

# Piper Rudnick

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## *Litigated Privacy Issues\*\**

### **A. FTC Act**

*In re* Geocities, No. 9823015 (1998) (consent order) (alleging that Geocities sold personal information in violation of its published privacy policy).

*In re* Liberty Financial Cos., Inc., No. 982 3522 (1999) (consent order) (alleging violation of Act for false and misleading statements about the collection and use of personal information).

F.T.C. v. Reverseauction.com, Inc. (D.D.C. 2000) (stipulated consent agreement) (alleging that defendant violated the FTC Act by violating the terms of eBay's privacy policy and sending unsolicited email to eBay subscribers).

must also give subscriber notice of any personally identifiable information that it plans to disclose, regardless of the source of that information).

### **B. Credit Information -- Gramm-Leach-Bailey Act (GLB) and Fair Credit Reporting Act (FCRA)**

Trans Union Corp. v. F.T.C., 245 F.3d 809 (D.C. Cir. 2001) (under the FCRA, certain target marketing lists are consumer reports, and therefore may not be rented or sold).

Indiv. Reference Servs. Group, Inc. v. F.T.C., 2001 WL 477382 (D.D.C. 2001) (upholding FTC regulations under GLB addressing financial institutions' responsibilities in protecting the personal financial information of customers).

F.T.C. v. Guzzetta, Civil Action No. CV 01 2335 (E.D.N.Y) (complaint filed April, 2001) (alleging that Guzzetta violates the GLB and the FTC Act by using fraud

and misrepresentation to obtain information about individuals, which he then sells).

F.T.C. v. Information Search, Inc., Civil Action No. AMD-01-1121 (D. Md.) (complaint filed April, 2001) (alleging that web company violates the GLB and the FTC Act by using fraud and misrepresentation to obtain information about individuals, which it then sells).

F.T.C. v. Garrett, Civil Action No. H 01 1255 (S.D. Tex.) (complaint filed April, 2001) (alleging that Garrett violates the GLB and the FTC Act by using fraud and misrepresentation to obtain information about individuals, which she then sells).

### **C. Children's Online Privacy Protection Act (COPPA)**

F.T.C. v. Toysmart.com, LLC, Civil Action No. 00-11341-RGS (D. Mass. 2000) (stipulated consent agreement) (defendant, going through bankruptcy proceedings, ordered to delete personal information collected through web site and to comply with COPPA).

U.S. v. Looksmart Ltd., Civil Action No. 01-606-A (E.D. Va. 2001) (consent decree) (\$35,000 penalty paid by defendant because of failure to fully disclose information collection, use, and disclosure practices, and failure to obtain parental consent before such collection from children).

U.S. v. Bigmailbox.com, Inc., Civil Action No. 01-605-A (E.D. Va. 2001) (consent decree) (\$35,000 penalty paid by defendant because of failure to fully disclose information collection, use, and disclosure practices, and failure to obtain parental consent before such collection from children).

U.S. v. Monarch Services, Inc., Civil Action No. AMD 01 CV 1165 (D. Md. 2001) (consent decree) (\$30,000 penalty paid by defendant because of failure to fully disclose information collection, use, and disclosure practices, and failure to obtain parental consent before such collection from children).

### **D. Drivers Privacy Protection Act (DPPA)**

Reno v. Condon, 528 U.S. 141 (2000) (upholding constitutionality of the Act, which prohibits states from disclosing a driver's personal information without the driver's consent, and prohibits resale and redisclosure of such information by private persons who obtained such information from the state).



**E. Telecommunications Act of 1996**

U.S. West, Inc. v. F.C.C., 182 F.3d 1224 (10th Cir. 1999) (striking down an FCC rule restricting disclosure of customer proprietary network information (CPNI); rule violates First Amendment because the alleged compelling state interest in protecting privacy is not substantial enough).

**F. Cable Communications Policy Act (Cable Act)**

Warner v. Am. Cablevision of Kansas City, Inc., 699 F. Supp. 851 (D. Kan. 1988) (Cable Act requires that cable operators reveal more than the bare fact that it sometimes discloses customer names and addresses to outside parties; must provide information about the purpose or nature of such disclosure).

Scofield v. Telecable of Overland Park, Inc., 973 F.2d 874 (10th Cir. 1992) (whether there has been a meaningful, clear and conspicuous disclosure of cable operator's practices is determined through a common sense approach, rather than a technical approach; operator is not required exhaustively to list the parties who may be given subscriber information).

Parker v. Time Warner Entm't Co., L.P., 1999 U.S. Dist. LEXIS 18883 (E.D.N.Y. 1999), *class certification granted in part* and denied in part, 198 F.R.D. 374, 2001 U.S. Dist. LEXIS 96 (E.D.N.Y. 2001) (cable company can disclose when customer began cable service and what channels customer subscribes to, as long as it gives customers the opportunity to opt out; cable company cannot release information regarding the time and length of viewing of a particular channel; cable company

**G. Electronic Communications Privacy Act (ECPA)**

State Wide Photocopy Corp. v. Tokai Fin. Servs., Inc., 909 F. Supp. 137 (S.D.N.Y. 1995) (holding that ECPA is aimed at parties accessing electronic facilities without authorization, so if users are authorized to use the information, they are not liable under ECPA, even if they use it fraudulently).

Sherman & Co. v. Salton Maxim Housewares, Inc. 94 F. Supp. 2d 817 (E.D. Mich. 2000) (no matter how malicious the intent, if a user has been granted access to electronically stored information, he is not liable under ECPA).

Supnick v. Amazon.com, Inc., 2000 WL 1603820 (W.D. Wash. 2000) (granting class status on claim that Amazon.com violated ECPA and state privacy rights by intercepting and accessing personal information using Alexa software).

*In re Doubleclick Inc. Privacy Litig.*, 2001 U.S. Dist. LEXIS 3498 (S.D.N.Y. 2001) (in litigation over use of personal information gathered through Internet “cookies,” court dismissed ECPA claim because Doubleclick’s access to the information was authorized by affiliated web sites; Federal Wiretap Act claim is dismissed because web sites consented to Doubleclick’s interception of the communication, and because Doubleclick did not intercept the communication for “criminal or tortious” purposes; pendent state invasion of privacy claims are dismissed because all federal claims are dismissed).

*In re Intuit Privacy Litig.*, 2001 U.S. Dist. LEXIS 5828 (C.D. Cal. 2001) (implantation of cookies on plaintiff s computers by defendant may violate § 2707 of ECPA because plaintiff did not authorize defendant to access the information; claims under § 2520 and § 1030 are dismissed because defendant did not have a tortious purpose and because plaintiff did not suffer any damage).

## **H. Freedom of Information Act**

*Wine Hobby USA, Inc. v. I.R.S.*, 502 F.2d 133 (3d Cir. 1974) (names and addresses of registered winemakers are exempt from compulsory disclosure under FOIA because disclosure would invade privacy).

*Person-Wolinsky Assocs., Inc. v. Nyquist*, 377 N.Y.S.2d 897 (N.Y. Sp. Term 1975) (New York state law prohibits the sale or release of addresses in the possession of government agencies for any private, fundraising or commercial use).

*Disabled Officer’s Assoc. v. Rumsfeld*, 428 F. Supp. 454 (D.D.C. 1977) (names and addresses of particular members of the armed services are not exempt from mandatory disclosure; there is no “clearly unwarranted” invasion of privacy because disclosure will not reveal any personal or embarrassing information and may benefit the individuals).

*HMG Mktg. Assocs. v. Freeman*, 523 F. Supp. 11 (S.D.N.Y. 1980) (lists of names owned by the General Services Administration, when being requested for marketing purposes, are exempt from mandatory disclosure under § 6 of FOIA because the invasion of privacy outweighs the public’s interest in disclosure).

Szikszay v. Buelow, 436 N.Y.S.2d 558 (N.Y. Sup. Ct. 1981) (because state Freedom of Information Law allows disclosure of names and addresses for commercial or fundraising purposes, individual access to that information may not be limited to particular formats).

Mimis v. Dep't of Agric., 737 F.2d 784 (9th Cir. 1984) (names and addresses of permitholders are exempt from mandatory disclosure under § 6 of FOIA because commercial interests do not outweigh the individuals' privacy interest).

## **I. Telephone Consumer Protection Act (TCPA) and Related State Laws**

Moser v. Frohnmayer, 845 P.2d 1284 (Or. 1993) (state law prohibiting all use of all automatic dialing and announcing devices (ADADS) violates Constitutional rights to free speech because it proscribes a type of communication, not an effect of that communication).

Lysaght v. New Jersey, 837 F. Supp. 646 (D.N.J. 1993) (the New Jersey version of the TCPA, which prohibits the use of ADADs unless a live operator has obtained consent, violates the First Amendment because it is not narrowly tailored enough to protect privacy interests).

Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir. 1995) (upholding a state statute requiring a live operator to gain subscriber's consent before all ADAD calls, because it does not foreclose the entire medium of expression).

Szefczek v. Hillsborough Beacon, 668 A.2d 1099 (N.J. Super. Ct. Law Div. 1995) (defendant violated statute by failing to place plaintiff on do-not-call list and by failing to honor her request after placing her name on the list; affirmative defense failed because established procedures were not effective in preventing violations).

Bland v. Fessler, 88 F.3d 729 (9th Cir. 1996) (upholding California state statutes requiring a live operator to gain subscriber's consent before all ADAD calls because there is no less restrictive way to protect privacy).

Kenro, Inc. v. Fax Daily, 962 F. Supp. 1162 (S.D. Ind. 1997) (TCPA applies to material that is not one hundred percent advertising, but the primary function of which is advertising).

Texas v. Am. Blast Fax, Inc., 121 F. Supp. 2d 1085 (W.D. Tex. 2000) (TCPA applies to both interstate and intrastate faxes, and services that merely send faxes for clients can be held liable under the Act).

Worsham v. Nationwide Ins. Co., 2001 WL 461313 (Md. App. 2001) (independent contractor status of caller does not shield entity from liability, because the Act reaches the entity “on whose behalf” the calls are made, as well as affiliated entities sharing ownership or operational control).

## **J. State/Federal Privacy Right**

Lamont v. Comm’r of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y. 1967) (statute allowing state to sell motor vehicle registration records does not violate federal privacy rights).

Bradshaw v. Michigan Nat’l Bank, 197 N.W.2d 531 (Mich. Ct. App. 1972) (unsolicited mailing of credit card does not violate state privacy right).

Shibley v. Time, 341 N.E.2d 337 (Ohio Ct. App. 1975) (sale of subscription list without consent of subscribers does not constitute an invasion of privacy).

Whalen v. Roe, 429 U.S. 589 (1977) (states do not infringe on individuals’ reputation or independence when they maintain lists of patients who receive certain medications, and therefore do not violate Fourteenth Amendment privacy right).

Montinieri v. S. New Eng. Tel. Co., 398 A.2d 1180 (Conn. 1978) (disclosure of unlisted phone number and address by telephone operator is not an invasion of privacy).

Bennett v. Columbia Broad. Sys., Inc., 1986 U.S. App. LEXIS 37308, 13 Media L. Rep. 1237 (6th Cir. 1986) (common law privacy right is not absolute, but is subject to a reasonable person test).

Dwyer v. Am. Express, 652 N.E.2d 1351 (Ill. App. Ct. 1995) (compilation and rental of lists of cardholders and their spending habits does not violate privacy right).

U.S. News & World Report, Inc. v. Avrahami, 1996 Va. Cir. LEXIS 518 (Va. Cir. Ct. 1996) (the inclusion of a name in a mailing list does not constitute an invasion of privacy).

Weld v. CVS Pharmacy, 10 Mass. L. Rptr. 217 (Mass. Super. 1999) (denying defendant's motion for summary judgment on plaintiff's claim that sale by pharmacy of name, address, and birth date for the purpose of marketing a particular drug is an invasion of privacy. Use of information for pharmacy's financial gain gives rise to a claim of invasion of privacy through appropriation of name or likeness.).

Arakawa v. Sakata, 133 F. Supp. 2d 1223 (D. Haw. 2001) (release of social security number by state agency may violate federal right to privacy, especially in light of the personal information available through use of the number).

**\*\*These case summaries based on a compilation by Privacy and American Business.**