely affect use of historical knowledge.

The court argued that this approach allows a straightforward analysis based on the principles of unfair competition. The court encourages "an assessment of the copyist's behavior in light of the competitive relationship he has to the copyright owner or at least in light of the impact upon the owner's legitimate expectations of business advantage."<sup>64</sup>

Regardless of in which conceptual pigeonhole one chooses to place the foregoing National Business Lists analysis, it is a long way from the simple application of a statutory scheme restricting copying by anyone for a finite period.

Whatever the outcome of particular copyright claims in specific jurisdictions, copyright continues to be controversial and difficult. Perhaps that is because it attempts to balance competing economic interests within the confines of a statutory scheme designed with literary works in mind. Perhaps it is also because copyright does not completely address the issue of ownership of information. Clearly, the policies actuating or justifying particular copyright decisions are as significant in the decision-making process as bright-line copyright law.

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<sup>64</sup>Id.

## **APPENDIX 3**

### **ADDITIONAL PRECEDENT**

1. **Introduction**
2. **General Guideline: Focus on Relationships**
3. **International**
4. **Fourth Amendment**
5. **First Amendment**
6. **Financial Institutions**
7. **Fair Credit Reporting Act**
8. **Equal Credit Opportunity Act**
9. **The Privacy Act of 1974**
10. **Paperwork Reduction Act of 1980**
11. **Privacy Protection Act of 1980**
12. **The Electronic Communications Privacy Act (1986)**
13. **Cable**
14. **Family Educational Rights and Privacy Act**
15. **Tax Reform Act of 1976**
16. **Privacy Torts**
17. **Postal, Census, Telegraphy**

## 1. Introduction

A yokel came to the Mulla and said, "Your bull gored my cow. Am I entitled to any compensation?"

"No," said the Mulla at once; "The bull is not responsible for its actions."

"Sorry," said the crafty villager, "I put it the wrong way around. I meant that it was your cow which was gored by my bull. But the situation is the same."

"Oh, no" said Nasrudin; "I think I had better look up my law books to see whether there is a precedent for this."

-- From The Sufi's by Idries Shah,  
"The Subtleties of Mulla Nasrudin"

Every intellectual system carries within itself the seeds of its own destruction. This is a bit of good fortune for the human race since otherwise we should be saddled forever with the "truth" and everything would come to an end.

-- Professor Grant Gilmore  
Vermont Law School, May 1981

The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.

-- Justice Oliver Wendell Holmes Jr.,  
The Common Law

The goal of this section is to list some of the precedent which may be pulled out of the grab-bag of legal concepts to address TTGI disputes. Because law is a reflection of society, it is constantly changing to keep up with new events and problems in society. Precedent is invoked here in the broadest possible sense -- not that it will control, but that it may persuade or influence.



We share different levels of personal information and have varying expectations of confidentiality with people and organizations depending on our relationship with them. There are some things, such as our income, that the government has a right to know, but other things, such as whether or not we have AIDS, that it may not.

We may voluntarily provide personal information to a loan officer that we may not want to share with others. Thus, privacy is part of a fabric of competing and ancillary rights and restrictions organized around relationships. Peripheral vision is essential in understanding privacy<sup>2</sup>:

Privacy, both as a societal value and as an individual interest, does not and cannot exist in a vacuum. Indeed, "privacy" is a poor label for many of the issues the Commission addresses because to many people the concept connotes isolation and secrecy, whereas the relationships the commission is concerned with are inherently social. Because they are, moreover, the privacy protections afforded them must be balanced against other significant societal values and interests. The Commission has identified five such competing societal values that must be taken into account in formulating public policy to protect personal privacy: (1) First Amendment interests; (2) freedom of information interests; (3) the societal interest in law enforcement; (4) cost; (5) Federal-State relations.

For these and other reasons, a general guideline for precedent regarding TTGI access, ownership, and privacy is to focus on relationships.

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<sup>2</sup> Ibid., p. 21.

A record is a document in any format that contains data of any kind. The disputes that led to the precedents listed below share a basic structural similarity with TTGI disputes. They were all concerned with the question of who owns records, who has access to them, and how that affects privacy.

The function of many law review articles is to suggest modifications of existing legislation, regulation, or case law. That is not the approach here. What follows is a general guide, a descriptive list, of precedent which may arguably affect TTGI disputes.

## 2. General Guideline: Focus on Relationships

The July 1977 report of the Privacy Protection Study Commission, Personal Privacy in an Information Society,<sup>1</sup> is organized around the concept of relationships: the consumer-credit relationship, the depository relationship, the insurance relationship, the employment relationship, the medical-care relationship, the citizen-government relationship, the taxpayer-government relationship. The commission recommended that an individual be informed at the beginning of a relationship what information may be disclosed from records about him and for what purposes.

Civil liability is based on the idea that if we breach a duty owed to someone and cause harm, we have to compensate for that loss. The question of who owes a duty to whom, and the subsequent risk of liability, is a matter of relationships. For example, doctors are held to a stricter standard of negligence, and risk greater liability, in aiding accident victims than the rest of us. Because of their professional status, they initiate the doctor-patient relationship by rendering aid.

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<sup>1</sup> The Report of The Privacy Protection Study Commission, Personal Privacy in an Information Society, July 1977, Supt. Documents, U.S. Government Printing Office, Washington, D.C., 20402, Stock No. 052-003-00395-3.

### 3. International

An example of where the international community has addressed privacy and access issues can be found in the OECD's guiding principles for privacy protection and transborder data flows. In part, these are<sup>3</sup>

#### 7. Collection Limitation Principle

There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.

#### 8. Data Quality Principle

Personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.

#### 9. Purpose Specification Principle

The purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfillment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion or change of purpose.

### 4. Fourth Amendment

The following are several examples of cases that address government access to TGI and to TTGI:

Every individual must from time to time reach beyond his private enclave, draw other people into his activities, and expose his activities to public view. In any normal life, even in pursuing his most private purposes, the individual must occasionally transact business with other people. When he does so, he leaves behind, as evidence of his activity, the records and recollections of others.

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<sup>3</sup> Organization for Economic Co-operation and Development, Council Recommendation Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, O.E.C.D. Document C(80) 58 (Final) of October 1, 1980, Adopted by the Council at its 523rd meeting of September 23, 1980.

He cannot expect that these activities are his private affair. To the extent an individual knowingly exposes his activities to third parties, he surrenders Fourth Amendment protections, and, if the Government is subsequently called upon to investigate his activities for possible violations of the law, it is free to seek out these third parties, to inspect their records, and to probe their recollections for evidence.

Circuit Judge Wilkey for the majority, Reporters Committee for Freedom of the Press v. American Telephone and Telegraph, 593 F.2d 1030, (1978).

AT&T's disclosure of toll billing records without notice calls into question the company's privacy obligations to its customers. The statutory scheme of the Communications Act regulating common carriers,... as well as AT&T's own pronouncements and publicly stated policy of respecting subscriber privacy,... suggests that one of the essential elements in the contractual relationship between the appellants and AT&T is the appellants' expectation of privacy, not only with respect to the content of communications over AT&T lines, but also with respect to the identities of the participants in those communications. And AT&T's responsibility for protecting that privacy is intensified by the fact that it is a common carrier with a legal monopoly.

Dissenting opinion Chief Judge Wright, Reporters Committee for Freedom of the Press v. American Telephone and Telegraph, 593 F.2d 1030 (1978).

First, we doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies "for the purposes of checking billing operations, detecting fraud, and preventing violations of law."

Justice Blackmun for the majority, Smith v. Maryland, 442 U.S. 735 (1979).

We said in Sporleder<sup>4</sup>: A telephone subscriber such as the defendant has an actual expectation that the dialing of telephone numbers from a home telephone will be free from governmental intrusion. A telephone is a necessary component of modern life. It is a personal and business necessity indispensable to one's ability to effectively communicate in today's complex society. When a telephone call is made, it is as if two people are having a conversation in the privacy of home or office, locations entitled to protection under Article II, Section 7 of the Colorado Constitution. The concomitant disclosure to the telephone company for internal business purposes, of the numbers dialed by the telephone subscriber does not alter the caller's expectation of privacy and transpose it into an assumed risk of disclosure to the government.

Here, as in Sporleder, disclosure of the number dialed was an unavoidable consequence of the telephone company's method of determining the cost of the service utilized. The toll records reflected the number dialed as well as the date and time of each call. It is clear that the reasonable expectation of privacy found in Sporleder is not based on the fact that some calls are individually billed to the subscriber, as the prosecution would have it, but rather on the expectation that the telephone company will not voluntarily disclose dialed numbers to the government. We conclude that the constitutional protections applied to pen register information in Sporleder also apply to toll records.

Colorado v. Casey Corr, 682 P.2d 20 (1984).

## 5. First Amendment

The following cases address the intersection of freedom of speech and privacy:

Appellee has claimed in this litigation that the efforts of the press have infringed his right to privacy by broadcasting to the world the fact that his daughter was a rape victim. The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.

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<sup>4</sup> Colorado v. Sporleder, 666 P.2d 135 (1983).

By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served...and a public benefit is performed by the reporting of the true contents of the records by the media.

Justice White for the majority, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1974)

Beginning with Bigelow v. Virginia, 421 U.S. 809 (1975), this Court extended the protection of the First Amendment to commercial speech. Nonetheless, our decisions have recognized the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978). Thus we have held that the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression. Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980); Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

Bolger v. Youngs Drug Product Corp., 463 U.S. 60 (1983).

## 6. Financial Institutions

In a very real sense financial institutions are repositories of information as much as wealth.<sup>5</sup> In fact, money has become information.<sup>6</sup> Government has sought access to that information in order to trace illegal activities such as money laundering and other forms of tax evasion. The bulk of the laws concerning transaction generated information found in bank records, therefore, involve issues concerning government access.

Government has not only sought access to the records of banks, but has passed laws to ensure that detailed records are kept. The real purpose of the Bank Secrecy Act<sup>7</sup> of 1970, in a sort of Orwellian twist,

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<sup>5</sup> "Essential bank operations consist to a very large degree of information gathering, management, and distribution. Decisions to extend credit, for example, begin with the process of accumulating and analyzing data relevant to the credit-worthiness of the applicant." Douglas Ginsburg, Interstate Banking, Cambridge, MA, Harvard Program on Information Resources Policy, Harvard Univ., 1982, p. 59.

<sup>6</sup> "A bank officer authorizes a \$100,000 loan to a small business man -- a judgment that the businessman's future earnings will be sufficient to repay the loan, that his enterprise would create real value in the future, which would justify the risk and the creation of the additional money. Ordinarily the banker would not hand over \$100,000 in dollar bills. He would simply write a check or, more likely, enter a credit in the businessman's bank account for \$100,000. Either way, money has been created by a simple entry in a ledger. Implausible as that might seem, it was a reality that everyone would accept, even if they were unaware of its audacity. The businessman would go out and spend the money, writing checks on his new account, and everyone would honor their value. The creation of new money, thus, was really based on bank-created debt. This concept is what baffled and outraged so many critics of the money system. Money ought to be 'real,' they insisted. It should be based on something tangible from the past, accumulated wealth like gold, not on a banker's hunch about the future." William Greider, Secrets of the Temple: How the Federal Reserve Runs the Country, New York, Simon and Schuster, 1987, p. 59.

<sup>7</sup> 12 U.S.C. Sections 1730(d), 1829(b), 1951-1959, and 31 U.S.C. 1051-1062, 1081-1083, 1101-1105, 1121-1122 enacted by Congress in 1970.

is to aid in government investigation.<sup>8</sup> The Act authorizes the Secretary of the Treasury to issue regulations prescribing the maintenance of adequate records by financial institutions. Prior to the Act, banks were under no obligation to keep detailed records, and they opposed the record keeping requirements.

The purpose of the Right To Financial Privacy Act of 1978<sup>9</sup> is similar to that of the Bank Secrecy Act, but is more exact in laying out the responsibilities of financial institutions when faced with a request for information and the limitations of government power in seeking information. Congress considered the Act a compromise between a bank customer's right of financial privacy and legitimate law enforcement needs,<sup>10</sup> and passed the Act in part as a response to U.S. v. Miller (1976), which held that a bank customer has no 4th amendment expectation of privacy in personal bank accounts records.<sup>11</sup> The Right To Financial Privacy Act contains two key principles:

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<sup>8</sup> There was a need to insure that domestic banks and financial institutions continue to maintain adequate records of their financial transactions with their customers. Congress found that the recent growth of financial institutions in the United States had been paralleled by an increase in the criminal activity which made use of these institutions. While many of the records had been traditionally maintained by the voluntary action of many domestic financial institutions, Congress noted that in recent years some larger banks had abolished or limited the practice of photocopying checks, drafts, and similar instruments drawn on them and presented for payment. The absence of such records, whether through failure to make them in the first instance or through failure to retain them, was thought to seriously impair the ability of the Federal Government to enforce the myriad criminal, tax, and regulatory provisions of laws which Congress had enacted. At the same time, it was recognized by Congress that such required records "would not be automatically available for law enforcement purposes [but could] only be obtained through existing legal process." H.R. Rep. No. 91-975, p.10 (1970); S. Rep. No. 91-1139, p. 5 (1970).

<sup>9</sup> 12 U.S.C. Section 3401 et seq., enacted by Congress in 1978.

<sup>10</sup> See H.R. Rep. No. 1383 at 34, reprinted in 1978 U.S. Code Cong. & Ad. News 9273, 9306.

<sup>11</sup> U.S. v. Miller, 425 U.S. 435 (1976).



- 1) A customer should be given prior notice of the government's attempt to gain access to his basic records.
- 2) A customer should be given the opportunity to contest, in court, government access to his records.

In 1984, the Supreme Court held that the SEC is not required to notify the targets of non-public investigations into possible violations of the securities laws when the SEC issues subpoenas to third parties. Citing Miller, the Court stated: "It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities."<sup>12</sup>

State law is also extremely important to an understanding of ownership and access to bank records, and privacy implications. For a list of state law regarding bank records and an excellent compilation of privacy law in general, consult the Compilation of State and Federal Privacy Laws by Robert Ellis Smith.<sup>13</sup> Among other things, the compilation covers state and federal arrest records, bank records, cable television, computer crime, credit reporting and investigations, criminal justice information systems, databanks in government (including library records), employment records, insurance records, mailing lists, and medical records.

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<sup>12</sup> S.E.C. v. O'Brien, 467 U.S. 735 at 742 (1984).

<sup>13</sup> Published by Privacy Journal, Robert Ellis Smith, P.O. Box 15300, Washington, D.C., 20003 202/547-2865.

7. Fair Credit Reporting Act<sup>14</sup>

Congress admonished consumer reporting agencies to "exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."<sup>15</sup>

Reporting agencies must adopt "reasonable procedures for meeting the needs of commerce...in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information."<sup>16</sup>

A consumer reporting agency is prohibited from providing reports unless certain conditions are met. An agency may give a report to a person which it has reason to believe

- intends to use the information in connection with a business transaction involving the consumer on whom the information is to be furnished.
- otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

Many states have enacted consumer credit statutes similar to those of the federal law.

8. Equal Credit Opportunity Act<sup>17</sup>

The Act limits the type of information that can be collected by a creditor, prohibiting investigation of a credit applicant's gender, race, color, religion, or marital status.

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<sup>14</sup> 15 U.S.C. Sections 1681-1681(t) (1982), Sections 1601-1691(r) (1982).

<sup>15</sup> Id. at Section 1681(a)(4).

<sup>16</sup> Id. at Section 1681(b).

<sup>17</sup> 15 U.S.C. Section 1691 et seq.

9. The Privacy Act of 1974<sup>18</sup>

The Privacy Act is directly applicable only to federal agencies. It limits the information about individuals that can be shared, without consent, among different parts of the government. The Act requires agencies that collect information about people to inform an individual if another agency is seeking information it has gathered. The Act also requires the agency to explain whether disclosure of the information is mandatory or voluntary, and to provide individuals with other similar protective warnings.

In order to trigger the Act, an agency must collect "records" that are maintained in a "system of records." The Privacy Act defines a "record" as the following:

[A]ny item, collection, or grouping of information about an individual that is maintained by an agency including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as finger or voice print or a photograph.

A "system of records" is a group of any such records from which information is retrieved by the name of the individual or other identifying particular.

10. Paperwork Reduction Act of 1980<sup>19</sup>

Administered by the Office of Management and Budget, the Act made OMB the leading federal agency on privacy issues. OMB may refuse to allow an agency to collect information from the public if another agency already collects the information, or if in OMB's judgment the agency

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<sup>18</sup> 5 U.S.C Section 552(a) et seq.

<sup>19</sup> 44 U.S.C. Section 3501 et seq.

does not truly need the information. The Act also mandated that federal data collections forms contain a notice telling why the information is being collected, how it is to be used, and whether the individual's response is mandatory.

11. Privacy Protection Act of 1980<sup>20</sup>

The Act bans unannounced searches by government agents of press offices and files if no one in the press office is suspected of a crime. It requires law enforcement agencies to use subpoenas instead of search warrants in most cases to obtain the work product possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.

12. Electronics Communications Privacy Act (1986)

The primary application of this statute is to electronic mail. The Act made it illegal for a person or entity providing public wire or electronic communications services to divulge the contents to any person other than the intended recipient. Penalties are specified if private interceptions are made for commercial gain.<sup>21</sup>

13. Cable

The Cable Communications Policy Act of 1984<sup>22</sup> created a national standard for the protection of subscriber privacy by regulating the collection and use by cable operators of personally identifiable information regarding cable subscribers, and prohibiting its disclosure.

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<sup>20</sup> 42 U.S.C. Section 2000.

<sup>21</sup> 18 U.S.C. Sections 2510-2710.

<sup>22</sup> 47 U.S.C. Sections 521-611, 47 U.S.C.A. Sections 521-559.

Personally identifiable information includes personal subscriber information such as names and addresses, telephone numbers, social security numbers, and any other personal identifiers, codes, or numbers. Aggregate information about subscribers that does not contain names, addresses, or other personal identifiers is not personally identifiable information.

All cable operators under the Act are required to provide written privacy rights notices to existing subscribers. Subscribers must receive notice at the time they enter into a contract or service agreement.

The privacy rights notice must contain the following:

- Nature of the personally identifiable information the cable operator collects
- Purposes for which the information will be used
- The particulars of to whom and when the information may be disclosed
- Length of time the cable operator will maintain the information
- When and where the subscriber may access information pertaining to him or her
- Notice that the subscriber may enforce the Cable Act's limitations on collection and disclosure by civil suit.

14. Family Educational Rights and Privacy Act<sup>23</sup>

The government is barred from access to personal data in educational records without a court order or subpoena, except for specific education-related purposes.

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<sup>23</sup> 20 U.S.C. Section 1232(g).

15. Tax Reform Act of 1976<sup>24</sup>

The I.R.S. must follow notice and challenge procedures similar to the Right To Financial Privacy Act of 1978 in order to obtain access to certain institutional records about an individual maintained by certain private record-keepers.

16. Privacy Torts

Privacy torts are organized under four categories<sup>25</sup>:

- 1) Appropriation of name or likeness
- 2) Publication portraying one in an objectionable false light
- 3) Publication of private facts
- 4) Intrusion into seclusion.

17. Postal, Census, Telegraphy

For an excellent discussion of privacy precedent in the realms of the census, postal law, and telegraphy see David J. Seipp, The Right to Privacy in American History, Cambridge, Harvard University, Program on Information Resources Policy, 1978.

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<sup>24</sup> 26 U.S.C Section 7609.

<sup>25</sup> See George B. Trubow, Privacy Law And Practice, Matthew Bender, Inc., New York, 1988, Vol. 1, Ch. 1.

## ACRONYMS

AT&T	American Telephone & Telegraph
BAPCO	BellSouth Advertising & Publishing Co.
BOC	Bell Operating Company
CPE	customer premises equipment
CPNI	Customer Proprietary Network Information
CPUC	California Public Utilities Commission
CRIS	Carrier Route Information System
ED	Enumeration District
FGC	Federal Communications Commission
IRS	Internal Revenue Service
IXC	interexchange carrier
MCI	MCI Telecommunications, Inc.
MFJ	Modification of Final Judgment
NRDC	non-RBOC directory company
OECD	Organization for Economic Co-operation and Development
OMB	Office of Management and Budget
PIRP	Program on Information Resources Policy (Harvard)
PUC	Public Utilities Commission
RBOC	Regional Bell Operating Company
SMSA	Standard Metropolitan Statistical Area
SNFA	shared network facility arrangement
TGI	transaction-generated information
TTGI	telephone transaction-generated information
UA	Urbanized Area
VCR	video cassette recorder