

1993

U.S. Telecommunications Privacy Policy and Caller ID

Laurie Thomas Lee

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Thomas Lee, Laurie (1993) "U.S. Telecommunications Privacy Policy and Caller ID," *California Western Law Review*. Vol. 30 : No. 1 , Article 3.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol30/iss1/3>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

CALIFORNIA WESTERN LAW REVIEW

VOLUME 30

FALL 1993

NUMBER 1

U.S. TELECOMMUNICATIONS PRIVACY POLICY AND CALLER ID

LAURIE THOMAS LEE*

ABSTRACT

Caller ID and its use of Calling Party Identification (CPI) has raised a public outcry about possible invasions of privacy. Is calling party identification an invasion of the calling party's "right" to privacy? This article examines the debate and two states' court decisions which have reached different conclusions. The article examines the current regulatory status of Caller ID. Then it critically examines and details the existing legal framework of privacy protection. U.S. Constitutional rights are examined, with a focus on the "State Action" doctrine, Informational Privacy and the Fourth Amendment. State constitutions are also examined. Federal statutory laws, particularly the Electronic Communications Privacy Act, as well as state wiretap laws are detailed. Then, common law privacy and privacy associated with a right of property are discussed, followed by policy considerations dealing with the issues of blocking and the protection of unlisted numbers. The study concludes that Caller ID is, for the most part, a legal service under the current regulatory framework.

* Ph.D Mass Media (Telecommunications), Michigan State University 1993; M.A., University of Iowa 1983; B.S., Kearney State College 1982. Dr. Lee is currently an Adjunct Assistant Professor at the University of Nebraska-Lincoln.

I. INTRODUCTION 2
 A. Caller ID and the Debate 3
 B. The Current Regulatory Status 5
 II. THE CONSTITUTIONAL QUESTION 7
 A. The U.S. Constitution 8
 1. Meeting the "State Action" doctrine 8
 2. A Constitutional right of privacy 13
 3. Informational privacy and weighing of interests 16
 4. An expectation of privacy and the Fourth Amendment 19
 B. State Constitutions 23
 III. STATUTORY LAW—THE WIRETAP QUESTIONS 28
 A. Federal Statutes 28
 B. State Statutes 35
 IV. PRIVACY UNDER COMMON LAW 38
 V. PRIVACY AND PROPERTY RIGHTS 44
 VI. POLICY CONSIDERATIONS 50
 A. Blocking 50
 B. Protection of Unlisted Numbers 54
 VII. CONCLUSIONS 57

I. INTRODUCTION

The recent introduction of Caller ID and its use of Calling Party Identification (CPI)¹ has regulators, the courts, and the industry embroiled in a controversial issue over subscriber privacy rights. Caller ID—a telephone service which displays the calling party's number on a display unit when a call is made—is argued to be an invasion of privacy of the caller whose number is displayed, yet an enhancement of privacy for the Caller ID subscriber who can see who is calling before choosing to answer. The controversy raises a score of questions over its legality under federal and state laws. The matter is so unclear that many states are waiting for a decisive legal determination before allowing the service to be offered.

Two recent, yet conflicting, court decisions only fuel the debate and are sure to necessitate further court analysis. In the summer of 1990, in *Barasch v. Pennsylvania Public Utility Commission*,² the Commonwealth Court of Pennsylvania ruled that Caller ID violates U.S. and Pennsylvania constitutional privacy rights as well as that state's wiretap laws.³ Yet several months later in *Southern Bell v. Hamm*,⁴ the Court of Common Pleas in

1. This is also sometimes called Calling Party Information, CPNI (Calling Party Number Identification), and CNI (Calling Number Identification).

2. 576 A.2d 79 (Pa. Commw. 1990) [hereinafter *Barasch I*]. This case was decided May 30, 1990.

3. *Id.* at 90-91.

4. *Southern Bell v. Hamm*, No. 90-CP-40-2686 (S.C. Court of Common Pleas, Richland Co., Nov. 26, 1990) (declaratory judgment) [hereinafter *Southern Bell II*].

South Carolina ruled that the service does *not* invoke or violate U.S. or South Carolina constitutional privacy rights.⁵ Moreover, the court found that Caller ID does not violate the wiretap laws of South Carolina.⁶ In both cases the service proposed included limited blocking capabilities for certain agencies. Both cases have since been upheld by each state's Supreme Court in *Barasch v. Bell Telephone Company of Pennsylvania*⁷ and *Southern Bell Telephone and Telegraph Company v. Hamm*.⁸

The service has been the subject of many public utility commission hearings and proposed rules and legislation. This article examines the debate and the current regulatory status of Caller ID. It then critically examines and details the existing legal framework of privacy protection. U.S. Constitutional rights are examined, including the "State Action" doctrine and the Fourth Amendment. State constitutions, federal statutory laws and state wiretap laws are also detailed. Then, common law privacy and privacy associated with a right of property are discussed, followed by policy considerations dealing with the issues of blocking and the protection of unlisted numbers. The study concludes that Caller ID is, for the most part, a legal service under the current regulatory framework.

A. Caller ID and the Debate

Caller ID is part of a package of Custom Local Area Signaling Services (CLASSSM)—a new generation of telephone technologies and services.⁹ The new services are now possible because of a transmission technology known as Common Channel Signaling System 7 (SS7) being deployed in public telephone networks worldwide. SS7 provides a separate transmission channel from the one carrying the content of the call which can be used to transmit and process calling party information (i.e., telephone numbers) independently of the call itself.

With SS7 technology, when a caller originates a call through his or her serving central (telephone) office, that central office generates information containing the caller's phone number. This information is then sent to the central office serving the called party. At that point, the called party's number is analyzed by the receiving switch to ascertain if the party being called is a subscriber to the Caller ID service (and other CLASSSM features). If so, with Caller ID the caller's number, which has been "trapped" by the

5. *Id.* at 18-19.

6. *Id.* at 18.

7. 605 A.2d 1198 (Pa. 1992) [hereinafter *Barasch II*]. The court agreed with the lower court on the wiretap question, ruling that caller ID violates the Pennsylvania wiretap law. *Id.* at 1202-03. The court declined to rule on the constitutionality of the service, however, stating that Pennsylvania courts should not decide constitutional issues in cases which can properly be decided on non-constitutional grounds. *Id.* at 1203.

8. 409 S.E.2d 775 (S.C. 1991) (decided Oct. 7, 1991) [hereinafter *Southern Bell II*].

9. These include such features as Selective Call Forwarding, Call Trace, Return Call, Priority Calling, and Call Block.

telephone company's switch, is then transmitted over the normal telephone lines to the subscriber's display device. This unit is provided by the subscriber and may be a telephone set with a built-in display screen, a small "box" connected to the line along with his or her telephone, or a personal computer connected to a line via a modem.¹⁰ The caller's telephone number¹¹ is delivered during the first silent interval of ringing. In addition to displaying the number, a Caller ID device may also record and store the number, its area code, and the date and time the incoming call was made.¹²

Proponents of Caller ID argue that they should be able to know who is calling before they answer the phone. They want to be able to screen and manage calls, claiming that Caller ID protects and enhances privacy.¹³ The service could, for example, help stop obscene, harassing, and threatening calls as well as allow subscribers to avoid other undesirable calls (i.e., annoying sales calls).¹⁴ Plus, knowing the caller's identity could lead to improved emergency response service (where emergency 911 is not available), help reduce false alarms and anonymous bomb threats,¹⁵ and lead to more efficient business communications¹⁶ and customized customer services.¹⁷ Thus, lives, money, and time could be saved and privacy increased.

On the other hand, opponents of Caller ID, including consumer groups and the American Civil Liberties Union, argue that they should not have to have their number displayed every time they place a call to anyone with the service. They want to be able to be anonymous, saying that Caller ID is an

10. Unless in conjunction with a subscription to Caller ID (where available), the device itself would be incapable of displaying the calling party's number. The units generally cost \$60 to \$80, and a monthly subscription (where available) generally runs \$6 to \$10.

11. This had been limited to one's telephone number; however, the technology has been developed to transmit one's *name* associated with the number instead of or in addition to the number. U.S. West Communications tested the service in Grand Forks, North Dakota, in 1990 and is now offering it in such places as Omaha, Nebraska.

12. Thomas Lanning, *New Caller ID Data Emerges in Trial*, TELEPHONY, May 7, 1990, at 8.

13. James E. Katz, *Caller-ID, Privacy and Social Processes*, TELECOMM. POL'Y at 372 (Oct. 1990); see also Richard Karpinski, *GTE Unrolls CLASS Red Carpet*, TELEPHONY, Oct. 22, 1990, at 12, 14.

14. A Bell Atlantic survey of Caller ID customers revealed that 73% selected the service to combat abusive calls while 60% chose it for its call management capabilities, replacing an answering machine. *Should Caller ID Be Offered With Or Without Blocking*, TELEPHONE NEWS, Dec. 17, 1990, at 4.

15. Timothy W. Maier, *Consumer Groups Want to Hang Up On Caller ID System*, BALTIMORE BUS. J., Feb. 26, 1990, at 5.

16. *Fear of Caller ID Abuses Unfounded*, COMMERCE, July 1990, at 43.

17. For example, telephone users could cross reference telephone numbers with databases. Catalog ordering, for example, could be customized, lowering the costs of its products and services.

invasion of privacy.¹⁸ The service could, for example, present a threat to battered spouses and undercover law enforcement officials whose protected location could become known. The service could also compromise the integrity of confidential hotlines (i.e., AIDS,), encourage discrimination in answering certain callers,¹⁹ plus lead to an increase in telemarketing calls by businesses which could record the callers' numbers and compile computerized lists to use or sell.²⁰ Thus, the welfare and sanctity of many could be at stake and privacy jeopardized.

The debate is also affected by issues such as the protection of unlisted phone numbers and the availability of blocking options. Customers with unlisted telephone numbers could lose their anonymity with Caller ID (as it is currently offered),²¹ posing an even greater privacy threat. On the other hand, Caller ID Blocking options—such as per-call,²² per-line, or limited to certain “at-risk” groups—are now being considered and offered in some places, which might mitigate the privacy threat (although reduce its enhancement qualities).²³ The extent to which these and other factors may influence judicial decisions determining the legality of Caller ID is important.

B. *The Current Regulatory Status*

Since it was first offered in New Jersey in 1987, the service has been subjected to several proposed federal and state laws and numerous state regulatory decisions and actions modifying tariffs to allow or disallow the service. The key actions have revolved around the issues of whether or not Caller ID is legal under federal and state statutory and constitutional law, whether or not unlisted numbers should be protected, and whether or not blocking should be available.

18. See generally Eric Neisser, *Caller ID: Balancing Technology and Privacy*, N.J. L.J., May 31, 1993, at 20; *No Reply to Who's Calling; Ida. ACLU Asks DOJ to Consider Shutting Down Name ID Service*, COMM DAILY, Mar. 25, 1991, at 2; and J. Martin Mcomber, *It's a Brave New World of Telephoning*, SEATTLE TIMES, July 17, 1993, at A1.

19. *Six Arguments Against Caller ID*, TRANSNAT'L DATA & COMM REP., May 1990, at 21-23 (excerpt from a statement by Pennsylvania Public Utility Commissioner Joseph Rhodes, Jr., dissenting from the PUC's approval in December 1989 of a proposal by Bell Telephone Company of Pennsylvania to offer caller ID services).

20. Anita Taff, *Future Bright For 900-type Services*, NETWORK WORLD, July 24, 1989, at 12, 13.

21. For example, in California, one-third of telephone customers have unlisted numbers. See *Look Who's Calling*, L.A. DAILY J., Oct. 5, 1989, at 6. In Nevada, 47% have unlisted numbers. *Centel of Nevada Proposes 'Caller ID' With Blocking; Ohio Bell Files Tariff Without*, TELECOMM. REP., Mar. 26, 1990, at 17.

22. This works by dialing a code (i.e., *67) before placing a call. The called party display would reveal the words “private number” (or simply a “P”).

23. A Harris poll found that 48% of the public favors blocking while 27% believes Caller ID should be outlawed and 23% believes it should have no limitations placed on it. In general, a 55% (to 43%) majority believes Caller ID should be offered. See LOUIS HARRIS & ASSOCIATES, *THE EQUIFAX REPORT ON CONSUMERS IN THE INFORMATION AGE 15-16(1990)*.

Caller ID is currently available or approved and soon to be offered in almost forty states.²⁴ Telephone companies have or are currently offering the service on a trial basis in several states. Several others have tariffs pending.

The states have reacted differently to Caller ID. For example, tariffs for the service were approved by the public utility commissions (PUCs) in New Jersey, Maryland, Virginia, West Virginia and Tennessee with few or no objections.²⁵ Even so, the Virginia Corporation Commission is still reviewing the privacy question, having opened hearings on the subject, and the West Virginia commission would revisit the issue if necessary.²⁶ After approving Caller ID, the Maryland Public Service Commission (PSC), in response to increasing privacy concerns being raised, later ordered C&P Telephone Company to offer free, per-call blocking.²⁷ The New Jersey Board of Regulatory Commissioners recently approved of a deal between New Jersey Bell Telephone and a coalition of privacy advocates to enable per-call blocking.²⁸ The Indiana Commission rejected a Caller ID proposal, citing inflexible blocking options.²⁹ Other commissions have also mandated some form of blocking.³⁰

On the state legislative front, some interest has also been sparked. California was the first state to pass a law *requiring* free, per-call blocking.³¹ The law has served as a model for other state legislation, and blocking has been the subject of several other state bills.

No laws have yet been passed on the federal level, although bills in the House of Representatives and the U.S. Senate were introduced in 1990 and 1991,³² and again (so far) in the Senate in 1993.³³ The bills would create

24. Figures vary. One recent source states that Caller ID is currently offered in 39 states. See Sanford Nowlin, *Bell Seeks Approval for Caller ID in Texas*, SAN ANTONIO BUS. J., Sept. 3, 1993, at 11.

25. Mark Rockwell, *States React Differently to Caller ID*, COMM. WEEK, Oct. 9, 1989, at 43.

26. C&P Telephone Co. of West Virginia, No. 89-292-T-T, slip op. (W.V.P.S.C. June 30, 1989).

27. Charles Mason, *Maryland Orders Call Blocking*, TELEPHONY, Nov. 26, 1990, at 3. Service in Maryland began in October 1989 and the blocking was required in November 1990.

28. *Number Blocking Ok'd in New Jersey*, DM NEWS, Sept. 10, 1993, at 1.

29. Mary Nagelhout, *Caller ID: Privacy and Blocking Issues*, PUB. UTIL. FORT., Mar. 1, 1992, at 33.

30. See *infra* part VI.A.

31. CAL. PUB. UTIL. CODE § 2893 (Deering 1990). North Dakota has since passed a similar law. See 1991 N.D. Adv. Legis. Serv. 1556 (adding § 49-21-01.6 to chapter 49-21 of the N.D. CENT. CODE). In Texas, the PUC had declared that Caller ID violated that state's wiretapping laws, although the Legislature recently remedied the matter, allowing for Caller ID, provided that blocking was available. 1993 Tex. Gen. Laws 659. See, e.g., Ross Ramsey, *SW Bell Hopes to Ring in Caller ID Sooner, Cheaper than Expected*, HOUSTON CHRONICLE, Oct. 22, 1993, sec. A, at 1. Additionally, Wisconsin has enacted similar legislation. Wis. Stat. § 196.207 (1992).

32. H.R. 1449, 102d Cong., 1st Sess., 137 CONG. REC. E965 (daily ed. Mar. 14, 1991) (statement of Rep. Synar), and S. 652, 102d Cong., 1st Sess., 137 CONG. REC. S3283 (daily ed. Mar. 13, 1991) (statement of Sen. Kohl).

the Telephone Privacy Act, allowing Caller ID, but requiring telephone companies to also offer blocking. The FCC is also proposing a rule to regulate Caller ID on an interstate basis and would require per-call blocking.³⁴ Many of the telephone companies,³⁵ however, have come out strongly against any federal legislation, preferring to leave the matter to be worked out by the states.³⁶

The inconsistency across states is, of course, troubling because of the interstate nature of telecommunications. Currently, CLASSSM services are offered only within individual telephone exchanges. But with the advent of nationwide Signaling System 7 capabilities in the next few years, calling party information may be transported across state borders, raising the specter of a patchwork of regulation that may be technically and legally unworkable. For example, should customers in Pennsylvania where Caller ID is not allowed be able to block their CPI when calling South Carolina where Caller ID is available? A clear, legal determination of the privacy debate is needed so that some uniform policy among the states might exist. The question is: Is Caller ID an invasion of the calling party's "right" of privacy?

II. THE CONSTITUTIONAL QUESTION

Caller ID teeters on the edge of constitutionality and symbolizes the beginning of an important era for emerging telecommunications technologies and privacy policy. Whether a fundamental interest exists in the anonymity of CPI and how the calling and called parties' interests will be weighed will have a lasting impact on the future development of the U.S. telecommunications infrastructure, potentially encouraging or handicapping the capabilities and benefits of an advanced network in a global information market. So too, will the notions, functions, and strategies of privacy undergo change in a society with expanded or reduced opportunities for privacy.³⁷

It is important to first look to the highest source of law when assessing whether or not Caller ID is, in fact, an illegal service offering. Although the

33. S. 612, 103d Cong., 1st Sess., 139 CONG. REC. S3176-79 (daily ed. Mar. 18, 1993) (statement of Sen. Kohl).

34. 56 Fed. Reg. 57,300 (1991) (proposed Sept. 26, 1991) (summarizing the Commission's *Notice of Proposed Rulemaking, In the Matter of Rules and Policies Regarding Caller Identification Service*, 6 F.C.C.R. No. 6752 (1991)).

35. These include New Jersey Bell, Pacific Bell, Centel's Central Telephone Co., and AT&T, as well as Bell Atlantic Corp., Bell South Corp. and U.S. West, Inc.

36. Anita Taff, *Proposed Federal Caller ID Regulation Raising Hackles*, NETWORK WORLD, Jan. 13, 1992, at 6, 47 [hereinafter Taff, *Raising Hackles*]; *Caller ID Legislation Opposed by Telco Witnesses at Kohl Bill Hearing; Consumer Groups Back Measure; Pacific, Centel Favor Per-Call Blocking; NJ Bell Firm on "No Blocking,"* TELECOMM. REP., Aug. 6, 1990, at 9, 10; *LECs Blast Baer Proposal that FCC Establish Uniform, Nationwide Rules for Caller ID*, TELECOMM. REP., Aug. 27, 1990, at 25, 26.

37. See Laurie Thomas & R. LaRose, *The Meaning of Privacy in the Age of the Intelligent Network*, Paper Presented to the International Communications Association, Chicago (May 1991).

Pennsylvania Supreme Court did not rule on the constitutional question,³⁸ the Pennsylvania Commonwealth Court in *Barasch I* and the South Carolina Supreme Court in *Southern Bell II* did rule on the constitutionality of Caller ID. Both courts, however, reached opposite conclusions.

A. *The U.S. Constitution*

1. Meeting the "State Action" doctrine

In order to invoke the U.S. Constitution as a binding source of law, the requirements of the "state action" doctrine must be met. Only actions by the government, and not private entities or individuals, are subject to U.S. Constitutional restrictions. Therefore, before considering whether Caller ID is violative of constitutional privacy rights, it is first necessary to determine whether Caller ID sufficiently involves government action. In this case we consider whether the involvement of a state's public utility commission, which regulates telephone companies and approves of a telephone company's Caller ID tariff, rises to the level of "state action."³⁹

Although the Pennsylvania Supreme Court did not rule on the constitutionality of Caller ID and hence did not address state action, the lower court did reach some interesting conclusions. In *Barasch I* the Commonwealth Court of Pennsylvania concluded that even though the "furnishing of utility service is generally not considered to be a state function," the Pennsylvania Public Utility Commission's action to allow Caller ID "must be construed as state action sufficient to justify the applications of constitutional prohibitions."⁴⁰ Petitioners persuasively argued that approval of Caller ID by the Commission constituted state action because the Commission facilitated Bell of Pennsylvania's intrusion into the privacy rights of that state's citizens.⁴¹ The court considered "the aggregate" of such factors as the Commission's required, extensive investigatory hearings and its further action in ordering that limited blocking be made available to certain, certified individuals.⁴² Moreover, the court noted that Bell of Pennsylvania has historically been a monopoly, and that Bell could not offer Caller ID without the imprimatur of

38. The Pennsylvania Supreme Court, on appeal, declined to decide the constitutional issue because the case could "properly be decided on non-constitutional grounds." *Barasch II*, 605 A.2d at 1203.

39. A claim that it is the individual Caller ID subscriber, rather than the telephone company, who invades the privacy of the caller, would not give rise to a constitutional question. In the first place, the subscriber is technically only the recipient of the information first "captured" and then released by the telephone company (see later section). Even so, a Fourth Amendment claim of search and seizure would only apply to government action; private party searches are exempt. See *Burdeau v. McDowell*, 256 U.S. 465 (1921). This would also include any subsequent private party receipt of the CPI, such as by telemarketers.

40. *Barasch I*, 576 A.2d at 87.

41. *Id.* at 86.

42. *Id.* at 87.

the Commission.⁴³ The court cited a *UCLA Law Review* article by G. C. Smith.⁴⁴

Smith, in an extensive article examining the constitutional question suggests that Caller ID would be subject to state action, although acknowledging that the relationship between the regulator and the regulated is not very clear.⁴⁵ He discussed two possible paradigms by which Caller ID availability may or may not be regarded as state action: "Responsibility through encouragement," and "Imprimatur through involvement."⁴⁶

Under the "Responsibility through encouragement" model, the courts, according to Smith, would look at whether the government is responsible by having "encouraged" the regulated party to take the constitutionally suspect action.⁴⁷ Smith points out that in *Blum v. Yaretsky*,⁴⁸ the Supreme Court said that state action occurs when the state is *responsible* for the specific conduct, such as by dictating the decision, using coercive power or affirmatively commanding or significantly encouraging the action.⁴⁹ A number of Supreme Court and lower court cases have followed this model. For example, in *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*,⁵⁰ the Eleventh Circuit ruled that a public service commission's restrictions on a service called "Dial-it," did *not* constitute state action since the PSC did not *require* Bell to prohibit the service; there was no coercion.⁵¹ Smith concedes that if applied to Caller ID, as it existed in New Jersey at the time of his article,⁵² Caller ID would not fall under state

43. *Id.*

44. *Id.* (citing Glenn C. Smith, *We've Got Your Number! (Is It Constitutional to Give Out?): Caller Identification Technology and the Right to Informational Privacy*, 37 UCLA L. REV. 145 (1989)). Smith analyzes the constitutionality of Caller ID and concludes that the service invokes a constitutional right of informational privacy, favoring the calling party and not Caller ID. (This article argues against many of Smith's analyses, in favor of Caller ID.)

45. Smith, *supra* note 44, at 147.

46. *Id.* at 153.

47. *Id.*

48. 457 U.S. 991 (1982) (concerning Medicaid regulations, where the Court found no state action, explaining that the State was not responsible for the decision to discharge or transfer patients).

49. Smith, *supra* note 44, at 156 (citing 457 U.S. 1004-05, 1010).

50. 802 F.2d 1352 (11th Cir. 1986). *See also* *Carlin Communications, Inc. v. Mountain States Telephone and Telegraph Co.*, 827 F.2d 1291 (9th Cir. 1987).

51. Smith, *supra* note 44, at 157-58 (citing 802 F.2d at 1360-61).

52. *Id.* at 159 (noting that in the case of the New Jersey Tariff, the PUC did offer some encouragement in a few statements, but that Bell was not coerced, influenced, or given an incentive). In fact, they established a system of monitoring and asked that alternatives be examined.

action.⁵³ However, he notes that only lower courts have applied this paradigm to *public utility regulation*; the Supreme Court has not yet.⁵⁴

Smith thus points to an "alternative" model suggested by *earlier* Supreme court decisions which have addressed public utility regulation. He suggested the paradigm of the Supreme Court as "Imprimatur through involvement," whereby state action is found when there is "active regulatory involvement followed by approval."⁵⁵ Such involvement is "a sign that government has put its 'imprimatur' on the actions of the regulated parties"⁵⁶ He arrived at this analysis by distinguishing the contrary Supreme Court decisions of *Public Utilities Commission v. Pollak*⁵⁷ and *Jackson v. Metropolitan Edison Co.*⁵⁸ In *Pollak*, the High Court had found state action where the utility commission had conducted an investigation and conducted a full hearing into the issue of whether or not piped-in music on buses should be allowed.⁵⁹ The commission had also concluded that the music "tends to improve" conditions.⁶⁰ Smith distinguished the case from the subsequent Supreme Court decision in *Jackson*, the leading case to date on this matter.⁶¹ In *Jackson*, the Court found no state action in a suit in which the termination of a woman's electric service had been permitted by a general tariff provision approved by the utility commission.⁶² The Court pointed out that in contrast to *Pollak*, the tariff had never been the subject of a hearing or other scrutiny by the commission; "there was no such imprimatur placed on the practice. . . ."⁶³ Since the *Jackson* Court only distinguished and did not overrule *Pollak*, Smith concluded that state action is thus suggested by "*active regulatory involvement*, in the form of a full investigato-

53. *Id.* at 164 (observing that the lower courts fail to register adequately the "realities" of public utilities regulation and should consider the subtle and symbiotic relationship between the regulator and the regulated). Even so, in determining whether state action exists, the inquiry does not turn on the relationship between the private entity and the State in general, but rather focuses on the relationship of the State to the challenged action of the regulated entity. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972)).

54. Smith, *supra* note 44, at 157.

55. *Id.* at 222.

56. *Id.*

57. *Id.* at 160-62 (citing 343 U.S. 451 (1952)).

58. *Id.* (citing 419 U.S. 345 (1974)).

59. *Id.* (citing 343 U.S. at 455)).

60. *Id.* (citing 343 U.S. at 454).

61. *Id.*

62. *Jackson*, 419 U.S. at 356. It is interesting to note that this case involved the Pennsylvania Utility Commission. The petitioner in this case argued that "this state action" deprived her of her property without due process of law (under the Fourteenth Amendment).

63. Smith, *supra* note 44, at 161 (citing 419 U.S. at 356-57).

ry hearing and approving conclusions”—hence “Imprimatur through involvement.”⁶⁴

However, after examining *Pollak* and *Jackson* more carefully, one could find this “alternative model” of the Supreme Court to simply be the same “Responsibility through encouragement” paradigm. In *Pollak*, state action was found *not* because the commission held investigations and hearings, but rather because it had *affirmatively endorsed* (encouraged) the piped-in music. It was because of this that the *Jackson* Court found “the nature of the state involvement” in *Pollak* to be “quite different.” The Court explained:

[T]he District of Columbia Public Utilities Commission [in *Pollak*], on its own motion, commenced an investigation of the effects of the piped-in music, and after a full hearing concluded *not only that* Capital Transit’s practices were ‘not inconsistent with public convenience, comfort, and safety,’ . . . *but also that* the practice ‘in fact, through the creation of better will among passengers, . . . tends to improve the conditions under which the public ride.’ Here, on the other hand, there was no such imprimatur placed on the practice. . . .⁶⁵

The Supreme Court clearly distinguished its two state action decisions based on whether or not the commission encouraged the practice. Regarding the *Jackson* case, the Court based its decision on finding “no suggestion in this record that the . . . Commission intended either overtly or covertly to encourage the practice.”⁶⁶ In fact, the Court in *Jackson* seemed to suggest that as long as a commission only approves and does not *initiate* the practice, state action does not arise.

Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its *own weight* on the side of the proposed practice by *ordering* it, does not transmute a practice *initiated* by the utility and *approved* by the commission into ‘state action’. . . . Respondent’s exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its actions in doing so ‘state action’⁶⁷

Thus, if a regulator does not initiate action on Caller ID and does not necessarily come out in support of the service, it is not responsible by “having encouraged” the telephone company to take the “constitutionally suspect” action.

64. *Id.* at 161 (emphasis added). The implementation of Caller ID in New Jersey, for example, would thus qualify as state action according to Smith since the commission there had conducted a full hearing, had made some positive statements about Caller ID and shared some of the same views about privacy as New Jersey Bell (although it did also undercut Caller Identification and established a monitoring system). *Id.* at 166-67.

65. *Jackson*, 419 U.S. at 356-57 (quoting *Pollak*, 343 U.S. at 126) (emphasis added).

66. *Jackson*, 419 U.S. at 357 n.17 (citing *Moose Lodge*, 407 U.S. at 173).

67. *Id.* at 357 (emphasis added).

Indeed, the South Carolina Supreme Court in *Southern Bell II* in its determination of state action, came to a similar conclusion in finding no state action. The State Court agreed with the lower court's determination that the South Carolina Public Service Commission's involvement was merely limited to the standard approval process that a telephone company must follow regarding the offering of new services.⁶⁸ In this case, the Commission only held a hearing and issued an order, even though it did subsequently deny a motion that blocking should be available to all customers.⁶⁹ Although the hearing was required by state law, the court stated that "in no way could the PSC be said to be responsible for or to have coerced the institution of the service."⁷⁰ Such conduct of a "quasi-judicial/executive entity . . . simply does not rise to the necessary level of involvement to result in action by the State."⁷¹ The lower court in its 1990 decision also stated that it "is equally clear that the [U.S.] Supreme Court has drawn a clear distinction between what might be called 'ex ante' encouragement by the State and 'ex post' encouragement." "[U]nless the State's encouragement takes place *before* the private actor initiates the activity in question, there can be no sustainable assertion of state action."⁷²

Supreme Court decisions since *Jackson*, albeit not public utility cases, have followed and further clarified the "encouragement" paradigm. Again, in *Blum v. Yaretsky*,⁷³ the Court said that a finding of state action requires government exercise of "coercive power" or "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state."⁷⁴

Thus, it can be concluded that as long as a telephone company *initiates* Caller ID (i.e., by filing a tariff) and a utility commission (or federal government or state legislature⁷⁵) does *not significantly encourage* the

68. *Southern Bell II*, 409 S.E.2d at 779.

69. *Id.* at 776. It should be noted that in contrast, the Pennsylvania Commission did affirmatively order limited blocking (which had already been part of Southern Bell's tariff).

70. *Id.*

71. *Id.*

72. *Southern Bell I*, No. 90-CP-40-2686, at 13 (citing *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978); and *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 438 U.S. 522 (1987)).

73. 457 U.S. 991 (1982).

74. *Id.* at 1004.

75. Indeed, a statutory law pertaining to the operation of a telephone company may also be examined for implicating state action. For example, in *State v. Droutman*, 362 A.2d 1304 (N.J. 1976), state action was considered. The Superior Court of New Jersey held that New Jersey's wiretap statute, allowing "interceptions" necessary to the rendering of service, did not evoke state action when the telephone company traced calls subject to its internal annoyance program. "The State by adopting the provision in no way put its weight behind the tracing operation by ordering it. Neither has the State provided the impetus to the company to engage in such activity. The initiative for the action came from the company, rather than the State. . . ." *Id.* at 1310.

service (i.e., by actively endorsing it or ordering it⁷⁶), then the doctrine of state action would not be met. If the constitutionality of Caller ID was again addressed in Pennsylvania, no state action would be found. Indeed, the decision in *Barasch I* on the question of constitutionality was close.⁷⁷ In the *Barasch I* case, unlike *Southern Bell I and II*, the Commission did affirmatively order limited blocking, absent a request by any party to do so. However, it is unlikely that an order requiring blocking would raise constitutional privacy questions,⁷⁸ unless proponents of Caller ID were to argue that blocking availability violates *their* privacy interests in not always being able to know who is calling them.

It is therefore unlikely that other Caller ID proposals around the country would implicate state action and, in turn, be subject to U.S. Constitutional review. Considering the current conservative makeup of the Supreme Court and that current Chief Justice Rehnquist wrote the *Jackson* opinion, it is doubtful that a public utility case concerning Caller ID would be decided differently. The lower courts, following the “Responsibility through encouragement” model, and the Supreme Court continuing with this similar tack would find no state action in a federal constitutional challenge.

2. A Constitutional right of privacy

Even if Caller ID failed the state action test and were subjected to constitutional scrutiny, it still would appear to fall within the standards of the U.S. Constitution. For example, some might charge that Caller ID is a restraint upon communication—a violation of First Amendment rights—should telephone customers requiring anonymity forgo making calls. In *Sokol v. Public Utilities Commission*,⁷⁹ the California Supreme Court

76. See Smith, *supra* note 44, at 162 n. 80 (noting that it is “problematic” for government “ordering” of the practice to be necessary, since in *Pollak* the commission did not “order” the practice. A more reasonable interpretation is that ordering the service would be only one example of “encouraging” it).

77. Two (of the five) judges dissented on the question of constitutionality, stating that state action involves more than just adjudicating a tariff. The Commission “did not encourage or require” that the Bell tariff be brought before it. Furthermore, the minority stated that the Commission “is not interested in whether Bell offers this service or not; it did not become involved in or give its imprimatur to Caller ID. It only carried out its statutory duty to adjudicate requests that come before it.” *Barasch I*, 576 A.2d at 94-95 n.5 (Pellegrini, J., dissenting).

78. A limited blocking requirement may, however, raise questions of constitutional due process rights as it did in the lower court’s *Barasch I* decision. (The Pennsylvania Supreme Court did not address the due process question.) In that case, the Commission’s order to provide limited blocking was found to have lacked minimal due process standards guaranteed by the Fourth through the Fourteenth Amendments of the U.S. Constitution as well as Article 1 of the Pennsylvania Constitution. *Barasch I*, 576 A.2d at 89. The court found that the certification process required of those granted blocking constituted arbitrary government action, leaving unanswered many procedural questions such as how any appeal would be handled if certification were denied. Thus, how a PUC handles matters of blocking could invite constitutional review under the due process clause.

79. 418 P.2d 265 (Cal. 1966).

found that the termination of an individual's telephone service deprived him of "an essential means of communication for which there is no effective substitute" and was thus an infringement of his right of free speech.⁸⁰ Whether there is a constitutional right to telephone service has not been addressed directly by the U.S. Supreme Court.⁸¹ Nonetheless, if the privately owned telephone network were considered a public forum,⁸² Caller ID would only be a restriction on the manner of communication (part of the reasonable time-place-manner restrictions allowed by the State) and not a total ban on one's telephone communication.⁸³ The decision not to communicate by telephone is one of choice, plus it can be argued that telephone alternatives such as using a pay phone are available.⁸⁴

Of course it is the right of privacy which is at the heart of the debate raising the most conjecture and which will be discussed at length here. A right of privacy is not explicitly stated in the U.S. Constitution, although it has an implicit textual basis. For example, the Third and Fourth Amendments confer special protections on "persons, houses, papers, and effects" which easily suggest a privacy right. The Fifth Amendment affords a type of privacy in withholding information related to self-incrimination. The First Amendment has also suggested a notion of a right of privacy.⁸⁵ Courts have held that unless a substantial government interest is being served, an individual can claim a First Amendment right not to disclose personal information—a right to avoid compelled disclosure.⁸⁶

These Amendments to the Constitution, however, provide little support for a Caller ID challenge. The Third Amendment would, if anything, be arguably advanced in favor of Caller ID because of the service's ability to screen out telephone "intruders" into the home. The Fourth Amendment would not be entirely applicable since the State is not "searching and seizing" the CPI, but rather is allowing its subsequent disclosure. The Fifth

80. *Id.* at 270.

81. See Patrick O'Neill, *Medium of Equality?: The Right to Communicate by Telephone*, Paper Presented to the International Communication Association, Dublin, Ireland (June 1990).

82. *Id.* The courts have, without explicitly saying so, treated the telephone system much like a public forum in cases involving illegal activities performed over the network.

83. See *Whalen v. Roe*, 429 U.S. 589 (1977) (refusing to entertain a First Amendment claim because the effective exercise of speech was not directly at stake).

84. A similar argument could be made for a First Amendment right of freedom of association should petitioners argue that Caller Identification inhibits associations (which people may wish to keep anonymous). See *NAACP v. Alabama*, 357 U.S. 449 (1958), where the Court held that an order requiring the NAACP to disclose membership lists violated members' right of freedom of association. *But see O'Neal v. United States*, 601 F. Supp. 874 (N.D. Ind. 1985), where telephone subscribers' right of freedom of association was not violated by an Internal Revenue Service summons issued to a telephone company for its toll records since the summons was not for a list of association members necessarily and no harm was shown.

85. See Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977).

86. See Sara C. Spears & John Cooper, *Privacy Implications of Caller ID*, (paper presented to the International Communication Association, Chicago (May 1991)) (citing *DeGregory v. Atty. Gen. of New Hampshire*, 383 U.S. 825 (1966), *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), and *Watkins v. U.S.*, 354 U.S. 178 (1957)).

Amendment is hardly applicable, and a First Amendment claim is tenuous, since compelled disclosure *to* the telephone company is not at issue—they already know the number from which the call originates. At issue is whether disclosure *by* the telephone companies to other private parties is an invasion of privacy.⁸⁷ Moreover, a right of privacy has appeared in First Amendment cases as a description of an individual's interest in solitude—such as freedom from the blast of sound trucks or door-to-door salesmen⁸⁸—a claim advocates of Caller ID could arguably make in support of Caller ID.

Privacy is nonetheless considered a protected right as one of a collection of unenumerated rights, contained in the Bill of Rights, which are considered to be “penumbral” or “inalienable.”⁸⁹ A “structural” or “relational” argument for this constitutional protection⁹⁰ is found in the Ninth Amendment. The Ninth Amendment states that the “enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”⁹¹ James Madison and other drafters of the Constitution sought to assure that specifying certain guarantees would not be read as excluding others, and it is argued that one of these fundamental rights “retained by the people” is privacy.⁹²

Despite this foundation for privacy rights, a right of privacy was not recognized until many years later. A broad right of privacy under common law was first articulated in the late nineteenth century in a famous and influential law review article by Samuel Warren and Louis Brandeis.⁹³ Only within this century has it achieved constitutional recognition by the Supreme Court, solidifying largely into the privacy-based approaches of the Fourth Amendment and more recently the liberty and substantive due process clause of the Fourteenth Amendment.

It is the Fourteenth Amendment which may provide the surest constitutional basis for the right of privacy.⁹⁴ The Supreme Court first recognized the fundamental “right to privacy” as a constitutional right, partly rooted in

87. *Id.*

88. See, e.g., Jennifer L. Radner, Comment, *Phone, Fax, and Frustration: Electronic Commercial Speech and Nuisance Law*, 42 EMORY L.J. 359, 381-88 (Winter 1993); and Marilyn R. Kaplan, Comment, *Commercial Speech and the Right to Privacy: Constitutional Implications of Regulating 'Unsolicited' Telephone Calls*, 15 COLUMBIA J. L. & SOC. PROB. 277, 294-95 (1980).

89. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965); and Gerety, *supra* note 85, at 239-40 n.25.

90. See Gerety, *supra* note 85, at 239.

91. U.S. CONST. amend. XI.

92. See Stephen F. Rohde, *Origins of the Right of Privacy*, L.A. LAW., Mar. 1988, at 46.

93. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Their work initiated the development of this area of law.

94. U.S. CONST. amend. XIV. § 1. This provides that “[n]o state” shall “deprive any person of life, liberty, or property, without due process of law; . . .”

the Fourteenth Amendment, in its 1965 decision in *Griswold v. Connecticut*.⁹⁵ Still, the High Court has recognized this fundamental right only in very limited circumstances involving marital, sexual, family and reproductive matters.⁹⁶

Thus the protections of the Fourteenth Amendment may not be germane to Caller ID. For example, in *Paul v. Davis*,⁹⁷ the Supreme Court rejected a plaintiff's claim that a police department's circulation of a flyer depicting him as a shoplifter (when he had only been arrested and not convicted) had deprived him of procedural due process.⁹⁸ This type of government disclosure of information was considered to be "very different" from "fundamental" privacy interests such as those related to procreation and family.⁹⁹ The release of CPI may also be considered beyond the scope of a fundamental right.

3. Informational privacy and weighing of interests

Although the Supreme Court has never directly addressed the constitutionality of the government disclosing "personal" information, in 1977 it did recognize a "privacy interest in disclosure," giving birth to what might be considered a specific right of "Informational Privacy."¹⁰⁰ In *Whalen v. Roe*¹⁰¹ and later in *Nixon v. Administrator of General Services*,¹⁰² the Court suggested that an individual's interest in the continued confidentiality of personal information stored by the government may be protected by a constitutional right of privacy.¹⁰³ Moreover, the Court seemed to have

95. 381 U.S. 479 (1965) (holding unconstitutional a statute prohibiting the use of contraceptives). The Court did not agree on the source of the right of privacy. The Court stated that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that give them life and substance." *Id.* at 484. The First, Third, Fourth, Fifth, and Ninth Amendments were said to contain "various guarantees [that] create zones of privacy." *Id.* at 484. The concurring Justices stated that the Fourteenth Amendment's "concept of liberty protects those personal rights that are fundamental." *Id.* at 486.

96. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (abortion held constitutional).

97. 424 U.S. 693 (1976).

98. *Id.* at 712.

99. *Id.* at 713. Of course, any restricted or limited blocking requirement may raise questions of constitutional due process rights as it did in *Barasch I*, should the action be considered arbitrary and no appeal process (to receive any specially created blocking privileges) is available. This, however, would only apply to procedures concerning blocking and would likely occur only in isolated cases as procedures for regulating Caller ID are fine tuned.

100. This has been described as "the right of an individual not to have his private affairs made public by the government." The interest has been termed as "disclosural privacy," "the right to nondisclosure" and "the right to confidentiality." See Bruce W. Clark, *The Constitutional Right to Confidentiality*, 51 GEO. WASH. L. REV. 133 (1982).

101. 429 U.S. 589 (1977).

102. 433 U.S. 425 (1977).

103. *Whalen*, 429 U.S. at 599.

abandoned the requirement that the interest be a “fundamental” right.¹⁰⁴ This informational privacy right also appears to exist in a compilation of constitutional rights including the First, Fourth, Fifth and Fourteenth Amendments.¹⁰⁵

Whalen and *Nixon* are the only Supreme Court cases addressing a right of “informational privacy.” *Whalen* involved a privacy-based challenge to a New York law which required state officials to collect information about patients’ use of certain prescription drugs such as opium and cocaine. The plaintiffs had alleged that some people who needed such drugs would decline treatment out of fear that the information gathered would be misused. *Nixon* concerned the release of former President Nixon’s papers to government archivists to review and classify.

Although these cases are instructive, they still do not provide a standard for determining the permissibility of *subsequent* disclosure by the government (i.e., the telephone company). In both *Whalen* and *Nixon*, the Court determined that the risk of public disclosure of the information at issue was too minimal to warrant consideration, and therefore dealt only with the intrusion upon privacy caused by the information gathering itself. The Court did not determine whether the government can “intrude” upon an individual’s informational privacy by disseminating private information to the public, much less to the specific parties an individual purposefully calls. Thus, a Supreme Court precedent on informational privacy applicable to Caller ID is not available.

Of course *Whalen* and *Nixon* may be read by courts in a broad sense to include an informational privacy right in limiting the government’s subsequent dissemination of personally identifying information. It can be argued that in both cases, the plaintiffs’ genuine concern was not with the mere disclosure to the government, but rather that the information would become known to the public and harm their reputations.¹⁰⁶ Even so, the Court specifically limited *Whalen* to its facts, providing little support for a broad disclosure privacy interest.

Nonetheless, should a privacy right be found in subsequent disclosures, the courts must then *balance* the alleged privacy right against the legitimate interests served by the challenged conduct. In both *Whalen* and *Nixon*, the

104. See Gary R. Clouse, *The Constitutional Right to Withhold Private Information*, 77 NW. U.L. REV. 536 (1982).

105. In *Whalen*, the Court did not say where the interest is located although it was not found in the First or Fourth Amendment, seemingly suggesting that it exists in the Fourteenth Amendment. In *Nixon*, however, the Court focused on the First, Fourth, and Fifth Amendments. It is important to note that there is no discrete legal discipline called “information law,” rather it is so far a composite of legal concepts including torts, criminal law, contracts, personal and intellectual property and statutory law. See George Trubow, *Information Law Overview*, 18 J. MARSHALL L. REV. 815 (1985).

106. See Heyward C. Hosch, III, *The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis*, 36 VAND. L. REV. 139 (1983).

Court balanced these interests and found for the State.¹⁰⁷ In *Nixon*, the Court concluded that the public good which would result from the archival screening of the materials outweighed any harm to Nixon's interests.¹⁰⁸ In *Whalen*, the Court balanced the extent of intrusion against the interests that the intrusion advanced.¹⁰⁹ The Court acknowledged and examined two specific privacy guarantees: 1) The right not to disclose private information, and 2) The right to make personal decisions without interference.¹¹⁰ It concluded that the challenged interests were minimal.¹¹¹

These case lessons in balancing may still serve as a guide in weighing Caller ID privacy interests. When the *Whalen* Court considered the interest in nondisclosure of personal information, it considered whether there was proper security maintained over the data.¹¹² The Court found insufficient risks when it found that the prescription drug law in question required precautions and imposed criminal liability on any official who publicly disclosed a patient's identity.¹¹³ Caller ID may also meet this test with precautions in place ensuring the release of the CPI only to the called party, or with additional laws passed limiting the nature or extent of subsequent disclosures made by the called party.

The *Whalen* Court also found that the law did not infringe upon the patient's right of autonomy since that law did not totally prohibit the use of the prescription drugs.¹¹⁴ Likewise, Caller ID does not totally prohibit opponents' use of the telephone. Finally, in *Nixon* the public's interest, versus the private interest, was held paramount.¹¹⁵ Certainly it is here that many of the arguments—pro and con—surrounding the Caller ID debate will be weighed.

Turning to *Barasch I* and *Southern Bell I and II*, the courts in these cases did indeed weigh these Caller ID constitutional privacy interests, although reaching different conclusions. In *Barasch I*, the court weighed the interests of the calling party and called party and found in favor of the calling party.¹¹⁶ The court considered several areas to be serious privacy invasions, such as the caller having less control over the distribution of his or her number as well as the threat Caller ID poses to women in battered women's shelters to law enforcement officials, and to police informants, all

107. Balancing has been supported by lower federal courts, such as in *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

108. 433 U.S. at 465.

109. For a discussion, see Clouse, *supra* note 104, at 541-47.

110. 429 U.S. at 599-600.

111. *Id.* at 600.

112. *Id.* at 600-02.

113. *Id.* at 594-95.

114. *Id.* at 603.

115. 433 U.S. at 465.

116. *Barasch I*, 576 A.2d at 88.

of whom need anonymity.¹¹⁷ In *Southern Bell II*, however, the Court, in applying the balancing test, found the interests served by the service to be “substantial” and the interests of the called party to be largely “undetermined.”¹¹⁸ That Court considered the benefits of Caller ID to the called party as being able to avoid harassing, fraudulent, unlawful, and obscene calls.¹¹⁹ It also considered the service to be a surrogate for “911” services where “911” is unavailable as well as a help in reducing the number of bomb threats.¹²⁰

Clearly, with privacy interests on both sides, a legal determination is difficult. *If* state action is found, and *if* a right of informational privacy relevant to the subsequent disclosure of information is found, then further court interpretation may be needed in balancing these diverse interests. As an appropriate legal test is developed, several areas should warrant examination. These include: 1) the nature of the “expectation of privacy” involved, 2) the extent to which the privacy interests are substantial and the nature of the disclosure (i.e., is there a privacy interest or property interest in telephone numbers?), and 3) the privacy alternatives and safeguards available such as blocking. Privacy expectation is examined next, while the nature of the privacy interests and privacy alternatives and safeguards will be explored in later sections.

4. An expectation of privacy and the Fourth Amendment

Further balancing or weighing of rights as applicable to Caller ID will probably include an examination of the privacy expectations of telephone customers, including whether or not a customer’s number is unlisted. Although the Fourth Amendment is not directly applicable,¹²¹ Fourth Amendment telephone cases are still instructive since they address the notion of a constitutional right of privacy and the expectation of privacy relevant to telephone use. The Fourth Amendment supports a conclusion that individuals have legitimate expectations of privacy when connected with the fundamental liberty against arbitrary governmental intrusions. These intrusions—illegal searches and seizures by the government—are often contested in telephone wiretap cases and cases involving the release of telephone calling records to government authorities.

In 1928, the Supreme Court reasoned that warrantless wiretapping of a phone by government officials did not violate the provisions of the Fourth Amendment because wiretapping did not involve physical intrusion into one’s

117. *Id.*

118. *Southern Bell II*, 409 S.E.2d at 779.

119. *Id.*

120. *Id.*

121. This is because the State is not “seizing” the CPI, but rather allowing for its subsequent disclosure.

home.¹²² By 1967, however, the Supreme Court departed from the trespass doctrine in the landmark case *Katz v. U.S.*¹²³ In *Katz*, FBI agents acting without a warrant attached a listening device to the outside of a public phone booth to monitor the defendant's conversation.¹²⁴ The High Court, finding the practice to be an unconstitutional search and seizure, declared that the Fourth Amendment "protects people, not places."¹²⁵ It adopted a stance that sought to protect a person's legitimate and reasonable privacy concerns, stating that information which a person seeks to keep private should be constitutionally protected.¹²⁶

When the Supreme Court employed the *Katz* analysis in *Smith v. Maryland* in 1979,¹²⁷ it decided that the utilization of a pen register, which records the numbers dialed from a telephone,¹²⁸ did not constitute a search or necessitate a warrant under the U.S. Constitution.¹²⁹ The key to the case was the "expectation of privacy" involved—a test developed in *Katz* and articulated in *Smith*. In this case, where the telephone company used a pen register at police request to record the numbers dialed from the home of a man suspected of placing threatening calls to a robbery victim, the Court found there was no "expectation of privacy" in the numbers a person dials.¹³⁰

In *Smith*, two tests were applied: 1) whether individuals have shown that they seek to preserve (something) as private, and 2) whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as reasonable."¹³¹ Regarding the first test, the Court found that callers

122. *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled by Katz v. United States*, 389 U.S. 347 (1967). Justice Brandeis wrote a now famous dissent in *Olmstead*, stating that the Founders of the Constitution "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." 277 U.S. at 478 (Brandeis, J., dissenting).

123. 389 U.S. 347 (1967).

124. *Id.* at 348.

125. *Id.* at 351.

126. *Id.* at 351-52.

127. 442 U.S. 735 (1979).

128. Closest to Caller ID in legal precedent are pen registers and so-called "trap and trace" devices. A pen register is a mechanical device, usually installed by the telephone company at the central office, which can decode and record the numbers dialed *from* a particular telephone. Local exchange carriers typically use pen registers to monitor equipment and facilities or identify the source of obscene or abusive calls. A trap and trace device (sometimes known as a cross frame unit, card drop, and touch-tone decoder) captures electronic impulses which identify the originating number of an *incoming* wire or electronic communication. Neither device enables anyone to hear or record the content of the communication. Although Caller ID service is most similar to a trap and trace, most available legal precedent centers on the use of pen registers. Note also that a Caller ID unit cannot perform a trap and trace per se, since it is merely a display terminal only; the information is forwarded from the central office.

129. 442 U.S. at 745-46. Law enforcement agencies are now required to obtain warrants as required by the Electronic Communications Privacy Act of 1986 (codified at 18 U.S.C. §§ 2510-2521, 2701-2710, 3117, 3121-3126 (1988)).

130. *Id.* at 742.

131. *Id.* at 740.

could not entertain an actual expectation of privacy in the numbers they dial.¹³²

[W]e doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must “convey” phone numbers to the telephone company, since it is through the 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.¹³³

The Court also stated that people realize that devices are used for the purpose of checking billing operations, detecting fraud, and preventing violations of law such as obscene phone calls.¹³⁴ Moreover, the Court found that even though the caller in this case may have intentionally called from the privacy of his home in order to keep the *contents* of his conversation private, his *conduct* (placing the call) was not calculated to preserve the number he dialed.¹³⁵

In addressing the second test, the Court determined that if any such expectation of privacy existed, it was not one that society would recognize as reasonable.¹³⁶ The telephone user must assume the risk that the telephone company might reveal the information.¹³⁷

[E]ven if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not “one that society is prepared to recognize as ‘reasonable’.” . . . When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and “exposed” that information to its equipment in the ordinary course of business. In doing so, petitioner assumed the risk that the company would reveal to police the numbers he dialed. The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber.¹³⁸

The Supreme Court’s Fourth Amendment ruling has since been followed by courts such as the District Court of Appeals of Florida, First District, in *Yarbrough v. State*¹³⁹ and by a U.S. District Court in Colorado in *United States v. Mosko*.¹⁴⁰ Many other courts have found no expectation of

132. *Id.* at 742.

133. *Id.* at 742.

134. *Id.*

135. *Id.* at 743.

136. *Id.*

137. *Id.* at 744.

138. *Id.* at 743-44.

139. 473 So. 2d 766 (Fla. 1985).

140. 654 F. Supp. 402 (D. Colo 1987).

privacy in telephone toll records that would implicate a federal privacy right.¹⁴¹ The courts repeatedly say that subscribers take a risk when revealing their affairs to third parties (i.e., the telephone company) that the information will be conveyed to law enforcement officials.¹⁴² Courts in the past have also held that an expectation of privacy protected under the Fourth Amendment only extends to the content of telephone conversations and not to the records or the fact that conversations took place.¹⁴³

In applying the "expectation of privacy" test, Caller ID may receive the same protection under the Constitution as pen registers and toll records. If telephone customers have no expectation that the numbers they dial will not be given to the police, then there would also be no expectation that the numbers would not be given to the people they call. This will be especially true as Caller ID is openly marketed and customers are informed about the service.¹⁴⁴ The telephone customer will have assumed the "risk" when he or she voluntarily conveys to the telephone company (a third party) the number from which he or she has elected to call. Of course, the matter becomes complicated when unlisted/unpublished numbers are taken into account. The federal courts have not specifically considered the nature of unlisted numbers in the expectation of privacy test. For the same matter, other safeguards, such as using alternative communication means (pay

141. *United States v. Doe*, 537 F. Supp. 838 (E.D. N.Y. 1982); *United States v. X*, 601 F. Supp. 1039 (D. Md. 1984); *Kesler v. State*, 291 S.E.2d 497 (Ga. 1982); *United States v. King*, 335 F. Supp. 523 (S.D. Cal. 1971), *aff'd in part and rev'd in part* 478 F.2d 494 (9th Cir. 1973), *cert. denied* 414 U.S. 846, and *cert. denied* 417 U.S. 920; *Indiana Nat. Bank v. Chapman*, 482 N.E.2d 474 (Ind. Ct. App. 1985); *Hadley v. State*, 735 S.W.2d 522 (Tex. Ct. App. 1987); *In re Order for Indiana Bell Tel. to Disclose Records*, 409 N.E.2d 1089 (Ind. 1980); *United States v. Baxter*, 492 F.2d 150 (9th Cir. 1973), *cert. dismissed* 414 U.S. 801 (1973), *cert. denied*, 416 U.S. 940 (1974); *United States v. Grabow*, 621 F. Supp. 787 (D. Colo. 1985); and *State v. Hamzy*, 709 S.W.2d 397 (Ark. 1986).

142. It is of interest to note that in *Smith* (and other cases) the telephone company was considered a *third party* to whom the subscriber risked conveying information. In most cases, the telephone company provided the information at the request of the government. However, if a third party *voluntarily* (and not acting as an agent for the government) conveys confidential information to law enforcement officials, Fourth Amendment privacy rights are not applicable. See *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984). It may then follow that the voluntary, third party (telephone company) release of CPI to the called parties—the private sector—would be no more invasive. In other words, if a telephone company can voluntarily release call records to government agencies without infringing constitutional rights, then it would seem implausible that a release to private individuals should implicate constitutional question. Moreover, treating the telephone company as a third party would suggest a view that a telephone company is not synonymous with the government, but instead is an independent entity; therefore its actions would not warrant state action and the "expectation" test would not apply.

143. *Nolan v. United States*, 423 F.2d 1031 (10th Cir. 1969), *cert. denied* 400 U.S. 848 (1970); *United States v. Baxter*, 492 F.2d 150 (9th Cir. 1973), *cert. dismissed* 414 U.S. 801 (1973), and *cert. denied* 416 U.S. 940 (1974); *United States v. Lustig*, 555 F.2d 737 (9th Cir. 1977), *cert. denied* 434 U.S. 926 (1977), and *cert. denied* 434 U.S. 1045 (1978); *Re Order for Indiana Bell Tel. to Disclose Records*, 409 N.E.2d 1089 (Ind. 1980); *Hadley v. State*, 735 S.W.2d 522 (Tex. Ct. App. 1987).

144. *Southern Bell Rolls Out Caller ID*, PR NEWSWIRE, May 15, 1991. For example, in Florida, Southern Bell was to conduct a mailing to its customers informing them of the pending Caller ID service.

phones, the mail), have also not been taken into consideration by the federal courts.

Nonetheless, the Supreme Court's treatment of the expectation of privacy test has only narrowed under a more conservative makeup, suggesting no reversal in the near future on its position toward privacy in telephone numbers.¹⁴⁵ In just the last two decades, the Court has diminished expectations of privacy in automobiles, businesses, offices, backyards, trash bins and bank records.¹⁴⁶ For example, in 1976 the Supreme Court ruled that bank customers have no legitimate expectation of privacy in their bank records.¹⁴⁷ The Supreme Court has also let stand a lower court decision finding that no expectation or right of privacy exists for conversations conducted over cordless telephones.¹⁴⁸ Indeed, the federal courts, to date, have not ruled that a constitutional right to caller anonymity exists, and future litigation may very well hinge on an interpretation of whether there is a reasonable expectation of privacy. In the meantime, it appears Caller ID will withstand a challenge under the U.S. Constitution.

B. State Constitutions

State constitutional privacy rights must also be examined following a similar analysis as federal rights. Caller ID is thus far approved or disapproved on a state-by-state basis and may continue to be subject to litigation in state courts applying state law. It is therefore important to examine individual states' privacy laws, particularly the highest source of state law—state constitutions.

As on the federal level, state courts will first assess whether the telephone company offering rises to the level of "state action." A key question to watch, though, may be whether or not a state court is *even required to apply* the "state action doctrine" in reaching a determination of constitutionality on the state level. Such a determination may not be necessary. The minority in the lower court *Barasch I* case stated their belief that a state action analysis is a pre-requisite to the exercise of federal protections, but irrelevant to the application of state constitutional rights.¹⁴⁹ Thus, a determination of state action may not even be needed to invoke a state constitutional privacy right.

145. See Donald Crowley & Jeffrey L. Johnson, *Balancing and the Legitimate Expectation of Privacy*, 7 ST. LOUIS U. PUB. L. REV. 337 (1988).

146. For an analysis of these related cases, see Laurence A. Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 J. MARSHALL L. REV. 825 (1989).

147. *United States v. Miller*, 425 U.S. 435, 442 (1976). This has since been protected by the *Right to Financial Privacy Act of 1978*, 12 U.S.C.S. §§ 3401-3422 (1993), where customers must be given prior notice and allowed to contest government access to their records.

148. *Tyler v. Berodt*, 877 F.2d 705 (8th Cir. 1989), *cert. denied*, 493 U.S. 1022 (1990).

149. 576 A.2d at 94 n.5 (Pellegrini, J., concurring and dissenting).

Even so, several state courts have considered state action while rendering decisions pertaining to telephone companies and state constitutional rights. In *District Attorney for Plymouth District v. Coffey*,¹⁵⁰ a telephone company's installation of an on-line trapping (tracing) system did not amount to state action, where the action was merely incident to the rendering of its service and there was no court order or prior police participation.¹⁵¹ Also, in *State v. Holliday*,¹⁵² where the telephone company kept a record of allegedly harassing calls made by a subscriber, the telephone company and the complaining subscriber were not considered agents of the state government.¹⁵³ Thus, if a finding of state action is a prerequisite, state courts, like federal courts, may reach similar conclusions, excluding Caller ID from constitutional scrutiny.

Should Caller ID nonetheless fail the state action test, the service may be subject to tougher constitutional standards than found at the federal level. Some states have stricter constitutional guarantees for privacy. State courts, interpreting their respective state constitutions, are free to impose more stringent standards of government conduct than required by the U.S. Constitution.¹⁵⁴

Unlike the U.S. Constitution, ten state constitutions explicitly recognize a right of "privacy." Thus, in these states, Caller ID may need to meet a higher level of standard to be found constitutional, if a state constitutional question is raised.¹⁵⁵ For example, in the state of Washington, where an explicit, constitutional right of privacy exists, the Utilities and Transportation Commission (WUTC) staff considered Caller ID to be in violation of that state's constitution (as well as wiretap laws), because the Washington Supreme Court, in *State v. Gunwall*,¹⁵⁶ had determined that the telephone numbers one calls are *private* communications.¹⁵⁷ The deputy state attorney general also agreed, saying that the phone number and not just the call is considered a private communication protected by law in that state.¹⁵⁸

Nonetheless, in *Southern Bell II*, the South Carolina Supreme Court ruled that South Carolina's constitutional privacy rights, as well as federal constitutional privacy rights, were not violated¹⁵⁹ (even though its State

150. 434 N.E.2d 1276 (Mass. 1982).

151. *Id.* at 1279-80.

152. 169 N.W.2d 768 (Iowa 1969).

153. *Id.* at 771-72.

154. Jon M. Browning, *On Privacy, Pen Registers, and State Constitutions: The Colorado Supreme Court Rejects Smith v. Maryland*, 15 TOLEDO L. REV. 1467 (1984).

155. Indeed, a right of privacy applicable to Caller ID may not be raised. Although unusual in the Pennsylvania case, *Barasch I*, courts are not likely to address a constitutional question if the matter can be decided on non-constitutional grounds.

156. 720 P.2d 808 (Wash. 1986).

157. *Id.* at 816.

158. Jim Simon, *US West Drawing Flak Over Caller ID—Critics Say Phone System Runs Afoul of Privacy Laws, But Firm Seeks Changes*, SEATTLE TIMES, Jan. 18, 1991.

159. *Southern Bell II*, 409 S.E.2d at 780.

Constitution specifically affords a right of privacy.)¹⁶⁰ The Court referred to the expectation analysis in *Smith* and said that it could not hold that “the telephone number of the equipment from which a call has been placed is entitled to more privacy than the telephone numbers called by someone.”¹⁶¹ The telephone number is numerical information, voluntarily transmitted, and the service “simply does not violate any right that rises to the level of constitutional protection.”¹⁶²

Yet in Pennsylvania, where a right of privacy is not explicitly stated in its constitution, the Commonwealth Court in *Barasch I* recognized that an independent constitutional right of privacy exists in the Pennsylvania Constitution (Art. 1, Secs.1 and 8). Citing several Pennsylvania cases, the court ruled that an individual has a right of privacy in the case of his or her telephone number, hence making the “unauthorized seizure” of one’s telephone number unconstitutional.¹⁶³ Furthermore, “efforts to make distinctions between telephone numbers and conversational content are constitutionally untenable. . . .”¹⁶⁴

It is clear that an examination of individual case rulings in each state will be necessary to, at best, project a legal determination of the constitutionality of Caller ID service in each state. Some states¹⁶⁵ also have clauses which recognize fundamental, inherent, and inalienable rights which may or may not be interpreted to include an applicable right of privacy. It should also be noted that most if not all states have a constitutional provision for due process, which was also violated in the Pennsylvania case.¹⁶⁶

Comparable “Fourth Amendment” cases on the state level will serve to shed light on how state courts will handle state constitutional privacy rights as they consider and weigh competing Caller ID interests. Whether there is a reasonable “expectation of privacy” may be a pivotal factor since several state courts have not reached the same conclusions as the Supreme Court in *Smith* when interpreting their own state constitutional rights.

160. See Appendix, table 1.

161. 409 S.E.2d at 780.

162. *Id.*

163. *Barasch I*, 576 A.2d at 88. Bell of Pennsylvania, appealing the decision, however contends that the State Supreme Court has consistently held that the Pennsylvania Constitution protects the privacy of telephone calls from disclosure to third parties—not that “one party to a telephone call may assert a constitutional privacy right against another who is also a party to that same call.” See *Bell of Pennsylvania, Public Utility Commissioners Seek Appeal From Commonwealth Court Decision That “Caller ID” Service Violates State Wiretap Act, Constitutional Privacy*, TELECOMM. REP., Aug. 20, 1990, at 9. Again, the State Supreme Court did not rule on the question of constitutionality in *Barasch I*.

164. *Barasch I*, 576 A.2d at 88.

165. These include Alaska, Colorado, Idaho, Indiana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, and Wisconsin.

166. PA. CONST., Art. 1, § 1. (See *supra* note 78.)

Despite the High Court's stand, the Colorado Supreme Court subsequently reached a dramatically different conclusion in 1983 in *People v. Sporleder*.¹⁶⁷ The State Court held that the telephone subscriber does indeed have a legitimate expectation of privacy in the numbers dialed, and therefore declared that a pen register constituted an illegal search and seizure in the absence of a search warrant, exigent circumstances, or consent.¹⁶⁸ The Court stated that the telephone is a "necessary component of modern life" and that disclosing to a company the numbers dialed did not alter the caller's expectation that those numbers would be used only for internal telephone company business purposes.¹⁶⁹ The individual had the right to expect that the information would otherwise remain private; it is impossible to assume the risk when there is no other realistic alternative.¹⁷⁰

The Colorado decision points to more arguments (which may be raised at the Supreme Court). One critic points out that there is no evidence that the average telephone user is aware of the circumstances under which such a record is made, and that it is reasonable to assume that the absence of a listing of *local* calls on a monthly phone bill leaves most subscribers with the accurate impression that the phone company does not record such numbers.¹⁷¹ Also, the Supreme Court's *Smith* decision did not take into account possible abuses of the pen register (i.e., by private citizens and businesses—as might occur with Caller ID).

The *Sporleder* rationale was also followed in applying constitutional protections to pen registers in Pennsylvania,¹⁷² and to toll records in the states of California and New Jersey.¹⁷³ In *State v. Hunt*,¹⁷⁴ the New Jersey Supreme Court held that a warrantless seizure of telephone billing records violated the New Jersey Constitution (although not the U.S. Constitution).¹⁷⁵ This precedent is interesting since New Jersey was the first state to allow Call ID without much objection.

Other states have, however, followed the U.S. Supreme Court's *Smith* rationale. In *Yarbrough*, the Florida Appeals Court found that in addition to the U.S. Constitution, the rationale in *Smith* delineates the parameters of constitutional protection in Florida.¹⁷⁶ Essentially, Article 1, section 12 of the Florida Constitution conforms with the Fourth Amendment of the U.S.

167. 666 P.2d 135 (Colo. 1983).

168. *Id.* at 144.

169. *Id.* at 141.

170. *Id.*

171. Clifford S. Fishman, *Pen Registers and Privacy: Risks, Expectations, and the Nullification of Congressional Intent*, 29 *CATH. U.L. REV.* 557, 570 (1980).

172. *Commonwealth v. Melilli*, 555 A.2d 1254 (Pa. 1989).

173. *People v. Blair*, 602 P.2d 738 (Cal. 1979); *People v. McKunes*, 51 Cal. App. 3d (2nd Dist. Ct. 1975); *People v. Suite*, 101 Cal. App. 3d 680 (1st Dist. Ct. 1980); and *State v. Hunt*, 450 A.2d 952 (N.J. 1982).

174. 450 A.2d 952 (N.J. 1982).

175. *Id.* at 954-56.

176. 473 So. 2d at 767.

Constitution.¹⁷⁷ A similar decision was reached in a New York case, *People v. Di Raffaele*.¹⁷⁸ Interestingly, in California, where constitutional protection for toll records has been recognized, no state constitutional right was found when the police obtained, without a warrant, the name and address of a telephone subscriber from the telephone company.¹⁷⁹ This could suggest that courts may find a lesser degree of constitutional privacy protection for the release of names and addresses than for telephone numbers.

The dissent in *Sporleder* is also instructive, drawing a comparison between the numbers dialed and the information contained in an address on the outside of one's mail.¹⁸⁰ Courts have held mail cover searches to be constitutional when they do not delay the delivery of mail and only obtain information regarding the size, weight and address.¹⁸¹ The dissenting justices argued that routing information such as phone numbers does not warrant constitutional protection.¹⁸²

The issue of unlisted numbers, not addressed on the federal level, has been a key consideration in several state cases examining privacy expectations. In the state of Washington case of *State v. Butterworth*,¹⁸³ state constitutional privacy rights were held to be violated, where the police had obtained the defendant's unpublished telephone listing without a warrant.¹⁸⁴ Although the action was not considered a violation under the Fourth Amendment of the U.S. Constitution, the Washington Constitution, Article 1, section 7,¹⁸⁵ was determined to be broader and to provide greater privacy protection.¹⁸⁶ The state appeals court relied, in part, on *State v. Gunwall*¹⁸⁷ and *Sporleder* and stated that "since *Butterworth* specifically requested privacy regarding his address and telephone number in asking for an unpublished listing, we need not resort to assumptions about his expectation of privacy."¹⁸⁸

177. *Id.* Art. 1, § 23 (see Appendix, Table 1), which specifically addresses "privacy," was not introduced in this case.

178. 433 N.E.2d 513 (N.Y. 1982).

179. *People v. Lissauer*, 169 Cal. App. 3d 413 (1st Dist. Ct. 1985).

180. 666 P.2d at 146 (Erickson, C.J., dissenting).

181. Browning, *supra* note 154, at 1484 n.147.

182. 666 P.2d at 146 (Erickson, C.J., dissenting).

183. 737 P.2d 1297 (Wash. Ct. App. 1987).

184. *Id.* at 1301.

185. See Appendix, Table 1.

186. *Id.* at 1299.

187. 720 P.2d 808 (Wash. 1986).

188. *Butterworth*, 737 P.2d at 1300. The court also noted that even though Washington state law permitted the disclosure to police of a customer's electrical usage records, this case was different because of the specific steps taken to keep the information private. *Id.* at 1301.

In California, the Supreme Court in *People v. Chapman*¹⁸⁹ determined that under the California Constitution, Article 1, section 13,¹⁹⁰ the defendant had a “reasonable expectation of privacy” in the unpublished listing which police had obtained from the telephone company.¹⁹¹ The court said that 1) disclosure of one’s name and address to the telephone company is not entirely volitional, 2) such disclosure is plainly for the purpose of billing, and 3) by affirmatively requesting an unpublished listing, the defendant took specific steps to ensure greater privacy.¹⁹² Interestingly, the language of the California constitutional provision closely tracks that of the Fourth Amendment as do such provisions of many other states.

Still, the issue of unlisted numbers is not resolved. The New Jersey Board of Public Utilities argues that an unlisted number, while connoting an expectation of privacy, does not accord an unbridgeable right to privacy on the subscriber.¹⁹³ The Board explains that the unlisted option does not, and has never been intended to, provide a subscriber with complete anonymity.¹⁹⁴

Thus, the treatment of privacy and of caller anonymity—even in unlisted numbers—is not decided and is not consistent across states. Local legal precedent will play a chief role as evidenced by the *Barasch I* decision. However, an examination of all privacy-related precedent to produce a projected estimate of the legality of Caller ID across each state would unfortunately be beyond the scope of this analysis. At best, it can be said that if a determination of the constitutionality of Caller ID only remains at the state level, then Caller ID will likely be permitted in some states, but if challenged, might be found in violation of constitutional privacy rights in some states as well.

III. STATUTORY LAW—THE WIRETAP QUESTION

A. Federal Statutes

Congress has legislated the use of pen registers and trap and trace devices—laws which could also be construed to apply to Caller ID. U.S. Senator Herbert Kohl (D-Wis) has proposed new federal legislation—the Telephone Privacy Act—to amend federal wiretap law, U.S.C. Title 18, section 3121, to unequivocally allow for Caller ID, although with a mandate

189. 679 P.2d 62 (Cal. 1984).

190. Article I, Section 13 provides: “[T]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches may not be violated; and a warrant may not issue except on probable cause, . . .”

191. *Chapman*, 679 P.2d at 71.

192. *Id.* at 67-8.

193. *Re New Jersey Telephone Company*, 86 Pub. Util. Rep. 308 (N.J.B.P.U. 1987).

194. *Id.*

that telephone companies also offer blocking.¹⁹⁵ A Senate bill, along with a companion House bill, were originally introduced in 1990,¹⁹⁶ primarily to open debate on privacy issues, and then reintroduced in 1991.¹⁹⁷ The bills did not pass either House of Congress,¹⁹⁸ and so far only a Senate bill has been reintroduced in the 103rd Congress.¹⁹⁹ Thus to determine the present legality of Caller ID under statutory law, a careful examination of the current federal wiretap law is necessary.

One of the few federal wiretap cases which have dealt with trap and trace devices—devices considered most similar to Caller ID because they trace incoming calls—is *U.S. v. Seidlitz*,²⁰⁰ a case decided in light of the 1968 Wiretap Act.²⁰¹ In *Seidlitz*, the U.S. Court of Appeals, Fourth Circuit, determined that telephone traces which did not interfere with or observe the contents of dialogues but merely traced the source of communications were not illegal “interceptions.”²⁰² In this case, owners of a computer system had used a “spy” attachment in order to trace the location of an unauthorized online user of computerized information.²⁰³ The court reasoned that the intruder, Seidlitz, who was a computer expert, was undoubtedly aware that by their very nature, computers could record the data

195. S. 612, 103d Cong. 1st Sess., 139 CONG. REC. S3176-79 (daily ed. Mar. 18, 1993) (statement of Sen. Kohl). The purposes of the proposed Act are (1) to protect the right to privacy of telephone users by enabling them to limit the dissemination of their telephone numbers to persons of their choosing, (2) to encourage the use of new services which discourage harassing and obscene telephone calls even though information identifying the caller may be blocked, and (3) to require government entities to give public notice of their use of caller identification service. *Id.* at S3178.

196. S. 2030, 101st Cong., 2d Sess., 136 CONG. REC. S485 (daily ed., Jan. 29, 1990) (introduced by Sen. Kohl), and H.R. 4340, 101st Cong., 2d Sess., 136 CONG. REC. E782 (daily ed. Mar. 22, 1990) (introduced by Rep. Kastenmeier).

197. S. 652, 102d Cong., 1st Sess., 137 CONG. REC. S3283 (daily ed. Mar. 13, 1991) (statement of Sen. Kohl), and H.R. 1449, 102d Cong., 1st Sess., 137 CONG. REC. E965 (daily ed. Mar. 14, 1991) (statement of Rep. Synar). The House bill was introduced by Reps. Synar and Edwards. The House bill was similar to the Senate bill, although the former Senate bill had specified that only nongovernmental entities could use Caller ID, and that callers would not be able to block calls to 911 emergency services.

198. A Senate bill did pass the Senate Judiciary Committee in October 1991 and was changed in the process (S. Rep. 102-247). New revisions clarified that the service would be legal not only on a federal level but also in states such as Pennsylvania where it was declared illegal. Per-line blocking authorized by a state would be grandfathered, and 800 and 900 services would be prohibited from selling, reusing, or disclosing information obtained through Caller ID. *Caller ID Law Moves Forward*, NETWORK WORLD, Nov. 4, 1991, at 2. Neither House nor Senate bill passed during the 102nd Congress.

199. S. 612, 103d Cong. 1st Sess., 139 CONG. REC. S3176-79 (daily ed. Mar. 18, 1993) (statement of Sen. Kohl). *See infra* section VI.A.

200. 589 F.2d 152 (4th Cir. 1978), *cert. denied* 441 U.S. 922 (1979).

201. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510-2520 (1970). *See also*, *Michigan Bell Tel. Co. v. United States*, 565 F.2d 385 (6th Cir. 1977), where the court required Michigan Bell to cooperate with police in installing equipment to trap and trace calls because the device does not accomplish “aural” acquisition within the meaning of the federal act.

202. 589 F.2d at 156-57.

203. *Id.* at 153-55.

he sent and received.²⁰⁴ The court cited Congress' intent in excluding such devices under the 1968 Wiretap Act, quoting that the "legislation is not designed to prevent the tracing of phone calls . . . [it] is intended to protect the privacy of the communication itself and not the means of communication."²⁰⁵

Then in 1986, Congress amended the 1968 Wiretap Act, creating the Electronic Communications Privacy Act of 1986²⁰⁶ (ECPA) which now legislates the use of pen registers and trap and trace devices as well as provides more expansive guidelines on the illegality of certain interceptions. The ECPA generally forbids the interception of wire and oral communication as well as "electronic" communication, which includes data communication.²⁰⁷ The Act also amended the definition of intercept to include non-aural interceptions.²⁰⁸

The question of whether or not Caller ID violates the ECPA is a matter of close analysis and interpretation. The Act's effect on the access to information about the usage of telecommunications is varied. Some argue that there is no authority for the proposition that wiretapping law even applies in the context of Caller ID service. Bell Atlantic argues that wiretapping law is aimed at various forms of surreptitious interference outside normal network operations, which is not the case with Caller ID.²⁰⁹ Others believe that attacking the Caller ID issue from the wiretapping side is a "big waste of mental energy," arguing that "[i]t's a long stretch from wiretapping—from physically and secretly listening to a conversation—to delivering Caller ID" which involves the network's signaling channel and not the message carrying channel.²¹⁰

Even so, others, including Congress' research branch, the Congressional Research Service, claim that Caller ID violates the federal wiretap statute.²¹¹ Although pen registers and trap and trace devices are permissible under Chapter 119 of the ECPA,²¹² newly created Chapter 206 specifically limits the use of pen registers and trap and trace devices.²¹³ This portion of the ECPA governs the use, application, and issuance of orders for these devices, and generally prohibits any person, including law enforcement and

204. *Id.* at 160.

205. *Id.* at 157.

206. Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified at 18 U.S.C. §§ 2510-2521, 2701-2710, 3117, 3121-3126 (1988)).

207. 18 U.S.C. § 2511(1)(a), § 2510(12).

208. *Id.* § 2510(4) (Pub. L. No. 99-508 § 101(a)(3), substituted "aural or other acquisition" for "aural acquisition.")

209. *Caller ID Doesn't Violate Wiretap Act*, TRANSNAT'L DATA & COMM. REP., May 1990, at 22.

210. Dave Powell, *Is ANI an Invasion of Privacy?*, NETWORKING MGMT., Feb. 1991, at 25 (quoting J. Pisula, President of Teleos Communications, a manufacturer of ISDN systems).

211. 136 CONG. REC. E783 (daily ed. Mar. 22, 1990 (introduced by Rep. Kastenmeier)).

212. 18 U.S.C. § 2511(2)(h)(i) (1988).

213. *Id.* §§ 3121-3126.

other governmental authorities, from installing or using a pen register or a trap and trace device without first obtaining a court order.²¹⁴ In any event, there are exceptions.²¹⁵

The key exceptions which have sparked the most debate are found in sections 3121(b)(2) and (3). These sections specifically allow:

a provider of electronic or wire communication service . . . 2) to record the fact that a wire or electronic communication was initiated or completed in order to protect . . . a user of that service from fraudulent, unlawful, or abusive use of service; or 3) where the consent of the user of that service has been obtained.²¹⁶

It can be easily argued that Caller ID service, offered by the telephone companies, similarly protects users from abuse by obscene and crank callers and unwanted, potentially fraudulent solicitations. Moreover, by virtue of subscribing to the service, the user of the service has given his or her consent to have calls "traced."

Nonetheless, the Congressional Research Service (CRS), in a legal memorandum requested by the House Committee on the Judiciary, has stated that these exceptions appear to be inapplicable.²¹⁷ CRS stated that "caller identification equipment constitutes a 'trap and trace device' for purposes of the ECPA . . . regardless of whether a number or a name associated with the number are displayed after the trap and trace has occurred."²¹⁸ CRS primarily argues that a telephone customer is not authorized under the Act to employ a trap and trace device because permissible use is limited to *providers* (the telephone company). This overlooks the nature of the technology since "tracing" of the call occurs at the central office, not at the customer's premises, and is done as a service provided only by the telephone provider; the customer is incapable of independently tracing calls with a Caller ID device which is merely a display unit through which the telephone company provides the information. Moreover, the exception requires the consent of the user, clearly implicating necessary subscriber involvement.

214. *Id.* § 3121(a).

215. For example, the legislative history clarifies that "[d]evices used by a provider . . . incident to billing or cost accounting, or for any other similar purposes in the ordinary course of business are excluded from the definition of pen register. Thus, devices that many companies and firms use to record billable time for their clients' accounts are outside this bill's prohibitions against the installation and use of pen registers." (Senate Report No. 99-541, U.S.C.C.A.N. 3555 (1986).) Whether Caller ID could be included here is debatable, particularly since these exceptions were not said to apply to trap and trace devices but to pen registers (which record outgoing numbers and not incoming numbers).

216. 18 U.S.C. § 3121(b)(2)-(3).

217. 136 CONG. REC. E783 (daily ed. Mar. 22, 1990 (introduced by Rep. Kastenmeier)).

218. Including name identification is an interesting point since a name is not explicitly covered by the Act's definition of a trap and trace device—"a device which captures the incoming electronic or other impulses which identify the originating *number* of an instrument or device from which a wire or electronic communication was transmitted." 18 U.S.C. § 3127(4) (emphasis added).

CRS suggests that even if the exception could be read to embrace user rather than provider use, its authority seems limited to preventing toll fraud, obscene or harassing calls or similar abusive service. "It does not seem to permit perpetual use offered as a customer convenience."²¹⁹ CRS relies on the argument that since the ECPA now protects private networks and intracompany communications, Congress must therefore frown on perpetual use. This argument is interesting, but too thinly supported.

CRS analyzes the phrase "where the consent of the user of that service has been obtained." It states that the term "the user" rather than "a user" seems to imply that the exception is restricted to consent to use a trap or trace in connection with a particular call as opposed to continuous use which might have many users. "[O]ther users cannot be presumed to have consented . . . and the exception clearly envisions user consent rather than just subscriber consent."²²⁰ Moreover, CRS argues that the past tense of the phrase limits the use to instances where there has been *prior* consent. "Since the trap and trace has already occurred when the name associated with the calling number is displayed regardless of whether a 'user' chooses to answer the call or not, there is no 'the user' to consent when a call is not answered."²²¹

These arguments are easily refuted by noting that the service is available on a *subscription* basis. In the first place, the Caller ID subscriber is the person (or household, *etcetera*) to whom the particular line with the service is assigned; consent (for calls to be traced) by any other user of the subscriber's telephone is largely irrelevant.²²² Its continuous use and prior consent are also implied within the context of a subscription. Even the words "the user of that service" suggest the possibility of a regular, on-going type of offering.

Arguments made by others concerning the lawfulness of Caller ID focus on whether one or both (or all) parties to the communication must give consent and whether or not the telephone company, following a trace, may then proceed to disclose the identifying information to the subscriber. In the first instance, the term "the user of that service" (rather than "users") appears to preclude others. Also, in trap and trace court cases, the consent of nonparticipating callers has not been upheld as necessary under privacy law. In addition, Congressional intent to limit consent to one party may be inferred from other parts of the ECPA. Chapter 119, which is to be read in conjunction with Chapter 206, generally permits interceptions, such as telephone recordings of the conversation, where prior consent has been given

219. 136 CONG. REC. at E784 (daily ed. Mar. 22, 1990) (introduced by Rep. Kastenmeier).

220. *Id.*

221. *Id.*

222. If anything, a guest in a subscriber's home would seem to have little basis arguing that the identity of callers calling the guest be necessarily unidentifiable to the subscriber.

by just one of the parties to the communication.²²³ The only exception to this is if the purpose of the interception is for committing a criminal or tortious act in violation of law in which case one party consent is not enough. The legislative history reveals that even this qualification was particularly narrowed from the 1968 Act because Congress wanted to prevent such claims as mere embarrassment (a privacy tort) as an exception to the single party consent requirement.²²⁴

Regarding the telephone company's liability for making calling party identification available, one may first consider the distinction between the disclosure of content and noncontent (or usage) information. In general, the ECPA prohibits those who are not a party to the communication from disclosing its "contents"²²⁵—information concerning the substance, purport, or meaning of the communication.²²⁶ With the 1986 amendment, Congress intentionally deleted from the 1968 contents definition the "identity of the parties" and the "existence . . . of communication," thereby essentially permitting the disclosure of the existence of communication and the identities of the conversants.²²⁷ One may also look to the newly created Chapter 121 addressing stored wire and electronic communications and transactional (such as toll) records access. The ECPA generally prohibits an electronic communications service provider from knowingly divulging the contents of any stored electronic communication.²²⁸ An exception to this provision, however, is that the contents of a communication may be divulged to the "addressee or intended recipient of such communication."²²⁹ (This also suggests once again the necessity for only single party consent.) Moreover, concerning noncontent information, the Act permits a provider of electronic communication service to disclose to *any person* other than a governmental entity, a record or other information pertaining to a subscriber or customer of such service.²³⁰ Under the ECPA, providers may now disclose non-content information, such as billing and administrative records regarding subscriber or customer accounts to nongovernmental entities, without liability. Hence, the release of calling party identification by the telephone

223. 18 U.S.C. § 2511(2)(d) (1988). This provides "[i]t shall not be unlawful under this chapter for a person not acting under color of law to intercept a[n] . . . electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent. . . ."

224. Senate Report No. 99-541, U.S.C.C.A.N. 3555 (1986).

225. 18 U.S.C. § 2511(1)(c).

226. *Id.* § 2510(8).

227. Russell S. Burnside, *The Electronic Communications Privacy Act of 1986: The Challenge of Applying Ambiguous Statutory Language to Intricate Telecommunications Technologies*, 13 RUTGERS COMPUTER & TECH. L.J. 451, 506 (1987).

228. 18 U.S.C. §§ 2702(a)(1) and (2).

229. *Id.* § 2702(b)(1).

230. *Id.* § 2703(c). Governmental agencies must obtain a warrant, subpoena, court order or consent. *Id.* § 2703(c)(1)(A).

companies to a Caller ID subscriber would certainly appear permissible under the ECPA.

Thus, absent a federal law prohibiting Caller ID, it would appear that Caller ID could survive the prohibitions of interception and disclosure under current federal statutory law. Even the CRS stated that the courts "might consider the privacy interest involved relatively minor and accordingly find that Congress did not intend to preclude the use of such equipment."²³¹

It should be noted that there are other federal statutory laws besides the ECPA which deal with privacy concerns, but none of these is applicable per se. Since the enactment of federal wiretap law, section 705 (formerly section 605) of the Communications Act of 1934²³² only prohibits the interception of *radio* communication. The Freedom of Information Act (1966)²³³ concerns the availability of personal information contained in federal records, and although it restricts from public inspection information that would constitute a "clearly unwarranted invasion of privacy," this information generally considers personnel, medical and investigatory records.²³⁴ The Privacy Act of 1974²³⁵ regulates the data collection and dissemination activities of federal agencies, requiring consent of the individual, and provides a procedure to allow individuals access to such personal records—which records include name and identifiable numbers. The Act is applicable only to federal agencies,²³⁶ however, and was not made applicable to private industry.²³⁷ A statute which does pertain to private entities is the Cable Communications Policy Act of 1984,²³⁸ which created a national standard for the protection of subscriber privacy by regulating the collection, use and disclosure by cable operators of personally identifiable information about subscribers without their consent. This information includes names, addresses, and telephone numbers. Although this Act would not pertain to telephone common carriers, its substance is worthy of note because it may become directly applicable should cable-telephone company cross-ownership be permitted.

Neither the Pennsylvania nor the South Carolina courts ruled on the legality of Caller ID under federal statutory law. Both states' courts did consider their own respective state wiretap laws, however. For this reason, it is also important to consider the individual state laws applicable to Caller ID.

231. 136 CONG. REC. at E783.

232. 47 U.S.C. § 705.

233. 5 U.S.C. § 552.

234. *Id.* § 552(b)(6).

235. *Id.* § 552a.

236. *Id.* § 552a(1).

237. *See* Legislative History, 1974 U.S.C.C.A.N. 6916, 6934-36.

238. 47 U.S.C. §§ 521-611.

B. State Statutes

States may regulate Caller ID, and in fact, some state laws are precisely the focus of the current privacy debate. An analysis of state laws is critical. In light of the conflicting decisions of the two state courts so far, Caller ID may be only allowed in some states and possibly taken away in some states where it is already available.

California, North Dakota and Texas are the only states thus far with laws enacted to specifically address Caller ID.²³⁹ Absent specific Caller ID legislation, the legal question for the remaining states will generally turn on an analysis of the state wiretap statutes. A review of all states' wiretap statutes reveals that 23 states have laws dealing with trap and trace devices.²⁴⁰ Twenty-one of those state laws are identical (or virtually identical) to the ECPA.²⁴¹

Each of these 21 state laws provides two particular, relevant exceptions (as found in the ECPA):

- 1) For a provider of electronic communication service to use a trap and trace device to record the fact that an electronic communication was initiated or completed in order to protect a user of that service, from fraudulent, unlawful, or abusive use of the service; or
- 2) where the consent of the user of that service has been obtained.

Unfortunately, the difficulty in knowing whether these exceptions are applicable to Caller ID rests with court interpretations. While the South Carolina Supreme Court accepted these exceptions, the Pennsylvania Supreme Court ruled differently. Although the Pennsylvania provision²⁴² is nearly identical to that of the ECPA, the Court determined that unlike the ECPA, *all-party* consent is required in Pennsylvania.²⁴³ The Court came to this conclusion by interpreting the intent of the provision together with the *underlying* Pennsylvania Wiretap Act which is much more protective of individual rights than the corresponding federal legislation.²⁴⁴ Another section of the state law, for example, prohibits a person from intercepting electronic communications unless *all* parties have given consent.²⁴⁵ Moreover, the Pennsylvania courts have consistently held that the recording of telephone conversations by a private party must have the consent of *all*

239. See *supra* note 31, and see *infra* part VI.A.

240. See Appendix, Table 2.

241. State wiretap laws vary, even though the ECPA required states to be in compliance with its provisions within two years of its enactment.

242. Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. Ann. § 5771 (1993) (as amended in 1988 in compliance with the federal law).

243. *Barasch II*, 605 A.2d at 1202-03.

244. *Id.* at 1203.

245. 18 Pa. Cons. Stat. Ann. § 5703.

parties.²⁴⁶ Where the consent of only one party is required, the Wiretap Act has so stated.²⁴⁷ The Court also stated that the term “user” could mean anyone using the telephone network, including the calling party.²⁴⁸ The service violates the law because it is being used for “unlimited purposes” without consent.²⁴⁹ Finally, the Court maintained that it is the customer and not the telephone provider (who would be excepted) who is “capturing” the data and controls the Caller ID device.²⁵⁰

Although South Carolina’s wiretapping law is almost identical, the South Carolina Supreme Court distinguished its decision from *Barasch I*,²⁵¹ finding that South Carolina does not have a similar (and extensive) statutory scheme as Pennsylvania.²⁵² “Nowhere in the South Carolina Act is the term ‘all parties’ utilized by the General Assembly so as to require both parties to consent.”²⁵³ The Court stated that the choice of the singular term “user” must, in this context, be understood to be the Caller ID subscriber.²⁵⁴ The Court also distinguished the South Carolina law from the Pennsylvania law by pointing out that in South Carolina, special legislative action to exempt police and emergency communications (i.e., “911”) from the wiretapping law is not required as it was in Pennsylvania.²⁵⁵ Regardless, the Court found the service to be lawful due to the exception pertaining to its use in protecting subscribers against fraud or abusive use.²⁵⁶ Even though the *Barasch I and II* courts did not consider this exception, the South Carolina Court stated that “there can be no doubt that Caller ID service is designed to protect the utility’s subscribers from abusive or unlawful telephone calls.”²⁵⁷ Finally, the South Carolina Supreme Court did not address the issue but the trial court maintained that the subscriber and the Caller ID device are incapable of independently “capturing” and/or displaying the calling party’s telephone number; only the telephone company (who would be excepted) conducts the trap and trace.²⁵⁸

246. See, e.g., *Commonwealth v. Jung*, 531 A.2d 498 (Pa. Super. 1987), cited in *Barasch I*, 576 A.2d at 93 (Pellegrini, J., concurring and dissenting).

247. It is interesting to note that 18 Pa. Cons. Stat. Ann. § 5704(9) allows one-party consent for recording computer communications, electronic mail, and voice mail.

248. 605 A.2d at 1203.

249. *Id.* at 1202.

250. It was also argued that two traps take place—the first by the telephone company and the second when the calling number is deposited and stored in the Caller ID device.

251. The rationale in the lower court (Pennsylvania) decision was similar to that of the Pennsylvania Supreme Court decision.

252. *Southern Bell II*, 409 S.E.2d at 777.

253. *Id.*

254. *Id.*

255. *Id.* at 777-78.

256. *Id.* at 777.

257. *Id.*

258. *Southern Bell I*, No. 90-CP-40-2686, at 3.

Thus, decisions in other states (or at least those with the trap and trace provisions) may hinge on 1) interpretations of each state's legislative histories and statutory schemes on wiretapping (i.e., who is/are the "user" and who must "consent"), 2) interpretations of who "captures" (intercepts) the CPI, and 3) whether an exception pertaining to fraud and abusive use exists and is considered applicable.

So far in several states with trap and trace provisions, Caller ID has been considered illegal. In Texas, the PUC had declared that Caller ID violated that state's wiretapping laws (although the Legislature recently remedied the problem, allowing for Caller ID, provided that blocking was available.²⁵⁹ In Florida, the Attorney General said the service may violate the Florida wiretap laws.²⁶⁰ The North Carolina Attorney General also filed an opinion following the *Barasch I* decision, stating that Caller ID is a commercial application of technology which constitutes a trap and trace device in violation of the North Carolina (and federal) law.²⁶¹ As for the "consent" exemption, the North Carolina analysis noted that a user could consent to a trap and trace for purposes of a telephone or police investigation, but the exemption could not be construed to include a *continuously operating* trap and trace device used by the subscriber and not the telephone provider.²⁶² In response, Southern Bell argues that the "capture" takes place in the telephone company's central office and thus is performed by the provider in conformance with the trap and trace law.²⁶³

Other state statutes are less clear. Nevada (and Texas) mentions trap and trace devices but seems to require a court order for its use, without exceptions.²⁶⁴ Some states (such as Texas), however, have provisions allowing a provider to divulge the contents of communications to the "addressee" or "intended recipient."²⁶⁵ Others allow communications to be "intercepted" with prior consent by one party (Alabama, Nevada, Wyoming, Iowa, Rhode

259. See *supra* note 31.

260. *Caller ID Roundup*, COMM. DAILY, Dec. 11, 1990, at 3.

261. *Caller ID Violates N.C., U.S. 'Trap and Trace' Law, Attorney General Tells Commission*, TELECOMM. REP., July 23, 1990, at 8.

262. *Id.*

263. *Southern Bell Argues That Caller ID Unit Does Not Constitute 'Trap and Trace' Device*, TELECOMM. REP., Aug. 13, 1990, at 15.

264. NEV. REV. STAT. ANN. § 199.540 (Michie 1993); TEX. PENAL CODE § 16.03 (1993) (this is prior to the 1993 changes permitting Caller ID, see *supra* note 24). Caller ID is nonetheless available in Nevada.

265. TEX. CODE CRIM. PROC. ANN. art. 18.21 (West 1993).

Island, Missouri, District of Columbia)²⁶⁶, or specifically require consent from all parties (Washington²⁶⁷).

Assessing the statutory schemes of every state's wiretapping law would again be beyond the scope of this analysis. It does appear, however, that the courts in some states may interpret their laws to permit Caller ID. In Maryland, the Attorney General has determined that the courts there would likely require the consent of only one party.²⁶⁸ Precedent in Massachusetts suggests that state's wiretap law may not be violated because the Massachusetts statute expressly permits telephone companies to trace calls and disclose the results when necessary to prevent unlawful, harassing calls.²⁶⁹ Some argue that this type of allowance found in some state statutes would only apply to Call Trace and 911e applications and not Caller ID. Yet in New Jersey, the Superior Court stated that their wiretap statute is not even applicable to the installation of tracing equipment because there is no interception; detecting the identity of a caller is not the result of overhearing word or sound.²⁷⁰

The states may respond like California by creating legislation specifically exempting, limiting, or prohibiting Caller ID. For example, U.S. West is proposing legislation to exempt all "tariffed services" from the specific wiretap provisions. And although a public utility commission has no jurisdiction to decide the legality (under criminal statutes) of Caller ID,²⁷¹ the Washington Utilities and Transportation Commission has said that the legal problems in that state may be resolved through a "carefully crafted tariff."²⁷²

IV. PRIVACY UNDER COMMON LAW

This analysis looks next to common law to examine the scope of invasion of privacy torts. In the absence of applicable constitutional or statutory protections, protection may be sought from the body of tort law. Moreover, an examination of applicable torts is useful in discovering various recognitions of an "informational privacy right," and how the courts have handled

266. ALA. CODE § 13A-11-30 (1993); ALA. CODE § 13A-11-31 (1993) (although pertaining to "eavesdropping"); NEV. REV. STAT. ANN. § 200.620 (1993); WYO. STAT. § 7-3-602 (1993); IOWA CODE § 808B.2 (1993); R.I. GEN. LAWS § 11-35-21 (1992); MO. REV. STAT. § 542.402 (1992); D.C. CODE ANN. § 23-542 (1993).

267. WASH. REV. CODE § 9.73.030 (1991). Although Washington's statute does also say that wire communications "which occur anonymously or repeatedly or at an extremely inconvenient hour . . . may be recorded with the consent of one party to the conversation." *Id.*

268. *Maryland Commission Directs C&P to Offer Free Per-call Blocking With Caller ID*, TELECOMM. REP., Nov. 26, 1990, at 5.

269. District Atty. for Plymouth Dist. v. Coffey, 434 N.E.2d 1276, 1276-77 (1982).

270. State v. Droutman, 362 A.2d 1304, 1311 (1976). See also State v. Murphy, 349 A.2d 122 (N.J. 1975), *rev'd on other grounds*, 372 A.2d 1315 (N.J. 1977).

271. See *Southern Bell I*, No. 90-CP-40-2686, at 4.

272. Letter from Washington Utilities and Transportation Commission to interested persons, Nov. 30, 1990, available in TELEGIS, File No. WA35 (expressing Commission's views on ANI service).

and weighed such claims of privacy invasion from a common law perspective.

Privacy law began its modern history as a tort. Originally, common law gave a remedy only for physical interference with life (such as bodily injury) and property. Then came a recognition of mankind's spiritual nature, feelings and intellect (such as with copyright and libel law). Gradually the scope of these rights broadened to mean "the right to enjoy life—the right to be let alone."²⁷³ This idea was first introduced into American jurisprudence in 1890 by Samuel Warren and Louis Brandeis in their well-known law review article, *The Right to Privacy*.²⁷⁴ A common law cause of action known as "invasion of privacy" has since been recognized by courts and legislative bodies as a means of protecting against unwarranted intrusions into one's affairs. Essentially, one who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.

In 1960, Dean Prosser synthesized hundreds of cases recognizing a right of privacy actionable in tort.²⁷⁵ Prosser's widely accepted analysis breaks down the privacy invasion lawsuit into four separate torts: 1) appropriation, for the defendant's advantage, of the plaintiff's name or likeness, 2) publicity which places a person in a false light in the public eye, 3) public disclosure of embarrassing, private facts about the plaintiff, and 4) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.²⁷⁶ For the most part, it appears that a privacy action here would not qualify for recovery under any of these four recognized categories.

The first two torts—appropriation and false light—have little direct relevance to Caller ID. The appropriation tort generally involves the commercial use of someone's notoriety or prestige without permission, such as an unauthorized product endorsement.²⁷⁷ While this tort protects an interest which seems to rest upon a "proprietary" right in one's name or likeness, it is the person's name as a symbol of his or her identity that is involved here,²⁷⁸ and not his or her name as a mere name. The same would be true with the transmission of a person's name or telephone number via Caller ID service. While it may be possible that a company which takes product orders over the phone could advertise that a particular caller i.e., a celebrity) is their customer, this situation could also occur when a customer

273. Warren & Brandeis, *supra* note 93, at 193.

274. They were prompted to write the article because of Warren's personal annoyance with press coverage of the lives of his socially elite family. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960). Because of this, their article is primarily concerned with what Prosser categorizes as public disclosure of embarrassing, private facts. *Id.* at 392.

275. *Id.*

276. *Id.* at 389. His concepts have since been alluded to in most privacy cases and by most scholars, as well as reflected in the RESTATEMENT (SECOND) OF TORTS § 652B (1977).

277. See Prosser, *supra* note 274, at 401-07.

278. *Id.*

orders a product by mail, uses a credit card, or enters a store in person.²⁷⁹ The matter is not a direct consequence of Caller ID.

Likewise, the tort of false light could only come into play indirectly. For example, if someone makes obscene phone calls while using another person's phone, that might implicate that person who may then be placed in a false light. The tort of false light, which deals with non-libelous falsehoods about a person, requires that the matter be made public.²⁸⁰ Moreover, it must be something that would be objectionable to an ordinary, reasonable person—not merely minor errors such as mistaken identity.²⁸¹

The intrusion and public disclosure torts, while worthy of examination, would likely not be met by a claim because of the standards that must be met to be actionable. The intrusion tort involves intentional intrusion, physically or otherwise, upon the solitude or seclusion of another or his or her private affairs or concerns.²⁸² This tort usually applies to physical intrusions and has little relevance to information law, except to the extent that it includes intrusions such as wiretapping, eavesdropping, using hidden microphones and unauthorized prying into personal bank accounts and confidential records.²⁸³ Aside from the technical arguments as to who (telephone company or subscriber) is doing the intruding, the intrusion must be found to be "offensive and objectionable" to a reasonable person.²⁸⁴ Merely having a number or name displayed would hardly seem "offensive."²⁸⁵

Also, Prosser explains that the thing into which there is prying or intrusion must be, and entitled to be, private.²⁸⁶ It is certainly arguable as to whether or not a telephone number or name is a private fact and not a public fact. These facts are contained in city directories and many public records. Even if unlisted numbers were considered a private fact, name identification, in itself, would not be. Of course, it may be argued that it is the name combined with the context of the call which renders the name

279. It might be argued that a business which uses the identification of a caller for commercial purposes (such as compiling and selling the names to other businesses) would be in violation of this tort. However, for the above reasons, this would not be the case. In *Shibley v. Time, Inc.*, 40 Ohio Misc. 51, 321 N.E.2d 791 (1974), *aff'd* 341 N.E.2d 337 (1975), the court found that none of the four judicially recognized categories of privacy were violated in an action where a magazine publisher, without consent, sold and rented its list of names and addresses to others for commercial purposes. *Id.* at 794-95. This conduct continues to be widespread.

280. Prosser, *supra* note 274, at 400.

281. *Id.*

282. *Id.* at 390.

283. *Id.*

284. *Id.* at 391.

285. In *In re Rosier*, 717 P.2d 1353 (Wash. 1986), the court stated that the release of an individual's electrical usage records would not be "highly offensive" to a reasonable person. *Id.* at 1359. Yet, the Washington Appeals Court in *State v. Butterworth*, 737 P.2d 1297 (Wash. 1987), remarked that if the information in *Rosier* had been contained in an unpublished telephone listing, its disclosure might have been "highly offensive." *Id.* at 1301. The court, however, offered no reasoning for this comment.

286. Prosser, *supra* note 274, at 391.

private. Still, a person may not be *entitled* to place totally anonymous calls. In *Southern Bell I*, the court found persuasive a tariff provision which provides that “[t]he calling party shall establish his identity in the course of any communication as often as may be necessary.”²⁸⁷ On top of this, a Caller ID subscriber could counter a claim of intrusion with a similar claim. After all, it is the caller who first intruded upon the called party’s solitude with the telephone call. Caller ID is, in fact, a service designed to guard against or manage intrusions.²⁸⁸ Plus, it may be difficult for the caller to argue that his and her number or name is more private and entitled to be more private than that of the person he or she is calling (and whose number he or she knows).

Finally, the tort of public disclosure of embarrassing private facts, which went to the heart of Warren and Brandeis’ analysis, is analogous to the concept of information privacy and might seem to be most relevant to the calling party’s concern. This tort would most likely implicate the telephone company, although again it offers little support. In the first place, the information involved, as with the intrusion tort, must be “offensive” to a reasonable person.²⁸⁹ Prosser remarks that “[a]ny one [sic] who is not a hermit must expect the more or less casual observation of his neighbors and the passing public as to what he is and does, and some reporting of his daily activities.”²⁹⁰ Again, the receipt of CPI is hardly offensive. Secondly, whether or not a name or telephone number is a private fact is again debatable. Prosser further describes here what is private and what is public by pointing out that what is public is a matter that is public record unless that record is confidential such as income tax returns.²⁹¹ He points out that, according to precedent, no one is entitled to complain when there is publication of his or her date of birth, marriage, or the fact that he or she drives a taxicab.²⁹² An individual’s home address is a public fact which

287. *Southern Bell I*, No. 90-CP-40-2686 at 15 (quoting from the *General Subscriber Service Tariff* § A2.2.2.)

288. The Supreme Court has even recognized the right of receivers in *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970). In this case, the Court said “[n]othing in the Constitution compels us to listen to or view any unwanted communication . . . [T]he ancient view that ‘a man’s home is his castle’ into which ‘not even a king may enter’ has lost none of its vitality . . .” regarding unsolicited and unwanted mail) *Id.* at 737.

289. Prosser, *supra* note 274, at 396.

290. *Id.* at 396-97.

291. *Id.* at 394-96.

292. Unless, of course, such information is protected by specific statutory law. For example, in Massachusetts, the sale of motor vehicle records identifying owners’ dates of birth was contested as a violation of that state’s Fair Information Practices Act, which restricts the release of personal data held by government agencies. One plaintiff successfully argued that potential employers would discriminate against him if they learned his age. Two other people involved in relationships with younger partners successfully argued that they feared embarrassment and harassment if their ages were known. On appeal, however, the plaintiffs admitted that the name and address of a car owner is a public record and its disclosure is not prohibited. The court agreed, determining that the release of date of birth and height are restricted by state law *but not one’s name and address*. See THOMAS E. MCMANUS, TELEPHONE TRANSACTION-

may be disclosed.²⁹³ CPI would indeed seem to fall into this latter category. Thirdly, this tort deals with publicity and would require that the information be communicated to the public at large and not just the called party or even a small group of people. Finally, for this tort to be brought, the information must not be a matter of legitimate public concern. It must fail "local standards regarding how much exposure a member of society should be required to put up with."²⁹⁴ Although these standards are not entirely known, it can be said that a significant portion of the population favors Caller ID.²⁹⁵ The service can be used for thwarting obscene and harassing calls which are legitimate public concerns. Thus, because CPI is not exactly communicated to the public at large, is hardly "offensive," and has some element of legitimate public interest, a tort cause of action in this case would probably not be found. Of course with Caller ID, it is conceivable that if a person (i.e., a public official) makes a "sensitive" call (i.e., to a drug rehabilitation center or a clinic for venereal disease) his or her identity and the "embarrassing" nature of the call could end up in the press. But this scenario could also occur with other forms of communication and is again not a problem inherent in the service itself.

The liability of the telephone company under common law for releasing CPI may otherwise turn on what may be considered to be more direct consequences of the service—such as a surge in unwanted telephone solicitations or the regrettable identification of the location of a woman in a battered women's shelter. Examples of privacy cases involving the publication or release of one's address are instructive to this analysis since identification of a person's address could be considered equally if not more of a privacy concern. Although an issue seldom raised, the courts have held that the publication of a person's residential address is NOT an invasion of his or her privacy.²⁹⁶ In one case, a court found that employees' rights to privacy were not invaded by a National Labor Relations Board order requiring an employer to release its employees' addresses and names.²⁹⁷ The court reasoned that those employees who did not welcome visits to their homes were free to turn the visitors away and would have the protection of

GENERATED INFORMATION: RIGHTS AND RESTRICTIONS 57-58 (May 1990) (citing *Doe v. Registrar of Motor Vehicles*, 26 Mass. App. Ct. 415, 528 N.E.2d 880 (1988)).

293. See *McNutt v. New Mexico State Tribune Co.*, 538 P.2d 804 (N.M. Ct. App. 1975), *cert. denied*, 540 P.2d 248 (N.M. 1975), where police officers' names and addresses were considered a public fact and their mere publication, without more, could not be viewed as an invasion of privacy.

294. *Deckle McLean, Unconscionability in Public Disclosure Privacy Cases*, COMM. & L., Apr. 1988, at 39.

295. See *supra* note 23.

296. See Philip E. Hassman, Annotation, *Publication of Address As Well As Name of Person As Invasion of Privacy*, 84 A.L.R.3d 1159 (1978 & 1989 Supp.).

297. *NLRB v. British Auto Parts, Inc.*, 266 F. Supp. 368 (C.D. Cal. 1967), *aff'd* 405 F.2d 1182 (9th Cir. 1968), *cert. denied* 394 U.S. 1012 (1969).

the law in doing so.²⁹⁸ A class action suit against the release of employees' names and addresses by an agency in a similar case was dismissed when the court found a claim that the people would be subjected to unsolicited messages to be insufficient to create an actionable invasion of privacy because a mailing of unsolicited messages not amounting to harassment is not actionable.²⁹⁹ Thus, courts might view the release of CPI in similar fashion and discard opponents' objections that telemarketing and other firms will abuse the availability of CPI with unwanted phone call solicitations.

Although there are not many cases, there are a few lower court cases involving the disclosure of a telephone customer's address or phone number by a telephone company when that subscriber has an *unlisted* phone number.³⁰⁰ In *Montinieri v. Southern New England Tel. Co.*,³⁰¹ the jury found a telephone company not liable for causing emotional distress by the unintentional release of the address of subscribers having an unlisted telephone number, even though the people were, in fact, taken hostage by a person who subsequently went to their home.³⁰² No liability would have existed unless the telephone company should have realized that its conduct involved an "unreasonable risk" of causing distress that might result in illness or bodily harm.³⁰³ (Would releasing CPI cause such an "unreasonable risk?") The jury in the case was allowed to consider that the plaintiffs also surrender part of their privacy to the public domain in other ways, such as when they obtain driver's licenses and motor vehicle registrations and have their names published in the city directory.³⁰⁴ In another case, *New York Times Co. v. Givens*,³⁰⁵ the court found that the plaintiff newspaper could compel a telephone company to reveal the name and address of a telephone subscriber for the purpose of pursuing a lawsuit.³⁰⁶ The court also pointed out the tariff regulation provided that in the absence of gross negligence or willful misconduct, a telecommunications carrier is free of all damage claims caused by the disclosure of the telephone number of a nonpublished service.³⁰⁷

For these reasons, a common law tort of invasion of privacy regarding CPI would probably not be actionable. Some states, in fact, may not even recognize such claims. In virtually all jurisdictions, some form of a tort

298. *Id.* at 373.

299. *Tobin v. Michigan Civil Service Com.*, 331 N.W.2d 184 (Mich. 1982).

300. Charles C. Marvel, Annotation, *Telephone Company's Liability for Disclosure of Number or Address of Subscriber Holding Unlisted Number*, 1 A.L.R.4th 218 (1980 & 1989 Supp.).

301. 398 A.2d 1180 (Conn. 1978).

302. *Id.* at 1184.

303. *Id.*

304. *Id.* at 1185.

305. 305 N.Y.S.2d 164 (1969).

306. *Id.* at 167.

307. *Id.*

cause of action for invasion of privacy is recognized. However, in three states—Nebraska, Rhode Island and Wisconsin—judicial adoption of any form of the common law cause of action continues to be rejected.³⁰⁸ Also, New York does not recognize the torts of intrusion upon seclusion and publicity given to private facts.³⁰⁹ Thus, a Caller ID claim under common law in some states may never even be brought in the first place.

V. PRIVACY AND PROPERTY RIGHTS

Finally, key to the decision in *Southern Bell* and a subject which has not been widely addressed is the matter of a property interest. In other words, who owns the telephone number? Although this may not appear to be a matter of privacy policy, it should be clear that if the telephone company owns the telephone numbers, then telephone customers may have no claim to an invasion of privacy if the telephone company chooses to disclose the numbers to others.

Indeed, in the *Southern Bell I and II* cases, the courts considered the telephone company's property interest as compared to the customer's privacy interest in the telephone number. The courts partly relied on a provision in Southern Bell's *General Subscriber Service Tariff* which states that "[t]elephone numbers are the property of the Company [and] [t]he subscriber has no property right to the telephone number or any other call designation . . ."³¹⁰ The courts, asserting that the information transmitted is numerical information, voluntarily transmitted, stated that "[n]o fundamental interest is involved in the anonymity of a telephone number, particularly when the ownership thereof is vested in the telephone utility, not the subscriber."³¹¹

Since the Supreme Court's decision in *Katz*, there has been a shift away from the original property-related standard of privacy analysis. Before the development of common law, the courts long recognized rights that were essentially the same as the right of privacy under the guise of property rights and rights of contract.³¹² With *Katz*, however, the notion of absolute property rights gave way to actual notions of privacy, emphasizing "liberty,"

308. See Laurretta E. Murdock, Comment, *The Use and Abuse of Computerized Information: Striking a Balance Between Personal Privacy Interests and Organizational Information Needs*, 44 ALB. L. REV. 589, 599 n.58 (1980). No cases have been reported since.

309. See Brian Graifman, *Put Telephone Right to Privacy on Hold*, N.Y.L.J., Apr. 3, 1990, at 2 (citing *Arrington v. New York Times Co.*, 434 N.E.2d 1319 (N.Y. 1982), *cert. denied*, 459 U.S. 1146 (1983)).

310. *Southern Bell II*, 409 S.E.2d at 780 n.4; *Southern Bell I*, No. 90-CP-40-2686 at 15 (referring to section A2.3.12).

311. *Southern Bell II*, 409 S.E.2d at 780; *Southern Bell I*, No. 90-CP-40-2686 at 17.

312. See, e.g., the landmark case of *Boyd v. United States*, 116 U.S. 616 (1886), in which the Supreme Court equated personality and the "privacies of life" with an individual's property rights.

“expectations,” and “familial or marital rights.”³¹³ Yet the courts still find property rights pertinent to privacy entitlements in the post-*Katz* era.³¹⁴ Increasingly, computer data, time and services have been accorded the status of property. Most states, for example, have passed laws establishing property rights in computer data, barring unauthorized access and alteration.³¹⁵ Such property rights are useful elements in evaluating privacy claims. Some even argue that privacy interests could still be effectively protected within a legal framework protecting property rights.³¹⁶

Few laws deal with the concepts of ownership in what may be otherwise known as “telephone transaction-generated information” or TTGI.³¹⁷ Prior to divestiture, information generated by telephone usage and by transactions related to telephone service was controlled by AT&T, and no one questioned their right to control it.³¹⁸ TTGI was used internally in research and development, planning products and services, and later in marketing. Until recently, an “implicit pact” existed between telephone companies and customers. The terms allowed telcos to collect and use customer data as required for provision of service; however, the data could not be provided to other parties without consent of the customer.³¹⁹ But with competition and new or more efficient uses of TTGI, the information became a valuable commodity subject to a number of concerns including privacy. In competitive businesses in general, information collected about customers is considered to be owned by the business, not the customer.³²⁰ Because local exchange companies still operate in primarily a monopoly, bottleneck situations where the expense of data collection is arguably borne by rate-payers, the issue of ownership is important.³²¹

313. Kenneth Mott & Lovette Mott, *Property and Personal Privacy: Interrelationship, Abandonment and Confusion in the Path of Judicial Review*, 18 J. MARSHALL L. REV. 847 (1985).

314. See also James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645 (May 1985).

315. Noted by Eli M. Noam, *Telecom Services Raising Privacy Concerns*, TRANSNAT'L DATA & COMM. REP., Mar. 1990, at 19 n.30.

316. Scott D. Palmer, *Privacy Isn't a Right—But It Might be Considered Property*, L.A. DAILY J., July 7, 1983, at 4; see also Mott & Mott, *supra* note 313.

317. MCMANUS, *supra* note 292, at 8-9. This includes white pages and yellow pages information, new service orders, aggregate traffic information, billing and call detail records, and of course, calling party identification and other network information. *Id.*

318. *Id.* at 43.

319. Jack Pendleton, *The Telco That Knew Too Much*, TELECOMM. ENG. & MGMT., Mar. 1, 1990, at 40.

320. MCMANUS, *supra* note 292, at 18. The local telephone loop is now being opened up to competition, however. See Charles F. Mason, *FCC Mandates Physical Co-location*, TELEPHONY, Sept. 21, 1992, at 3. This may affect this issue of ownership, but how is not clear. It may mean that the telephone companies, and perhaps their business competitors, do indeed own the information, or that because of their obligation to cooperate with these competitors, the telephone companies do not own the information or have a reduced ownership right to it.

321. MCMANUS, *supra* note 292, at 18.

The ECPA,³²² other areas of common law, and even copyright law offer only limited degrees of guidance in determining ownership rights. Copyright law is one of the only laws which addresses ownership of TTGI, but this primarily pertains to a telephone company's proprietary interest in its white and yellow pages directories, which competitors might copy,³²³ and would seemingly have little application to the telephone company's usage of CPI in its possession. Certainly customers could hardly stake a copyright claim to this information.³²⁴

Federal Communication Commission rules governing the use of Customer Proprietary Network Information (CPNI)³²⁵ may serve as an analog for analysis, although these rules may otherwise have limited application. The rules basically concern the release of customer information to such firms as enhanced service providers, customer premise equipment vendors and even telephone company subsidiaries.³²⁶ The FCC's CPNI rules apply, with minor exceptions, "to all information about customers' network services and customers' use of those services that a BOC [Bell Operating Company] possesses by virtue of its provision of network services."³²⁷ This includes usage data and information on customer calling patterns, billing information, traffic studies, and "forwarded-to numbers," but specifically excludes credit information because it only addresses information on how a customer pays its bills—information already available to those who do business with the customer.³²⁸

322. *E.g.*, 18 U.S.C. § 2703(c), allowing telephone companies to divulge usage data.

323. Up until now, lower courts have generally held that the telephone companies have a copyright interest in their directories. The Supreme Court, for the first time, recently reviewed the matter in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991) and held that a telephone company's white pages are not entitled to copyright. *Id.* at 363-64. The Court stated that the raw data are uncopyrightable facts, and the way in which a telephone company selected, coordinated, and arranged those facts is not original in any way. *Id.* at 20-21. "[I]t publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service. This is 'selection' of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression." *Id.* at 362. See also William Patry, *Copyright in Compilations of Facts (Or Why the "White Pages" Are Not Copyrightable)*, COMM. & L., Dec. 1990, at 37.

324. This is partly because copyright cannot extend to one's name or other short expressions, likely including a telephone number. Moreover, the customer has not created an original work of authorship; the CPI transmitted is merely a compilation of facts whose compilation is partly if not mostly done and "reported" by the telephone company who arguably (although now doubtfully) has a copyright interest should several bits of data—i.e., caller's name, number, last time called, etcetera—ever be transmitted. See Patry, *supra* note 323, at 37.

325. *Memorandum and Order*, 4 F.C.C.R. No. 1, 209-57 (1988).

326. A major concern behind the rules was the potential for carriers to use customer information in their possession to market enhanced services to their competitors' customers.

327. *Memorandum*, *supra* note 325, at 215.

328. *Id.* at 216.

It would appear that based on the FCC's definition, CPNI would exclude customers' names, addresses, and telephone numbers,³²⁹ although the FCC does not explicitly state this.³³⁰ The FCC, which largely accepts the BOCs' CPNI definitions, notes that Bell Atlantic and Southwestern Bell include customer name, address and telephone number within their CPNI definition. U.S. West, on the other hand, specifically excludes this information.³³¹

Despite this uncertainty, the rules are nonetheless interesting because the FCC responded to the privacy and commercial aspects of proprietary customer information by employing a property distinction. Its rules essentially place the ownership of the data in the hands of the customer generating that information rather than in the hands of the telecommunications carrier. Under this model, the customer "lends" the information to the telephone company for a service, but the control over who has access to the information remains with the "owner."³³²

There are a number of FCC rules restricting the use of CPNI. FCC rules forbid a carrier from providing any separate corporation with such information unless it is available to any member of the public on the same terms and conditions.³³³ In its Third Computer Inquiry, the FCC stated that it "would be inconsistent with legitimate customer expectations about confidentiality" to make CPNI generally available to all CPE vendors.³³⁴ In its Phase I and Phase II Orders addressing Open Network Architecture, the FCC allowed AT&T and the Bell Operating Companies to use proprietary customer information but required the carriers to honor requests from customers that their information be withheld or be released to other enhanced service providers. Multi-line business customers must be notified annually of these "rights," and the FCC determined that carriers should not be paid for releasing CPNI to third parties.³³⁵

The issue as regulated here is somewhat distinct from the release of information to a called party through the CLASSSM features: the motivations of the recipients of CPNI under these rules are primarily economic and the customers do not themselves initiate the release of their numbers by virtue

329. Some have suggested that the FCC order does, in fact, exclude names, addresses, and telephone numbers. See Judith Endejan, *Caller Identification Services: The Demise of the Anonymous Phone Call*, COMM. LAW., Spring 1990, at 6; also Victoria J. Toth, *Calling Line ID vs. Privacy: A Regulatory Update*, BUS. COMM. REV., Mar. 1990, at 62.

330. The FCC does, however, prohibit BOCs from making unpublished and unlisted telephone numbers available to their enhanced services personnel unless the customer first contacts the BOC seeking information about such services. *Memorandum, supra* note 325, at 217 & n.1017.

331. *Id.* at 212 n.995.

332. Katz, *supra* note 13, at 353.

333. 47 C.F.R. § 64.702(d)(3).

334. *Report and Order*, 104 F.C.C.R.2d 958, 1089 (1986).

335. *Report and Order*, 2 F.C.C.R. Vol 10, 3072 (1987); *Memorandum Opinion and Order on Reconsideration*, 3 F.C.C.R. No. 5, 1150 (1988); *Memorandum Opinion and Order*, 4 F.C.C.R. No. 11, 4544 (1989).

of placing a call. There is also a technical question of whether or not a customer's proprietary rights would extend to information about the phone numbers of the calls he or she receives. If they do, then customers would merely be telling the telephone company to release their CPNI to their own telephone display units. If they do not, it would appear that under these rules, a telephone company could not release the calling party's number (CPNI) without the calling party's permission.

Whether or not the rules governing the release of proprietary customer information could pertain to calling party identification is not clear, particularly since name, number and address may be excluded. The CPNI issue has also been concerned with mostly large business firms and not the residential subscriber, thus distinguishing the concern as one of a commercial nature and less a personal privacy issue. Because of this, the rules may not be extended to calling party identification. Also, because the FCC specifically allows automatic number identification (ANI)³³⁶ and had addressed Caller ID in an earlier proposal addressing options for subscribers with unlisted numbers,³³⁷ it is clear that the administrative agency has not intended to afford telephone customers with rights associated with ownership. One FCC rule which does, however, suggest such a recognition is the FCC's recent 800-number portability mandate which lets businesses take their 800 numbers with them when they switch long-distance carriers.³³⁸ This order, however, was intended to mitigate AT&T's competitive advantage over other interexchange carriers and may not necessarily indicate a property distinction.

A clearer answer to the property question comes from the courts in primarily search and seizure cases. In most cases, the courts have noted that telephone toll and billing records are the property of the telephone company and not the customer.³³⁹ In *Kesler v. State*,³⁴⁰ the court stated that the right of privacy is recognized in the content of telephone conversations, but not in the toll and billing records which belong to the telephone company.³⁴¹ In another case,³⁴² the court noted that a telephone subscriber is fully aware that a record of his or her long distance calls is the telephone company's property.³⁴³ In *State v. Hamzy*,³⁴⁴ the court held that telephone company records belonged to the telephone company and that the defendants in the case therefore lacked standing to assert a privacy interest

336. *Info-2 Order*, 3 F.C.C. Rcd 4407 (1988). ANI was allowed with little consideration for privacy issues.

337. See *infra* part VI.B.

338. Charles Mason, *FCC Mandates 800 Portability*, TELEPHONY, Aug. 5, 1991, at 3.

339. *People v. Di Raffaele*, 433 N.E.2d 513 (N.Y. 1982), *later app.* 476 N.Y.S.2d 20 (1984); and *United States v. Grabow*, 621 F. Supp. 787 (D. Colo. 1985).

340. 249 Ga. 462, 291 S.E.2d 497 (1982).

341. *Id.* at 469-70; 504.

342. *In re Indiana Bell*, 409 N.E.2d 1089 (Ind. 1980).

343. *Id.* at 1090-91.

344. 709 S.W.2d 397 (Ark. 1986).

in the property of a third party (the telephone company).³⁴⁵ Although the Supreme Court has yet to make such a decision, in a related landmark case,³⁴⁶ the Supreme Court held that a bank account record is the property of the bank and not the individual account holder.³⁴⁷

Courts have also ruled and some public utility commission rules specify that subscribers have no proprietary right in the telephone numbers assigned by the telephone company.³⁴⁸ Such cases have involved disputes where it was determined that a telephone company has the right to change a subscriber's telephone number.³⁴⁹ A subscriber, for example, has been held to have no proprietary and legal right to retain his or her present telephone number, even though the numbers transposed to letters spelling the subscriber company's name or slogan.³⁵⁰ Also, a telephone company has the right to dispose of the telephone numbers of bankrupt subscribers; the numbers do not become the property of the bankrupts.³⁵¹

Thus it may be found that telephone companies have a right to offer Caller ID because they have a property right in the telephone numbers in their possession. Tariffs, approved by state PUCs, may as with Southern Bell, specifically state this proprietary right. It may be argued, though, that the property right does not extend to identifying the customer's number each time a customer uses that number, much less identifying the customer's name, but CPI is just one more type of transaction-generated information like credit card data and magazine subscription lists which are compiled and circulated. In fact, the Bell Operating Company "license agreements" with directory subsidiaries largely state that the BOCs *own* their subscriber lists.³⁵² The courts in the *Barasch I and II* cases did not address a proprietary interest,³⁵³ hence this question of law may be dependent upon tariff language as well as more legal interpretation.

345. *Id.* at 399.

346. *United States v. Miller*, 425 U.S. 435 (1976). In *Miller*, the records were subpoenaed pursuant to the Bank Secrecy Act of 1970.

347. *Id.* at 440-41.

348. See Annotation, *Telephone Company's Right to Change Subscribers' Telephone Number*, 75 A.L.R.3d 700 (1977 & 1989 Supp.).

349. *First Cent. Service Corp. v. Mountain Bell Tel.*, 623 P.2d 1023 (N.M. Ct. App. 1981).

350. *M. R. Glass, Inc. v. New York Tel. Co.*, 264 N.Y.S.2d 160 (1965); *Freedom Finance Co. v. New York Tel. Co.*, 285 N.Y.S.2d 163 (1967).

351. *Slenderella Systems of Berkeley, Inc. v. Pacific Tel. & Tel. Co.*, 286 F.2d 488 (2nd Cir. 1961).

352. MCMANUS, *supra* note 290, at 19.

353. In fact, only the opposite was mentioned when Bell of Pennsylvania stated that Petitioner Barasch had failed to establish a property interest in telephone anonymity. *Barasch I*, 576 A.2d at 86.

VI. POLICY CONSIDERATIONS

The option for customers to be able to guard their CPI has been a key issue and one which might appear to reduce the weightiness of the calling party privacy interests. Several informational privacy cases suggest that "disclosure is less objectionable when the government . . . preserves an individual's ability to prevent particularly troublesome disclosures."³⁵⁴ Two alternatives have been proposed by regulators to safeguard callers' interests—blocking alternatives and unlisted numbers protection.

A. *Blocking*

Various blocking schemes, particularly free, per-call blocking, required of or perhaps simply offered by the telephone companies would seem to mitigate the privacy concerns. So far, however, this has only had an effect on some tariffs in some states.

While some of the first states to allow Caller ID required no blocking, more and more states are seeing forms of blocking attached to the service.³⁵⁵ Blocking has been offered by some telephone companies³⁵⁶ and rejected by others.³⁵⁷ Blocking has also been mandated by some public utility commissions, and has been the subject of several state bills and proposed federal regulation and legislation.

In California, newspaper accounts of Caller ID service provoked a groundswell of opposition to their introduction, resulting in action by that state's legislature. A California law³⁵⁸ mandates that users in that state must have the ability to suppress the display of their numbers on a per-call basis at no charge to the user, an approach that was subsequently followed

354. Smith, *supra* note 44, at 202. Smith cites *Barry v. New York*, 712 F.2d 1554 (2d Cir.), *cert. denied*, 464 U.S. 1017 (1983) (where adequate safeguards were found in allowing public employees to oppose an inspection request by filing a written "claim of privacy").

355. Most offer per-call blocking, while some, such as Alabama, Idaho, Iowa, Nevada, and New York have per-line blocking. Others, such as Florida, Georgia, Iowa, and South Carolina have blocking features available on a limited basis to law enforcement and/or crisis intervention centers. Alabama's Caller ID is prohibited for agencies whose services are confidential in nature. In Nevada and Iowa, per-line blocking installation is only free to initial and new customers, and nonresidential entities (i.e., businesses) may not have Per-line blocking. In the meantime, GTE has experimented with providing Protected Number Service (PNS)—a second unpublished number with a distinctive ring—as a way of mitigating the privacy concerns.

356. For example, Nynex, U.S. West, and Pacific Bell pledged to offer free, per-call blocking. Southwestern Bell has come out in favor of free, per-call blocking, and Centel has pledged to offer blocking. GTE has proposed its own version of blocking—Protected Number Service (PNS)—a second unpublished number with a distinctive ring.

357. These include Bell Atlantic, Bell South, Ameritech and United Telephone. *See Powell, supra* note 210, at 25.

358. CAL. PUB. UTIL. CODE § 2893 (Deering 1990). Section 1 of the law specifically states that a) "Telephone subscribers have a right to privacy, and the protection of this right to privacy is of paramount state concern;" and b) "To exercise their right of privacy, telephone subscribers must be able to limit the dissemination of their telephone number to persons of their choosing."

in North Dakota, and recently in Texas,³⁵⁹ and that other states are considering. Indeed, a few states have proposed similar legislation, including New York and Maryland.³⁶⁰ A bill to offer free blocking was overwhelmingly defeated in Virginia and Indiana passed a law forbidding its public utility commission from requiring blocking.³⁶¹ Some of the state public utility commissions which have specifically mandated some type of blocking include: Alabama, Delaware, District of Columbia, Illinois, Iowa, Kentucky, Maryland, and Nevada.³⁶² Commissions in New Jersey, Tennessee, Virginia, and West Virginia have not required blocking.³⁶³

With the proposed federal legislation—the Telephone Privacy Act—telephone companies nationwide, offering Caller ID, would be required to provide blocking.³⁶⁴ The Senate bill specifically calls for free, per-call blocking, and not per-line blocking, although free, per-line blocking must be available to domestic violence victims and shelters, and any existing state laws and regulations requiring per-line blocking would be grandfathered.³⁶⁵ Telephone companies would not, however, be expected to provide blocking to government assistance lines, emergency 911 services, or public pay phones.³⁶⁶ But if the telephone companies otherwise fail to provide blocking, aggrieved users are allowed to sue for civil damages or other relief.³⁶⁷ Author of the Senate Bill, Senator Herbert Kohl, has explained that blocking will not undermine Caller ID, since “Callers will not block calls to their friends and colleagues.”³⁶⁸ Moreover, he has explained that the call recipient would still obtain more information than is currently

359. 1991 N.D. Adv. Legis. Serv. 1556 (adding § 49-21-01.6 to chapter 49-21 of the N.D. CENT. CODE). 1993 Tex. Gen. Laws 659. Additionally, Wisconsin has enacted similar legislation. Wis. Stat. § 196.207 (1992).

360. A.B. 6054 (N.Y. 1991), A.B. 10000 (N.Y. 1990), and S. 7509 (N.Y. 1990); H.R. 1232 (Md. 1990), H.R. 1294 (Md. 1990), and S. 705 (Md. 1990).

361. See *Legislative Roundup*, WASH. TIMES, Jan. 16, 1991, at B3. Ind. Code Ann. § 8-1-2.9-2 (Burns 1993).

362. See, e.g., Nagelhout, *supra* note 29, at 33; COMM. DAILY, July 15, 1992, at 5; Mason, *supra* note 27, at 3; Charles Mason, *C & P Seeks Charge for Caller ID Blocking; Telcos Split on Issue*, TELEPHONY, Aug. 13, 1990, at 10; Karpinski, *supra* note 13, at 12; *D.C. Allows C & P to Offer ‘Caller Id’ with Per-Call Blocking Return Call Services*, TELECOMM. REP., July 23, 1990, at 9.

363. Powell, *supra* note 210, at 25. Although the New Jersey Board of Regulatory Commissioners recently approved a deal between New Jersey Bell Telephone and a coalition of privacy advocates to enable per-call blocking in that state. See *supra* note 28.

364. S. 612, 103d Cong., 1st Sess., 139 CONG. REC. S3176-79 (daily ed. Mar. 18, 1993) (statement of Sen. Kohl). See also previous bills, S. 652, 102d Cong., 1st Sess., 137 CONG. REC. S3283 (daily ed. Mar. 13, 1991) (statement of Sen. Kohl); H.R. 1449, 102d Cong., 1st Sess., 137 CONG. REC. E965 (daily ed. Mar. 14, 1991) (statement of Rep. Synar).

365. S. 612, 103d Cong., 1st Sess., 139 Cong. Rec. S3178. The bill would also allow government entities to have Caller ID, although they would be required to publish notice of their use of Caller ID in the Federal Register and appropriate phone directories.

366. *Id.*

367. *Id.*

368. See 136 CONG. REC. at S486 (daily ed. Jan. 29, 1990).

available and would still retain the right not to answer the phone.³⁶⁹ Blocking is also a matter of fairness as well as privacy, since it already exists for the wealthy, with access to 900 services through which private calls may be made for a few dollars a minute. Kohl has stated that he believes “phone companies should make blocking available to everyone—both rich and poor.”³⁷⁰

Of course many of the telephone companies have come out against the federal blocking requirement, arguing that blocking will undermine the service and its benefits. Representative from New Jersey Bell and AT&T have said that the nationwide mandate is “premature and unwise,”³⁷¹ and many argue that Caller ID should be dealt with at the state level because it is “a local problem, a local issue.”³⁷² They believe the states should function as “laboratory experiments” for the development of public policy before any federal law is enacted.³⁷³ Many issues not addressed by the proposed legislation must be resolved such as whether or not blocking must be free and whether it is to be offered on a per-call and/or subscription basis. Also unresolved are whether customers should be able to block calls to 800 and 900 numbers and whether telephone companies who do not offer Caller ID would still be required to provide blocking for customers who call areas which have Caller ID.

The FCC is also proposing a rule to regulate Caller ID on an interstate basis and would specifically require per-call blocking.³⁷⁴ A federal model of regulation for Caller ID was deemed necessary and in the public interest as the service is developing on an interstate basis. The FCC noted that interstate Caller ID involves the interconnection of local and long distance SS7 networks which would require a regulatory structure to address issues. In terms of blocking, the FCC has sought comments on establishing a requirement that interstate Caller ID incorporate a per-call blocking option. Many of the telephone companies have come out against the proposal and FCC involvement with Caller ID.³⁷⁵

Jurisdictional problems are also significant, particularly since the courts have severely limited the scope of FCC intervention or preemption of state regulation (unless there is substantial cause or justification). The Supreme Court has held that section 152(b) of the Communications Act of 1934³⁷⁶

369. *Id.* He further explains that “[b]y way of analogy, a homeowner can refuse to open the front door when a visitor covers the peephole with a finger.” *Id.*

370. See 137 CONG. REC. at S3284 (daily ed. Mar. 13, 1991).

371. Ellen Messmer, *Industry, Senate Argue Merits of Bill That Would Legalize Caller ID*, NETWORK WORLD, Aug. 6, 1990, at 5.

372. *Caller ID Legislation*, *supra* note 36, at 9 (quoting New Jersey Bell President and CEO J.G. Cullen). Others agreeing include representatives from Pacific Bell and Central Telephone. *Id.*

373. *Id.*

374. See *supra* note 34.

375. Taff, *Raising Hackles*, *supra* note 36, at 6.

376. 47 U.S.C. § 152(b).

“not only imposes jurisdictional limits on the power of a federal agency, but also by stating that nothing in the Act shall be construed to extend FCC jurisdiction to intrastate service, provides its own rule of statutory construction.”³⁷⁷ Thus, the Court has made it clear that the Act does not grant the FCC power to preempt state regulation of services. Deployment of CLASSSM has been mostly local in orientation, and any attempt to preempt the states is likely to be overturned as with the Ninth Circuit Court of Appeal’s recent decision regarding the FCC’s Open Network Architecture rules—asserting that the FCC had not properly justified its preemption of state regulation of enhanced services. If nationwide uniformity is determined to be in the public interest, this can be accomplished with federal and state cooperation through the use of joint conferences as allowed by the Communications Act, section 410(b).³⁷⁸

Despite the efforts to institute various forms of blocking, blocking options may still not be enough. North Carolina’s Attorney General contends that even if Caller ID is offered with free blocking to all customers, it would still not conform with the provisions of that state’s laws as well as the federal law.³⁷⁹ Also, if the constitutionality of Caller ID comes into question, blocking may be insufficient for the service to pass constitutional muster. Again in *Barasch I*, the Pennsylvania Commonwealth Court held that the service was unconstitutional with limited blocking available to certified agencies, but also would be unconstitutional *even if* blocking was an option free to everyone.³⁸⁰ The concurring opinion found no support for shifting the burden to individuals to protect their privacy rights by activating blocking.³⁸¹ Failing to activate blocking, they said, does not give consent.³⁸² Moreover, the majority stated that privacy violations still exist for those who lack notice of the blocking option, who cannot afford blocking if a fee is imposed, and who forget to trigger the blocking mechanism in cases of emergency or trauma.³⁸³

Of course in *Southern Bell I and II*, where the same limited blocking options had been proposed,³⁸⁴ the courts found the service to meet constitutional standards.³⁸⁵ The courts did not specifically consider the limited blocking, nor did they weigh the matter of blocking at all in their decisions.

377. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 376-77 n.5 (1986).

378. 47 U.S.C.S. § 410(b) (1981).

379. *Caller ID Violates*, *supra* note 261, at 8.

380. *Barasch I*, 576 A.2d, at 88. The Pennsylvania Supreme Court chose not to address the blocking issue, having chosen not to rule on the constitutionality of the service. *Barasch II*, 605 A.2d at 1201.

381. *Barasch I*, 576 A.2d at 94 (Pellegrini, J., concurring and dissenting).

382. *Id.*

383. *Id.* at 88-89.

384. The limited blocking here means that blocking would be limited to law enforcement officials and crisis intervention agencies upon request. *Southern Bell I*, No. 90-CP-40-2686 at 3 n.3; *Barasch I*, 576 A.2d at 82.

385. *Southern Bell I*, No. 90-CP-40-2686 at 18; *Southern Bell II*, 409 S.E.2d at 780.

Thus in either case, the addition of optional blocking may not resolve the Caller ID debate over its legality.³⁸⁶ Other arguable “safeguards,” such as making calls from a payphone or foregoing certain calls altogether, may also not weigh into the decision.³⁸⁷

B. Protection of Unlisted Numbers

Protection of unlisted (and nonpublished) numbers is another option being considered for safeguarding privacy interests and may be a factor in weighing and mitigating the debate. Since subscribers with unlisted numbers demonstrate a desire (if not need) for anonymity by virtue of paying for unlisted service, then it is thought that this category of customers should be afforded protection from Caller ID disclosures. Still, singling out such customers may present some technical as well as legal difficulties.

About 27 percent of customers nationwide subscribe to nonpublished³⁸⁸ and unlisted³⁸⁹ service.³⁹⁰ The number varies with location. Almost 20 percent of U.S. West customers in the state of Washington have unlisted numbers while 16 percent of Bell Atlantic customers have nonpublished numbers.³⁹¹ One-third of all Californians subscribe to unlisted service, and 47 percent of those in Nevada have unlisted numbers.³⁹² The percentage is higher in large cities than rural areas. With such a considerable number, the telephone companies fear that special consideration given to unlisted subscribers will hurt the integrity of Caller ID service.

In addition to the FCC’s CPNI rules which distinguish unlisted subscribers by requiring their consent for information release, some state PUCs are beginning to deal with the issue of unlisted and nonpublished numbers. In Washington, the Utilities and Transportation Commission clarified Pacific Northwest Bell’s (PNB’s) tariff³⁹³ associated with nonpub-

386. An administrative law judge working for the California PUC recommended that that state not allow Caller ID even though blocking would be offered. Anita Taff, *Pa. Caller ID Ruling May Be Far-Reaching*, NETWORK WORLD, Mar. 30, 1992, at 15.

387. See Smith, *supra* note 44, at 205 (noting that there are no examples of informational privacy cases which involve the individual capability to avoid privacy problems *selectively without* foregoing *all* benefits of participation). With Caller ID, when a person can use a pay phone, call with a credit card or with operator assistance, or call through a third party, then the ability to make calls is not lost.

388. A nonpublished number generally means one which is not published in the white pages directory, although it is still available through directory assistance. Katz, *supra* note 13, at 395.

389. An unlisted number is given out by neither a directory nor directory assistance. *Id.*

390. *Id.*

391. Jim Simon, *Caller ID May Get Test in Gi Harbor—Proposal Sent to State Panel*, SEATTLE TIMES, Mar. 23, 1992, at B4; COMM. DAILY, Oct. 25, 1993, at 5.

392. See *supra* note 21.

393. Enacted in response to a 1987 decision, *State v. Butterworth*, 737 P.2d 1297 (Wash. App. 1987), which forbids the release of nonpublished subscriber information to law enforcement without a court order.

lished numbers,³⁹⁴ allowing for the release of nonpublished subscriber information to public safety agencies (i.e., 911) and other telephone companies, but prohibiting PNB to release such information to information service providers (other than for collecting charges).³⁹⁵ In Massachusetts, New England Telephone is prohibited from providing enhanced service providers with billing tapes without first deleting information about subscribers with nonpublished numbers.³⁹⁶ In 1989, the Idaho PUC began requiring all local exchange companies to notify customers of the conditions under which their unpublished telephone numbers may be released.³⁹⁷ The Colorado PUC has proposed rules similar to the FCC's CPNI rules whereby the collection and disclosure of individually identifiable information is regulated. The regulated information, however, would specifically exclude the names, addresses and telephone numbers of published subscribers, but customers with unpublished numbers would have to be notified and sign a waiver before information about them can be released.³⁹⁸ Only a few states so far have addressed the issue of unlisted and nonpublished numbers, and already a lack of uniformity among states has developed. None have specifically applied regulation to the release of unlisted numbers though Caller ID.

The FCC recently considered but rejected a nationwide, uniform plan to assuage the interests of unlisted subscribers. A Petition for Rulemaking at the FCC sought to establish uniform nationwide rules for "calling number delivery," or Caller ID.³⁹⁹ The proposed rule would have amended Part 64 of the Code of Federal Regulations and stated that all telephone common carriers must "make available to any non-business telephone subscriber who has taken telephone service on an unlisted basis the means, at reasonable charges, of substituting a confidentially registered alphanumeric designation

394. The Commission defines this as the name, address, and telephone number of nonpublished subscribers, but does not distinguish this term from unlisted numbers.

395. *Washington Utilities and Transportation Commission v. Pacific Northwest Bell Telephone Company*, 102 P.U.R.4th 396 (WASH. U.T.C. 1989). Interestingly, if a nonpublished subscriber's number is improperly disclosed, the subscriber retains the right to have the number changed and collect a refund, but the telephone company liability continues to follow the "commonly accepted" policy that it be "held harmless for the unauthorized release of nonpublished information in order to prevent ratepayers from paying for the company's defense of frivolous lawsuits." *Id.* at 402.

396. Toth, *supra* note 329, at 65.

397. In the Matter of the Investigation into Privacy in Telecommunications Services, Case No. U-1500-173, Order No. 22576 (Idaho P.U.C. June 1989).

398. Rules Regulating the Collection and Disclosure of Personal Information Obtained by Public Utilities, Docket No. C90-1142, Decision No. 90R-520, Commission Order Proposing Rules (Colo. P.U.C., Aug. 27, 1990).

399. *Petition for Rulemaking, In the Matter of Calling Number Delivery*, Docket No. RM-90-7397, F.C.C. (Mar. 20, 1990). The rulemaking was requested by Joseph Baer, a professional engineer from New York.

for the billing number on a call-by-call basis”⁴⁰⁰ The petition also proposed that whenever a called party rejects a call, this would be indicated to the caller by an audible and displayable signal.⁴⁰¹ The alphanumeric identification, or AI, is considered to protect the caller’s privacy while still providing adequate identification for the called party to screen calls or report abuse.⁴⁰²

The telephone companies blasted the proposal, however, because the plan was fraught with considerable technical, administrative as well as jurisdictional problems. In separate comments filed at the FCC, the telephone companies generally argued that the plan was technically unfeasible, saying that the technology necessary to implement the plan does not exist and would have been expensive to develop and deploy, causing significant delays.⁴⁰³ The FCC rejected the proposal in favor of establishing a federal policy for governing interstate Caller ID which could coexist with intrastate regulatory models.⁴⁰⁴ So far no action has been taken on this proposed rulemaking.

Finally, the telephone companies argue that “rights” associated with nonpublished and unlisted number service should not be equated with any “right” to *make* anonymous calls, again noting that tariffs generally state that callers must identify themselves in the course of communication.⁴⁰⁵ Moreover, unlisted telephone numbers are designed to protect the interest of telephone subscribers as *called* parties—i.e., to protect against unwanted calls—not when those subscribers are the calling party.⁴⁰⁶ In that case, the subscriber is *intentionally* disclosing his or her number and then only to the

400. This would consist of the area-code, followed by up to 20 alphanumeric characters chosen by the subscriber and permanently assigned. The service is to be invoked with each call by pressing a sequence of buttons.

401. *Petition*, *supra* note 399, at 14.

402. Call Trace would still function.

403. For example, Southwestern Bell noted that telephone switches cannot recognize whether a call is coming from an unlisted number for per-call activation to work. *Comments of Southwestern Bell Telephone Company, In the Matter of Request by Joseph Baer for Rulemaking*, RM No. 7397, Before the F.C.C., Aug. 20, 1990. Bell Atlantic argued that an alternate identity would require the creation of a second North American Numbering Plan. *Comments of the Bell Atlantic Telephone Companies on Petition for Rulemaking, In the Matter of Petition for Rulemaking to Establish Uniform, Nationwide Rules for Calling Number Delivery*, RM No. 7397, Before the F.C.C., August 20, 1990. Nynex pointed to problems with using an unambiguous mnemonic which could be exploited—the AI could approximate another party’s AI, exposing that party to potential liability. *Comments of the NYNEX Telephone Companies, In the Matter of Petition for Rulemaking Filed by Joseph Baer Regarding Calling Number Delivery*, RM No. 7397, Before the F.C.C., August 20, 1990. All in all, the required modifications were said to require at least three years to complete, and would deprive customers of the many benefits of Caller ID if abusive callers could hide behind the cloak of an AI.

404. *See supra* note 34.

405. In addition to Southern Bell’s General Subscriber Service tariff, *supra* note 287, GTE’s Tariff, F.C.C. No. 2, § 2.3.1 provides: “The calling party shall establish his identity in the course of any communication as often as may be necessary.” *See also* AT&T Tariff F.C.C. No. 1, § 2.4.1.C.1.

406. *Comments of the Ameritech Operating Companies, In the Matter of Petition for Rulemaking Concerning Calling Number Delivery*, RM No. 7397, Before the F.C.C., Aug. 20, 1990.

called party. Alternative services such as pay phones can preserve the identity of the number, or the unlisted subscriber can simply subscribe to Caller ID to protect against unwanted return calls.⁴⁰⁷

Thus the issue may remain at the state level. To specifically protect unlisted service subscribers, it appears, however, that individual tariffs would have to be revised if anonymity is only extended to directories and operator directory assistance. This may raise an entirely different problem if the action is found to be discriminatory. Singling out unlisted subscribers as warranting this protection may lead to an inequity between rich and poor—more so, since the costs in providing this type of specific protection would be high. Who pays is a problem facing both blocking and unlisted numbers policy considerations.

VII. CONCLUSIONS

Caller ID and its use of CPI appears, for the most part, to be a legal service under the current framework of the law and may survive future court challenges—at least on the federal level. “State action” will probably not be found, and if it is, the service will likely withstand a constitutional challenge as the interests of both parties are weighed. Federal wiretap laws contain applicable exceptions, and proposed legislation only clarifies Congressional intent that Caller ID should be permissible under the law. If the service remains subject to state statutory and constitutional law, it may, however, encounter obstacles in some states. Yet if a property right in the CPI is found to be vested with the telephone company, the matter may be reduced to an interpretation of tariffs. While policy solutions such as blocking and unlisted numbers protection might mitigate the issue when Caller ID is brought before the courts, these considerations (which may pose additional problems) might not be decisive elements.

In the meantime, experience and the marketplace may serve to relax many of the resultant privacy concerns. The fears of exposure when using a hotline service may be soothed by advertising that Caller ID is not being used, for example. Most businesses will be careful not to abuse calling party information for fear of alienating customers. The public will also adapt. If anonymity is necessary, a caller will use a public telephone or a business phone which is not associated with them personally, and Caller ID blocking where available.

A “technological fix” is also possible, although the Caller ID suppression option now receiving the most attention is not necessarily the most desirable option. While it is true that per-call or per-line suppression would address the concerns of callers, especially those with unlisted numbers, it

407. Indeed, a majority of Caller ID subscribers also have unlisted numbers, suggesting that unlisted service subscribers are not necessarily against Caller ID, but in fact use it to guarantee greater anonymity. With widespread availability of Caller ID, the request for unlisted numbers may even dramatically decline.

would also deprive the general public of the ability to screen out unwanted calls from telephone solicitors or abusive callers, who would undoubtedly be among the first to subscribe to the suppression option! Developments in telephone switching system software⁴⁰⁸ offer a better solution: the option of forwarding the calling party name as well as the number. If calling parties were allowed to suppress either the number or the name—but not both—the right of the called party to identify a caller would not be denied, while the calling party could prevent the association of their name and number if desired. This alternative would presumably give subscribers with unlisted numbers the same measure of protection they now enjoy, since they could prevent disclosure of their number.

Essentially, the debate boils down to a conflict of rights: the right of callers to remain anonymous versus the right of called parties to know who is on the other end of the line. In the aftermath of the *Barasch I and II* and *Southern Bell I and II* decisions, it will now be up to higher courts to decide and clarify the legality of this new technology, undoubtedly by incorporating some type of balancing methodology. If Caller ID is indeed found to be within the law, the new service will certainly impact telecommunications privacy policy and the concept of privacy.

408. Subscriber name display has been developed and began with market trials in 1990. *Northern Telecom., U.S. West Complete First Market Trial for 'Caller ID Name Display'*, TELECOM. REP., Aug. 20, 1990, at 19. It is not yet a widely available option, however.

APPENDIX

TABLE 1

State Constitutions Explicitly Recognizing A Privacy Right*

ALASKA CONST., Art. 1, § 22: "The right of the people to *privacy* is recognized and shall not be infringed."

ARIZ. CONST. Art. 2, § 8: "No person shall be disturbed in his *private affairs*, or his home invaded, without authority of law."

CAL. CONST., Art. 1, § 1: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*."

FLA. CONST., Art. 1, § 23: "Every natural person has the right to be let alone and free from governmental intrusion into his *private* life except as otherwise provided herein."

HAW. CONST., Art. 1, § 6: "The right of the people to *privacy* is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."

ILL. CONST., Art. 1, § 6: "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, *invasions of privacy* or interceptions of communications by eavesdropping devices or other means."

LA. CONST., Art. 1, § 5: "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or *invasions of privacy*."

MONT. CONST., Art. II, § 10: "The right of *individual* privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."

S.C. CONST., Art. 1, § 10: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated"

WASH. CONST., Art. 1, § 7: "No person shall be disturbed in his *private affairs*, or his home invaded, without authority of law."

*Emphasis added.

TABLE 2

States With Trap and Trace Statutory Provisions*

Arizona	ARIZ. REV. STAT. ANN. § 13-3012 (1993)
Colorado	COLO. REV. STAT. § 18-9-305 (1993)
Florida	FLA. STAT. CH. 934.31 (1993)
Hawaii	HAW. REV. STAT. § 803-42 (1993)
Idaho	IDAHO CODE § 18-6720 (1993)
Louisiana	LA. REV. STAT. ANN. § 15:1303 (1992)
Kansas	KAN. STAT. ANN. § 22-2525 (1992)
Maryland	MD. CTS. & JUD. PROC. CODE ANN. § 10-4B-02 (1993)
Minnesota	MINN. STAT. § 626A.02 (1993)
Nebraska	NEB. REV. STAT. § 86-707.03 (1992)
New Hampshire	N.H. REV. STAT. ANN. 570-B:3 (1991)
North Carolina	N.C. GEN. STAT. § 15A-261 (1991)
Oklahoma	OKLA. STAT. TIT. 13, § 177.2 (1993)
Oregon	OR. REV. STAT § 165.661 (1991)
Pennsylvania	PA. STAT. ANN. TIT. 18, § 5771 (1993)
South Carolina	S.C. CODE ANN. § 17-29-20 (1991)
South Dakota	S.D. CODIFIED LAWS ANN. § 23A-35A-23 (1993)
Utah	UTAH CODE ANN. § 77-23A-13 (1992)
Virginia	VA. CODE ANN. § 19.2-70.1 (MICHIE 1993)
West Virginia	W. VA. CODE § 62-1D-10 (1993)
Wisconsin	WIS. STAT. § 968.34 (1993)

*Statutory provisions identical (or nearly) to Title 18 USCA section 3121 of the federal Electronic Communications Privacy Act of 1986 (ECPA).