

# NOTES

## CALLER INTELLIDATA: PRIVACY IN THE DEVELOPING TELECOMMUNICATIONS INDUSTRY

### I. INTRODUCTION

George Orwell's *1984* discusses the implications that technology and information gathering can have on privacy.<sup>1</sup> It describes a world where Big Brother monitors the everyday conduct of its citizens through technologically advanced equipment.<sup>2</sup> In *1984*, Big Brother is the government. In 1997, Big Brother is business. Modern businesses want information about consumers to improve the production, quality, marketing, and distribution of their goods and services. This Note examines how businesses use a new technology, known as Caller Intellidata ("Intellidata"), in computers and telecommunications to gather consumer information. Further, this Note analyzes the legal implications that Intellidata's information gathering has on privacy.

On September 6, 1995, Southwestern Bell Telephone Company ("SWB")<sup>3</sup> filed an application with the Missouri Public Service Commission ("MPSC")<sup>4</sup> to introduce Intellidata in Missouri.<sup>5</sup> Intellidata, an information

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1. See GEORGE ORWELL, 1984 (1949).

2. See *id.*

3. Southwestern Bell Telephone Company ("SWB") is a subsidiary of SBC Communications Inc. ("SBC"), one of the world's leading diversified telecommunications companies, and the second largest wireless communications company based in the United States. SBC's businesses include wireless services and equipment, business and consumer telecommunications equipment, messaging services, cable television interests in both domestic and international markets, and directory advertising and publishing. SWB operates in Texas, Missouri, Oklahoma, Arkansas, and Kansas. See *Southwestern Bell Introduces Advanced Intelligent Network (AIN) in Kansas City: AIN Enables Business to Cater Telecommunications To Their Customers* (visited Sept. 23, 1997) <<http://www.swbell.com/News/Article.html?wquery-type=article&query=19960328-01>>.

4. A public service commission in each state governs the regulation of utilities such as phone, electricity, and gas within that state. Missouri Revised Statute § 386.040 established the MPSC in Missouri. The jurisdiction, supervision, powers, and duties of the this commission extend to all telecommunications facilities, services, and companies within Missouri. See MO. REV. STAT. § 386.250(2) (1996).

"Telecommunications service" is the transmission of information by wire, radio, optical cable, electronic impulses, or other similar means. "Information" means knowledge or intelligence represented by any form or writing, signs, signal, pictures, sound, or any other symbols. See *id.* § 386.020(53) (1996).

5. Part III of this Note describes Caller Intellidata in greater detail.

gathering service, provides businesses with monthly reports related to their incoming telephone calls.<sup>6</sup> Shortly after SWB filed the application, the Missouri Office of Public Counsel stated that the service “smacks of Big Brother by big business.”<sup>7</sup> SWB withdrew its application for Intellidata from the MPSC on Thursday, October 5, 1995, one day after critics announced that the service constituted an unwarranted invasion of privacy.<sup>8</sup> Thereafter, SWB announced that it would consider refileing a scaled-back version sometime in 1996.<sup>9</sup>

SWB has not yet refiled a scaled-back version of Intellidata; consequently, Intellidata currently has an uncertain status in Missouri. The primary purpose of this Note is to analyze the legal implications of Intellidata before the service is reintroduced in Missouri. Specifically, this Note addresses the actual and potential privacy issues with respect to constitutional, statutory, administrative, and common law. The secondary purpose of this Note is to provide a legal framework that addresses privacy issues of future information gathering technologies in computers and telecommunications.

Part II of this Note outlines the history and development of information gathering telecommunications services. Part III describes Intellidata. Part IV analyzes Intellidata's implications on privacy. Part V concludes that the personal information provided by Intellidata threatens privacy more than the demographic information, and applies different areas of the law to those privacy issues. Finally, Part VI proposes two regulatory solutions to the legal

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6. See generally Before the Public Service Commission of the State of Missouri, Southwestern Bell Telephone Company's Tariff Revision to Introduce a New Service Called Caller Intellidata (No. TT-96-68, Tariff No. 9600133) (Mo.P.S.C. 1995). The Missouri Office of Public Counsel filed a Motion to Dismiss or, in the Alternative, Motion to Suspend SWB's Tariff with the MPSC on September 6, 1995, the same day SWB filed its proposal to introduce Caller Intellidata in Missouri. See *id.* SWB filed a response to the Office of Public Counsel's motion on September 11, 1995. See *id.* The Office of Public Counsel filed a Reply to Southwestern Bell Telephone Company's Response on September 13, 1995. See *id.* On September 19, 1995, SWB filed a Response to the Office of Public Counsel's Reply to Southwestern Bell Telephone Company's Response. See *id.*

On September 29, 1995, the MPSC suspended (as opposed to cancelled or rejected) SWB's tariff to offer Intellidata. See *id.* The MPSC's Suspension set hearings on the matter for November 16th through 17th, 1995. SWB's deadline to submit written testimony was October 27, 1995. See *id.* The Office of Public Counsel's deadline to submit written rebuttal testimony was November 7, 1995. See *id.* SWB withdrew its proposal on October 5, 1995 before the scheduled deadlines. See *id.* The MPSC filed a final order dismissing the case on October 12, 1995. See *id.*

7. Steve Everly, *New Phone Service Revives Privacy Issue, From Customer's Call To A Business, Bell Can Glean Marketing Data*, KAN. CITY STAR, Oct. 10, 1995, at A1.

8. See Steve Everly, *Caller Intellidata Is On Hold, Southwestern Bell Plan To Offer Detailed Information About Callers To Missouri Businesses Is Withdrawn*, KAN. CITY STAR, Oct. 6, 1995, at B1. See also *supra* note 6.

9. See Jerri Stroud, *Bell Backs Off Caller-ID Request Firms Would Get Caller's Profile*, ST. LOUIS POST-DISPATCH, Oct. 6, 1995, at 10C.

issues arising from the use of Intellidata.

## II. THE HISTORY OF TELECOMMUNICATIONS SERVICES

On August 27, 1992, SWB submitted a tariff to the MPSC designed to implement Caller Identification ("Caller ID") as a new telecommunications service in Missouri.<sup>10</sup> Caller ID provides its subscribers with the calling party's telephone number, first and last name, and the date and time of the call.<sup>11</sup> Subscribers pay a monthly fee and purchase a display device on which the information about the calling party is transmitted.<sup>12</sup> On March 18, 1993, the MPSC authorized SWB to provide Caller ID in Missouri.<sup>13</sup>

Caller ID originally offered only the calling party's phone number and the date and time of the call.<sup>14</sup> Soon after its introduction, Caller ID expanded to include the local calling party's first and last name.<sup>15</sup> Caller ID expanded again to include this information for incoming long distance calls.<sup>16</sup> The historical progression of Caller ID creates a paradigm: as telecommunications technology advances, the amount of information

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10. See *In re Southwestern Bell Tel. Co.*, No. TR-93-123, 144 P.U.R.4th 528 (Mo.P.S.C. 1993) (MPSC order authorizing Caller ID in Missouri).

11. See *id.* For more information about Caller ID and its privacy implications, see *infra* note 24.

12. See *State ex rel. Office of Pub. Counsel v. Missouri Pub. Serv. Comm'n*, 884 S.W.2d 311, 313 (Mo. Ct. App. 1994) (OPC appeal of MPSC's order authorizing Caller ID in Missouri). Subscribers to Caller ID must pay a monthly fee and purchase a device that displays the identification information. See *id.* The information of the calling party is not displayed if the call originates from outside of the area where Caller ID is available, is made from a cellular phone, is operator assisted, is made using a credit card, is made from a party line, or is the second call received using Call Waiting. See *id.* Caller ID also does not display the party's information if that calling party applies a blocking option. See *id.* For information discussing blocking options, see *infra* note 13.

13. See *In re Southwestern Bell Tel. Co.*, 144 P.U.R.4th at 528. This order authorizing Caller ID in Missouri requires that Caller ID implement those service conditions designed to protect the public interest, including free per-call blocking for everyone and free per-line blocking for law enforcement and domestic violence intervention agencies. See *id.* Per-call blocking allows a user to block the transmission of her name and number by dialing a code, \*67 in Missouri, before dialing the phone number. See *State ex rel. Office of Pub. Counsel*, 884 S.W.2d at 314. When this code is used, the transmission on Caller ID equipment indicates that the source of the call is "anonymous" or "private." In addition, per-line blocking dials anonymously automatically without entering a code before dialing. See *id.*

The Office of Public Counsel appealed the MPSC's order authorizing Caller ID, but the Missouri Court of Appeals affirmed the order. See *id.* at 313-17.

14. See *id.* at 313. See also Filing by N.J. Bell Telephone Co. of a Revision of Tariff B.P.U.-N.J. No. 2, Providing for the Introduction of CLASS Calling Service on a Limited Basis, Docket No. TT87070560 (N.J. Bd. Pub. Utilities July 16, 1987) (first time Caller ID service introduced in United States).

15. See *infra* note 16.

16. See *Southwestern Bell's Caller ID to Display More Long-Distance Phone Numbers and Names* (visited Sept. 23, 1997) <<http://www.swbell.com/News/Article.html?query-type=article&query-19960515-01>>.

disseminated increases. Intellidata, described in Part III, supports this paradigm.

Caller ID's popularity is growing.<sup>17</sup> Yet, critics argue that Caller ID is an invasion of privacy.<sup>18</sup> Specifically, they argue that Caller ID uses technology surreptitiously to gain personal information about people without their consent.<sup>19</sup>

In *Barasch v. Pennsylvania Public Utility Commission*,<sup>20</sup> a Pennsylvania trial court held that Caller ID violated the Pennsylvania wiretap statute and the caller's privacy rights under both the Pennsylvania and U.S. Constitutions.<sup>21</sup> The Supreme Court of Pennsylvania affirmed the trial court's holding with respect to the wiretap violation.<sup>22</sup> However, the court declined to review the trial court's holding that Caller ID violated the state and federal constitutions.<sup>23</sup>

Legal scholars began discussing the issues raised by Caller ID only after its introduction.<sup>24</sup> Yet, the debate over Caller ID laid a foundation to address

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17. Nearly one Southwestern Bell customer out of three in Texas, Missouri, Oklahoma, Arkansas, and Kansas subscribes to Caller ID. Today 32.25% of all residential customers of SWB subscribe to Caller ID. See *Consumer Demand For 'Caller ID' Continues To Soar: Southwestern Bell Announces Its Three Millionth Subscriber* (visited Sept. 23, 1997) <<http://www.swbell.com/News/Article.html?query-type=article&query=19960822-02>>. Proponents of Caller ID argue that callers implicitly consent to the information transferred when they make a call. They also argue that Caller ID is helpful in reducing prank phone calls and increasing privacy in the home by allowing subscribers to screen phone calls. See *In re Southwestern Bell Tel. Co.*, No. TR-93-123, 144 P.U.R.4th 528 (Mo. P.S.C. 1993).

18. See *State ex rel. Office of Pub. Counsel v. Missouri Pub. Serv. Comm'n*, 884 S.W.2d 311, 313, 315 (Mo. Ct. App. 1994) (OPC appeal of MPSC's order authorizing Caller ID). See also *infra* note 22, at 1199 n.2. Some critics argue that Caller ID is unnecessary to reduce prank phone calls and provide screening privacy because other services such as Call Blocking and Call Trace meet these goals without revealing the caller's personal information.

19. See *supra* note 18.

20. 576 A.2d 79 (Pa. Commw. Ct. 1990) (holding that Caller ID is illegal).

21. See *id.* at 90-91.

22. See *Barasch v. Pennsylvania Pub. Util. Comm'n*, 605 A.2d 1198, 1202 (Pa. 1992). In affirming the trial court's holding, the Pennsylvania Supreme Court said, "[W]e agree with the Commonwealth Court that the service still violates the wiretap law, because it is being used for unlimited purposes without the 'consent' of each of the users of the telephone service." *Id.* The court further stated, "It is the caller whose number is being trapped and traced and whose privacy is being jeopardized, and whose 'consent' would therefore be particularly relevant." *Id.* at 1203.

23. See *id.* at 1203. The court stated, "We need not reach the constitutional issues decided by the Commonwealth Court majority in this case because we have long held that our courts should not decide constitutional issues in cases which can properly be decided on non-constitutional grounds." *Id.*

24. See Susan M. Felkowski, Note, *Caller Identification Technology And The Challenges In Adapting To Telecommunications Innovations*, 38 WAYNE L. REV. 415 (1991); Laurie Thomas Lee, *U.S. Telecommunications Privacy Policy And Caller ID*, 30 CAL. W. L. REV. 1 (1993); Steven P. Oates, Note, *Caller ID: Privacy Protector Or Privacy Invader?*, 1992 U. ILL. L. REV. 219 (1992); Glenn Chatmas Smith, *We've Got Your Number! (Is It Constitutional To Give It Out?): Caller Identification Technology And The Right To Informational Privacy*, 37 UCLA L. REV. 145 (1989).

the legal implications of new technologies such as Intellidata. As Professor Glenn Smith predicted over seven years ago,

[C]aller Identification is the opening chapter of a larger story of rapidly changing telecommunications technology which brings with it unique privacy dilemmas. As the telephone becomes even more of an "intelligent network" at the center of the "information age," new challenges for privacy and the law are certain to arise.<sup>25</sup>

Professor Smith's prediction proved correct a few years later when SWB introduced the "Advanced Intelligent Network" and one of its services, Intellidata.

### III. INTELLIDATA

Intellidata is part of SWB's Advanced Intelligent Network ("AIN").<sup>26</sup> AIN combines a central computer database with new telecommunications technology to provide an array of call-management services for business customers.<sup>27</sup> Intellidata provides businesses with monthly reports containing

25. Smith, *supra* note 24, at 223. Intellidata and Caller ID are just two examples of how telephone technology can affect privacy. For a broader discussion of telecommunications privacy, see Robert Asa Crook, *Sorry, Wrong Number: The Effect Of Telephone Technology On Privacy Rights*, 26 WAKE FOREST L. REV. 669 (1991).

26. See *Advanced Intelligent Network* (visited Dec. 28, 1996) <<http://www.sbc.com/swbell/wct/ain.html>>; *AIN Business Solutions* (visited Dec. 31, 1996) <<http://www.sbc.com/swbell/shortsub/ain.html>>; *Southwestern Bell Introduces Advanced Intelligent Network (AIN) in Kansas City: AIN Enables Businesses to Cater Telecommunications To Their Customers* (visited Sept. 27, 1997) <<http://www.swbell.com/News/Article.html?query-type=article&query=19960328-01>>; *Southwestern Bell Telephone Introduces Advanced Intelligent Network (AIN) in Dallas-Fort Worth: AIN Enables Businesses to Cater Telecommunications to their Clients* (visited Dec. 28, 1996) <<http://www.sbc.com/swbell/now/news/archives/960214-01.html>>; *Mediafile: First Market for Three Advanced Telephone Services* (visited Oct. 9, 1996) <<http://www.sbc.com/cgi-bin/cgiwais?getdes...com/cgi-bin/cgiwais&keywords=intellidata>>; *Mediafile: Southwestern Bell Telephone Announces Advent of Advanced Network Technology in Austin* (visited Dec. 28, 1996) <<http://www.sbc.com/swbell/now/news/archives/nr950424-01.html>>; see also *infra* notes 27 and 29.

27. In addition to Intellidata, AIN offers businesses other advanced telecommunications services. IntelliNumber enables a business to advertise a single metro phone number for all locations that automatically directs calls to the location specified by the business. See *Southwestern Bell Introduces Advanced Intelligent Network (AIN) in Kansas City: AIN Enables Businesses to Cater Telecommunications To Their Customers* (visited Sept. 27, 1997) <<http://www.swbell.com/News/Article.html?query-type=article&query=19960328-01>>. Disaster Routing Service ("DRS") avoids dead phone lines and customer confusion by redirecting calls to alternate locations during natural disasters or other emergencies. See *id.* Intelligent Redirect offers call routing options that enable businesses to provide important customers with priority treatment that route calls to alternate locations based on customer-specific criteria such as time-of-day and day-of-week. Such treatment also balances loads among multiple locations through percentage routing. AreaWide Networking allows businesses with multiple locations to merge into a single communications network through inter-office dialing, centralized routing, and remote access to the private network via a public network. See *id.* Ironically,

information about incoming telephone calls.<sup>28</sup>

Intellidata's monthly reports are both "specific" and "general."<sup>29</sup> The Call Detail Report provides specific information about the caller, such as the caller's name, address, area code, phone number, and origin (business or residence).<sup>30</sup> Conversely, the Summary Report provides general information. For instance, it contains computer generated statistical summaries on incoming calls such as the hourly distribution of calls by day of the week.<sup>31</sup> Businesses use this general information to predict the busiest times of the day. This type of information allows businesses to serve customers more efficiently by adjusting their workforce during certain hours of the day or on certain days of the week.

The Summary Report also provides businesses with demographic information, displaying demographic codes with information about the

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Positive ID, an AIN service, helps businesses secure their computer and voice networks from "hackers." See *Southwestern Bell Introduces "Padlock" for PCs: Positive ID Responds To Growing Need To Safeguard Computer And Voice Networks Of Medium, Large Businesses* (visited Sept. 27, 1997) <<http://www.swbell.com/News/Article.html?query-type=article&query=19960405-01>>.

28. The information comes in tabular and graphical formats on paper or computer diskette. Graphical reports are available on paper, while tabular report formats are available on paper or computer diskette. See *infra* note 29.

29. Before The Public Service Commission Of The State Of Missouri, *Southwestern Bell Telephone Company's Tariff Revision To Introduce A New Service Called Caller Intellidata*, Case No. TT-96-68, Tariff No. 9600133 (Mo.P.S.C. 1995) (this case is on file with the office of the MPSC). SWB proposes to revise the General Exchange Tariff, P.S.C. Mo.-No. 35 by adding a new Section 50, known as Advanced Intelligent Network Services. This new section would introduce Caller Intellidata. See *id.* More useful and detailed information about Intellidata is found in unpublished brochures and advertising pamphlets produced by SWB. In addition, the Southwestern Bell website also provides general information about Intellidata and its numerous features. See *How Does It Work? Caller Intellidata* (visited Sept. 27, 1997) <[http://www.swbell.com/cgi-bin/page.exe?file=ProdWork.html&PRODUCT\\_CODE=CIN&BACK\\_URL=&BACK\\_TEXT=>](http://www.swbell.com/cgi-bin/page.exe?file=ProdWork.html&PRODUCT_CODE=CIN&BACK_URL=&BACK_TEXT=>)>.

30. See *How Does It Work?*, *supra* note 29. The Call Detail Report also provides the date, day, and time of the call. See *id.*

31. See *id.* The Summary Report-Individual also provides: the total number of calls, number of calls by day and date, number of calls by day of the week, hourly distribution of calls by day of the week, hourly distribution of calls per month, number of calls by telephone exchange (area code and the first three digits of the caller's telephone number), number of calls by zip code + 4, number of calls by demographic code (i.e., consumers' lifestyles, purchasing behavior, income levels, and education), and a graphical distribution of zip codes and telephone exchanges on geographic maps. Individually these services range from \$7.50 per month to \$20 per month, but the Summary Reports Package includes all six summary reports for \$39 per month.

The Graphical Report is only available with the purchase of the summary tabular All Reports Elements package or the Deluxe Report Package. The Deluxe Package includes Call Detail, all Summary Reports, and Graphical Reports. The Graphical Report format provides the following data: number of calls by day of the month, number of calls by day of the week, hourly distribution of calls during the month, hourly distribution of calls on a specific day of the weeks, number of calls by telephone exchange (provided by graphical map), number of calls by Zip code + 4 (provided by graphical map), and distribution of calls by demographic code. The Deluxe Package costs \$120.00 per month. See *id.*

caller's purchasing behavior, lifestyle, marital status, income, education, and household size.<sup>32</sup> These reports utilize fifty different demographic codes to categorize callers.<sup>33</sup> One such code, called "Young and Carefree," provides detailed information on people between the ages of eighteen and twenty-nine, while another code, "Secure Adults," provides breakdowns on adults fifty-five years and older. Intellidata uses the U.S. Census, consumer surveys, and other data that profile a zip code + 4 to develop the caller's demographic profile. A caller's demographic information is therefore generalized and based on statistics from households within that area.<sup>34</sup>

Callers can reduce Intellidata's information gathering abilities by utilizing a blocking option, having a non-published or unlisted telephone number, or omitting their address from the directory.<sup>35</sup> These options generate a report that reflects the caller's five-digit zip code instead of the zip code + 4.<sup>36</sup> A blocking option also prevents the caller's phone number, name, and street address from disclosure.<sup>37</sup> An unlisted phone number likewise prevents disclosure of the caller's street address and origin (business or residence).<sup>38</sup> Finally, an unlisted address prevents disclosure of the caller's street address.<sup>39</sup>

#### IV. LEGAL IMPLICATIONS OF INTELLIDATA

Opponents of Intellidata argue that the service constitutes an invasion of privacy because it uses telecommunications technology surreptitiously to gain personal information from people without their consent.<sup>40</sup> The notion of a "right to privacy" dates back to 1890 when Justices Samuel Warren and Louis Brandeis urged broad legal recognition of a right to privacy in a now

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32. *See id.* The demographic information is compiled by Equifax Corporation, an Atlanta-based marketing and information company, by using the zip code + 4 of each caller. The data from Equifax is based on a sophisticated, demographic tracking system known as Equifax MicroVision codes. For additional information on Equifax, see *Equifax: Managing A World Of Information* (visited Dec. 31, 1996) <<http://www.equifax.com>>.

33. *See How Does It Work?*, *supra* note 29. Other demographic codes include Upper Class Families, Upper Class Singles, Sunset Suburban Singles, Good Country Life, Average Suburban Households, Young Families, Students and Starters, Hard to Reach, Blue Collar Blues, Poor Families, Struggling Rural Families, Economic Lower Class, Struggling Urban Single Parents, and Businesses.

34. *See Everly*, *supra* note 7.

35. *See How Does It Work?*, *supra* note 29.

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *See supra* note 6. *See also State ex rel. Office of Pub. Counsel v. Missouri Pub. Serv. Comm'n*, 884 S.W.2d 311 (Mo. Ct. App. 1994).

famous law review article entitled *The Right To Privacy*.<sup>41</sup> The Justices defined the right to privacy as “the right to be let alone.”<sup>42</sup> The notion that Intellidata invades a right to privacy or a “right to be let alone” implicates many areas of the law.<sup>43</sup>

## A. Constitutional Right to Privacy

### 1. Jumping the Procedural Hurdle: State Action

The protections afforded by the U.S. Constitution do not apply to actions of private parties,<sup>44</sup> but rather only apply to actions of government.<sup>45</sup> Any constitutional challenge to Intellidata must therefore satisfy this state action requirement. Although SWB is a private corporation, its proposal to offer Intellidata as a telecommunications service within Missouri must be approved by the State of Missouri through the MPSC.<sup>46</sup> Thus, the threshold question is whether the MPSC’s role in approving Intellidata as a telecommunications service constitutes state action.<sup>47</sup> The Supreme Court has stated that, in determining whether there is state action, “[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”<sup>48</sup> In conducting this inquiry, the Supreme Court relies on several factors.<sup>49</sup>

41. Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487 (1975), the Supreme Court refers to the Warren and Brandeis article as the “root article” of the right to privacy. See also Richard C. Turkington, *Legacy Of The Warren And Brandeis Article: The Emerging Unencumbered Constitutional Right To Privacy*, 10 N. ILL. U. L. REV. 479 (1990).

42. Warren & Brandeis, *supra* note 41, at 195.

43. Although most of this Note discusses the constitutional right to privacy, the final section of Part IV elaborates on the other legal implications that Intellidata has on privacy. In addition, Part V concludes that other areas of law, namely regulatory or administrative law, provide a more efficient means of opposing Intellidata than constitutional law.

44. See, e.g., *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926); *The Civil Rights Cases*, 109 U.S. 3 (1883); see also *infra* note 47.

45. See *Corrigan*, 271 U.S. at 330; *The Civil Rights Cases*, 109 U.S. at 3.

46. See MO. REV. STAT. § 386.250(2) (1996).

47. The Supreme Court has stated, “While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is ‘private,’ on the one hand, or ‘state action,’ on the other hand, frequently admits of no easy answer.” *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-50 (1974) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972)).

48. *Jackson*, 419 U.S. at 351. For a more detailed discussion of the constitutionality of telecommunications services like Intellidata, see Smith, *supra* note 24.

49. The *Jackson* Court stated: “As our subsequent discussion in *Burton* made clear, the dispositive question in any state action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels



First, the Court is more likely to treat private actions as those of the state if they serve a public function “traditionally exclusively reserved to the State.”<sup>50</sup> The Court has applied this public function doctrine to invoke constitutional protections against privately owned towns,<sup>51</sup> privately owned parks,<sup>52</sup> private political associations,<sup>53</sup> and privately owned shopping centers.<sup>54</sup> Second, the Court is more apt to conclude that private conduct is truly state action if the state is involved in the private conduct “to some significant extent.”<sup>55</sup> Third, state authorization of private conduct may

a finding of state responsibility.” 419 U.S. at 360. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Supreme Court stated, “[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.” *Id.* at 722.

The state action factors described in this Note often overlap, and many constitutional commentators use different names and categories. An in depth discussion of state action doctrine goes beyond the scope of this Note. For a more detailed discussion of state action, see Daphne Barak-Erez, *A State Action Doctrine For An Age Of Privatization*, 45 SYRACUSE L. REV. 1169 (1995); Dilan A. Esper, Note, *Some Thoughts on the Puzzle of State Action*, 68 S. CAL. L. REV. 663 (1995); see also GERALD GUNTHER, CONSTITUTIONAL LAW 920 (12th ed. 1991) (a discussion of recent state action cases).

50. *Jackson*, 419 U.S. at 352. In *Marsh v. Alabama*, the Court subjected the actions of a privately owned town to constitutional restraints because the town’s function was so public in nature that its actions may be treated as those of the State itself. 326 U.S. 501 (1946). In *Jackson*, the Court narrowed the public function doctrine to private conduct “traditionally exclusively reserved to the State.” 419 U.S. at 352.

Recent cases have followed this narrow approach to the public function doctrine. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157-64 (1978) (discussing public function theory and cases). For a further discussion of public function doctrine, see Esper, *supra* note 49, at 687-709.

51. See *Marsh*, 326 U.S. at 501.

52. In *Evans v. Newton*, 382 U.S. 296 (1966), the Court focused on the nature of a park and concluded that a park was traditionally public and thus was more similar to fire and police departments, rather than golf clubs, social centers, luncheon clubs, and schools. The Court stated:

A park, on the other hand, is more like a fire department or police department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain (citation omitted) and state courts that aid private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment. Like the streets of the company town (citation omitted), the elective process (citation omitted), and the transit system (citation omitted), the predominant character and purpose of this park are municipal.

*Id.* at 302.

53. See *Terry v. Adams*, 345 U.S. 461 (1953) (where a state delegates an aspect of the elective process to private groups, they become subject to the same restraints as the state).

54. See *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (holding that a trespass law could not be applied to stop First Amendment activity—union picketing of a supermarket—in a privately owned shopping center). *But see* *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972).

55. *Reitman v. Mulkey*, 387 U.S. 369 (1967). In *Reitman*, the Court determined “whether the State has significantly involved itself” enough in private conduct for that conduct to be treated as that of the State itself. *Id.* at 380. In *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961), the Supreme Court held that the exclusion of an African-American patron from a privately operated restaurant located in a building financed by public funds and owned by a state agency constituted sufficient state involvement to invoke constitutional protection. See *id.* The Court determined that the

convert the conduct into that of the state itself,<sup>56</sup> authorization is similar to encouragement because the result is to selectively approve certain conduct. However, the Court distinguishes encouragement from mere authorization and places greater weight on encouragement as a fourth factor in determining the existence of state action.<sup>57</sup> Finally, if the private entity possesses a monopoly conferred or protected by the state, the private conduct may be treated as that of the state.<sup>58</sup>

The facts surrounding Intellidata at least partially satisfy each of the factors described above.<sup>59</sup> First, although the MPSC is not involved with

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restaurant and the State were joint participants for its involvement because the state parking authority owned the building and could have required the private restaurant owner to serve all persons. *See id.* at 725. The Court stated, “[P]rivate conduct abridging individual rights does no violence to the [Constitution] unless to some *significant extent* the State . . . has been found to have become involved in it.” *Id.* at 722 (emphasis added).

*But cf.* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (holding that the operation of a State’s regulatory scheme enforced by the state liquor board did not sufficiently involve the State of Pennsylvania in the discriminatory policies of Moose Lodge to render those policies state action); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974) (state regulation of a private business is insufficient involvement by itself). *See also* GUNTHER, *supra* note 49, at 909.

56. In *The Civil Rights Cases*, the Court indicated that private actions must be either “sanctioned by the state” or “done under state authority” in order to be considered those of the State. *See* 109 U.S. 3, 17 (1883). Further, the *Burton* Court, found implicit authorization through the State’s inaction sufficient to treat the private action involved as that of the State itself, even though the State did not encourage or order the private conduct. *See Burton*, 365 U.S. at 725; *see also supra* note 55. In addition, in *Reitman*, the Court found sufficient state action because a specific state constitutional provision “was intended to authorize, and does authorize” the private discrimination. 387 U.S. at 381. *But see* *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978) (“This Court, however, has never held that a State’s mere acquiescence in a private action converts that action into that of the State”). *See* GUNTHER, *supra* note 49, at 912.

57. *See supra* note 56; *see also infra* notes 63, 83, 85, and accompanying text. Although the authorization and encouragement standards are both used to determine whether the state is responsible for private conduct, there is a fine, albeit important distinction between the two in state action cases. The Supreme Court distinguishes between a public utility commission providing authorization through a general tariff not specifically related to the private conduct, versus encouragement through a commission’s hearings and subsequent decision on the specific private conduct in question.

Therefore, courts are more likely to construe the MPSC’s hearings on the approval of Intellidata as encouragement rather than mere authorization. This encouragement categorization increases the likelihood that the facts surrounding Intellidata will overcome the state action procedural hurdle. *See Jackson*, 419 U.S. at 356-57 (distinguishing the public utility commission’s hearings and involvement in *Public Utilities Commission v. Pollak*, 343 U.S. 451, 462 (1952)); *see also Moose Lodge No. 107*, 407 U.S. at 176-77 (suggesting that if the State’s regulation had in any way fostered or encouraged the private conduct, a state action finding might have been justified); *see* GUNTHER, *supra* note 49, at 912.

58. *See Jackson*, 419 U.S. at 366-67 (Marshall, J., dissenting) (citing cases that support monopoly status as a factor in determining whether constitutional obligations can be imposed on private entities); *Moose Lodge No. 107*, 407 U.S. at 177 (stating that the lack of monopoly status conferred upon the private entity was a contributing factor in the no state action holding). For a further discussion of the monopoly status factor, *see* Bruce W. Blakely, Comment, *Public Utility Bill Inserts, Political Speech, And The First Amendment: A Constitutionally Mandated Right To Reply*, 70 CAL. L. REV. 1221, 1239-41 (1982).

59. Although the MPSC regulates SWB, the involvement factor is not applicable because the

SWB in a joint venture, it does regulate many aspects of SWB's business.<sup>60</sup> Second, SWB serves a public function by providing telephone services throughout Missouri.<sup>61</sup> However, it is unclear whether telephone services were "traditionally exclusively reserved to [Missouri]."<sup>62</sup> Third, the MPSC's investigation, hearing, and authorization of Intellidata are facts that indicate encouragement, rather than mere authorization.<sup>63</sup> Finally, although SWB has a monopoly on phone services, recent legislation prevents Missouri from protecting SWB's monopoly.<sup>64</sup>

The following cases demonstrate the importance of the encouragement factor in state action cases involving public utilities.

In *Public Utilities Commission v. Pollak*,<sup>65</sup> Capital Transit Company was a privately owned public utility corporation that owned and operated a street railway and bus system.<sup>66</sup> The Public Utilities Commission of the District of Columbia regulated Capital Transit's public transportation service and equipment.<sup>67</sup> Capital Transit introduced "music as you ride" radio programs

MPSC is not involved in SWB's telecommunications business to "some significant extent" as a joint venturer or participant. *See supra* note 55. The MPSC's regulatory role is more applicable to the encouragement factor. *See supra* notes 56-57 and accompanying text. The procedure of authorizing Intellidata would include investigation and hearings conducted by the MPSC. *See supra* note 29. Therefore, the facts surrounding Intellidata satisfy the authorization factor but are more similar to the encouragement factor.

60. *See* MO. REV. STAT. § 386.250 (1996); *see also supra* note 59.

61. *See supra* notes 50-54 and accompanying text (discussing the public function doctrine).

62. *Jackson*, 419 U.S. at 352. *See also infra* note 64. Examining the history of telephone service in Missouri goes beyond the scope of this Note. Nevertheless, this history is relevant in determining the strength of the public function factor in state action cases.

63. *See supra* notes 56-57; *see also infra* note 85. The fact that the MPSC's role in authorizing Intellidata is similar to the encouragement factor rather than the authorization factor increases the likelihood that privacy concerns regarding Intellidata will overcome the state action procedural hurdle.

64. *See Competitive Telecomms. v. Missouri Pub. Serv. Comm'n*, 886 S.W.2d 34, 37 (Mo. Ct. App. 1994) (describing SWB as a noncompetitive telecommunications service under Missouri law); *see supra* note 62.

Missouri law states:

No certificate of service authority issued by the commission shall be construed as granting a monopoly or exclusive privilege, immunity or franchise. The issuance of a certificate of service authority to any telecommunications company shall not preclude the commission from issuing additional certificates of service authority to another telecommunications company providing the same or equivalent service or serving the same geographical area or customers as any previously certified company, except to the extent otherwise provided by section 392.450.

MO. REV. STAT. § 392.410.3 (1996). A 1996 amendment to this section deleted "except a grant of authority to provide basic local telecommunications service" following "issued by the commission" in the first sentence. However, the MPSC retains the right to classify and regulate a telecommunications service as "noncompetitive." MO. REV. STAT. §§ 392.370.3 and 392.480.1 (1996).

65. 343 U.S. 451 (1952).

66. *See id.* at 454.

67. *See id.*

on its streetcars and busses.<sup>68</sup> After protest, the Public Utilities Commission investigated “music as you ride” and concluded that it was not inconsistent with public convenience, comfort, and safety.<sup>69</sup> The issue in *Pollak* was whether the action of Capital Transit in installing and operating the music service, coupled with the action of the Public Utilities Commission in dismissing its own investigation into the practice, constituted state action.<sup>70</sup>

The *Pollak* Court held that the relationship between the State and the radio service was sufficiently close to invoke constitutional protection.<sup>71</sup> The Court recognized but did not rely upon the fact that Capital Transit was a private company operating a public utility and that the State granted Capital Transit a substantial monopoly in public transportation.<sup>72</sup> Instead, the Court based its decision on the role of the Public Utilities Commission in regulating and supervising Capital Transit’s public transportation service. In particular, the Court focused on the Commission’s own investigation, hearings, and decision to authorize the radio service.<sup>73</sup>

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68. *See id.* at 455. The music was received and amplified through loudspeakers on the streetcars and busses. *See id.*

69. *See id.* at 457. The Court dismissed the investigation after concluding “that the installation and use of radios in streetcars and busses of the Capital Transit Company is not inconsistent with public convenience, comfort, and safety.” *Id.* at 457 (quoting the Public Utilities Commission investigation at 81 P.U.R. (N.S.) 122, 126). After considering arguments from both sides concerning “music as you ride,” the Commission said,

“From the testimony of record, the conclusion is inescapable that radio reception in streetcars and busses is not an obstacle to safety of operation.

Further, it is evident that public comfort and convenience is not impaired and that, in fact, through the creation of better will among passengers, it tends to improve the conditions under which the public ride.”

*Id.* at 458-59 (quoting the Public Utilities Commission investigation at 81 P.U.R. at 126).

In addition, the Commission’s investigation included hiring a private company to conduct a public opinion survey to determine the attitude of Capital Transit customers toward transit radio. *See id.* at 459.

70. *See id.* at 461.

71. *See Pollak*, 343 U.S. at 462. The Court said, “We find in the reasoning of the court below a sufficiently close relation between the Federal Government and the radio service to make it necessary for us to consider those Amendments.” *Id.*

72. *See id.* The Court said:

In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia.

*Id.*

73. *See id.* The Court stated:

We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not

In *Jackson v. Metropolitan Edison Co.*,<sup>74</sup> a customer brought suit against Metropolitan Edison Company, a privately owned and operated electric utility corporation. The suit alleged that the company violated the Fourteenth Amendment by terminating a customer's electric service before she had been afforded notice, a hearing, and an opportunity to pay any amounts due.<sup>75</sup> In order to deliver electricity in Pennsylvania, Metropolitan held a certificate of public convenience issued by the Pennsylvania Public Utility Commission.<sup>76</sup> As a condition to granting the certificate, Metropolitan subjected itself to extensive regulation by the Commission.<sup>77</sup> The general tariff filed with the Commission gave Metropolitan the right to discontinue service to any customer upon reasonable notice.<sup>78</sup> *Jackson* presented the question of whether Metropolitan's termination of the customer's service for alleged nonpayment, a permissible action under its general tariff, constituted state action.<sup>79</sup>

The *Jackson* Court held that the State of Pennsylvania was not sufficiently connected with the act of terminating Jackson's electricity to render Metropolitan a state actor.<sup>80</sup> The Court said that even extensive state regulation of public utilities and the existence of a state-granted monopoly cannot by themselves convert the action of a private entity into that of the State.<sup>81</sup> The Court recognized but rejected the public function factor because

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impaired thereby.

*Id.*

74. 419 U.S. 345 (1974).

75. *See id.*

76. *See id.* at 346.

77. *See id.*

78. *See id.* at 346 n.1.

79. *See id.* at 348.

80. *See id.* at 358-59. The Court stated, "We conclude that the State of Pennsylvania is not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent's conduct in so doing attributable to the State for purposes of the Fourteenth Amendment."

*Id.* Further, the Court stated:

All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law. Under our decision this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment.

*Id.* at 358; *see also infra* note 81.

81. *See id.* at 350. The *Jackson* Court stated, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so." *Id.* (citations omitted). Regarding the monopoly status factor, the Court stated, "[a]s a factual matter, it may well be doubted that the State ever granted or guaranteed Metropolitan a monopoly. But assuming that it had, this fact is not determinative in considering whether

Pennsylvania law did not consider the delivery of utility services “traditionally exclusively reserved to the State.”<sup>82</sup> The Court also rejected the notion that Metropolitan’s termination was state action because the State authorized and approved the termination practice in its general tariff.<sup>83</sup> The Court’s standard for holding the State responsible for private action was higher than mere authorization.<sup>84</sup> The Court required encouragement such as ordering the proposed practice, similar to the action of the Public Utility Commission in *Pollak*.<sup>85</sup> Finally, the Court did not find any relationship between the State and the private utility company to suggest that the State was a joint participant in Metropolitan’s business.<sup>86</sup>

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Metropolitan’s termination of service to petitioner was ‘state action’ for purposes of the Fourteenth Amendment.” *Id.* at 351-52; *see also supra* note 80 and accompanying text.

82. *Id.* at 352-53. *Jackson* narrows the public function factor from actions of private entities that substantially affect public interest to those traditionally the exclusive prerogative of the state; *see also supra* notes 50-54 and accompanying text.

83. *See id.* at 354 (“We also reject the notion that Metropolitan’s termination is state action because the State ‘has specifically authorized and approved’ the termination practice.”).

84. *See infra* note 85 and accompanying text.

85. *See Jackson*, 419 U.S. at 354-57. The Supreme Court distinguishes between actions by the state or a public utility commission that specifically authorize or approve the private conduct, and those that generally authorize or approve the private conduct. *See id.* The Court considers specific authorization and approval closer to the higher standard of encouragement, while general authorization and approval is an insufficient nexus between the state and the private entity to hold the state responsible for the private action. For example, the Court distinguishes the Public Utility Commission’s general tariff provision authorizing the termination practice in *Jackson*, from the Public Utility Commission’s specific investigation and authorization of “music as you ride” in *Pollak*. *See id.* The Court stated that, “[a]lthough the Commission did hold hearings on portions of Metropolitan’s general tariff relating to a general rate increase, it never even considered the reinsertion of this provision in the newly filed general tariff.” *Id.* at 354-55.

The Court further indicated that:

In either event, the nature of the state involvement there [*Pollak*] was quite different than it is here. The District of Columbia Public Utilities Commission, on its own motion, commenced an investigation of the effects of the piped music, and after a full hearing concluded not only that Capital Transit’s practices were “not inconsistent with public convenience, comfort, and safety,” (citation omitted) 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.” *Ibid.* Here, on the other hand, there was no such imprimatur placed on the practice of Metropolitan about which petitioner complains. . . . 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.”

*Id.* at 356-57. The Court also suggests that the State is responsible for the private conduct where the State initiates such conduct. *See id.* at 357.

Justice Marshall’s dissent interprets the majority opinion as requiring the Public Utility Commission to hold hearings before state action is found. *See id.* at 370-71 (Marshall, J., dissenting). He says that “The majority’s test puts potential plaintiffs in a difficult position: if the Commission approves the tariff without argument or a hearing, the State has not sufficiently demonstrated its approval and support for the company’s practices.” *Id.* at 370.

86. *See id.* at 357-58.

The *Pollak* and *Jackson* decisions provide the framework for the distinction between encouragement and authorization.<sup>87</sup> In *Pollak*, where the Court did find state action, the public utility commission approved the radio service after holding hearings specifically related to this service.<sup>88</sup> In *Jackson*, where the Court did not find state action, the utility commission approved the termination of the customer's electrical service by a general tariff provision rather than specific hearings.<sup>89</sup> The Court differentiates *Jackson* from *Pollak* based on this encouragement/authorization distinction. *Jackson* interprets *Pollak* as requiring a public utility commission to investigate and conduct hearings on the specific private conduct in question before deeming the conduct state action.<sup>90</sup>

The encouragement/authorization distinction is of particular importance in the context of Intellidata because the MPSC would hold specific hearings on the privacy issues surrounding Intellidata before approving the service. Therefore, it is possible that the MPSC's hearings on, and approval of, Intellidata would constitute state action thereby invoking the constitutional right to privacy.

## 2. *The Substantive Right to Privacy: The "Penumbra"*

The U.S. Constitution does not explicitly confer a "right to privacy."<sup>91</sup> The Supreme Court did not recognize a constitutional right to privacy until 1965 in *Griswold v. Connecticut*.<sup>92</sup> *Griswold* struck down a Connecticut statute that forbade the use of contraceptives because it violated the right of marital privacy.<sup>93</sup> However, the Justices disagreed as to the origins of the

87. See *supra* notes 56-57, 63, 83-85, and accompanying text.

88. See *supra* note 73.

89. See *Jackson*, 419 U.S. at 354-55.

90. See *supra* note 85.

91. See *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (stating that "as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one [privacy], which are protected from abridgment by the Government though not specifically mentioned in the Constitution.").

92. *Id.* at 479; see also *infra* notes 94-95 and accompanying text; Turkington, *supra* note 41, at 496 (interpreting *Griswold's* holding as the first Supreme Court case to recognize a right to privacy under the Constitution independent of the Fourth Amendment). As a prelude to *Griswold* and its progeny, Justice Brandeis' now famous dissent in *Olmstead v. United States* stated:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

93. See *Griswold*, 381 U.S. at 485-86 ("The very idea is repulsive to the notions of privacy

constitutional right to privacy.<sup>94</sup> Justice Douglas, writing for the majority, derived the right to privacy from several amendments, which he referred to as the “penumbras” of the Bill of Rights.<sup>95</sup>

In 1977, the Supreme Court first recognized a constitutional right to informational privacy in *Whalen v. Roe*.<sup>96</sup> The *Whalen* Court upheld a New York law under which the State recorded the names and addresses of all patients obtaining prescriptions for certain dangerous drugs in a centralized computer file.<sup>97</sup> *Whalen* recognized two aspects of a right to privacy:<sup>98</sup> the right to avoid disclosure of personal matters;<sup>99</sup> and the right to personal privacy in decisionmaking.<sup>100</sup> While the *Whalen* Court did not find a

surrounding the marriage relationship.”).

94. In *Griswold*, three Justices wrote separate opinions addressing the basis for so-called privacy rights. Justice Douglas found the basis of the right to privacy in the “penumbras” of the Constitution. *See id.* at 484; *see also infra* note 101 and accompanying text. Justice Goldberg found that the Ninth Amendment did not expressly create the right to privacy, but that it authorized the Court to identify and protect such a right. *See Griswold*, 381 U.S. at 487. Specifically, he stated, “I add these words to emphasize the relevance of that [Ninth] Amendment to the Court’s holding.” *Id.* Justice Harlan concluded that the right to privacy was found in the Fourteenth Amendment’s concept of personal liberty. *See id.* at 500. Justice Harlan stated, “In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values ‘implicit in the concept of ordered liberty.’” *Id.* (citation omitted); *see also Oates, supra* note 24, at 225 (citation omitted) (interpreting the various opinions in *Griswold*).

95. *See Griswold*, 381 U.S. at 484. Justice Douglas stated: “[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy.” *Id.* (citation omitted). Justice Douglas’ opinion discusses a right to privacy as derived from the First, Fourth, Fifth, and Fourteenth Amendments. *See id.* at 481-85.

96. 429 U.S. 589 (1977). A complete discussion of the constitutional right to informational privacy exceeds the scope of this Note. For more discussion on the issue, see David H. Flaherty, Symposium, *The Right To Privacy One Hundred Years Later: On The Utility Of Constitutional Rights To Privacy And Data Protection*, 41 CASE W. RES. L. REV. 831 (1991); *see also* Turkington, *supra* note 41.

97. *See Whalen*, 429 U.S. at 591. A lower court held the patient identification provisions of the state law unconstitutional because they invaded constitutionally protected rights of privacy. *See id.* The Supreme Court concluded that “the New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation.” *Id.* at 600; *see also* GUNTHER, *supra* note 49, at 573-74.

98. The Court stated, “The cases sometimes characterized as protecting ‘privacy’ have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.” *Whalen*, 429 U.S. at 598-600; *see also* Gary R. Clouse, Comment, *The Constitutional Right To Withhold Private Information*, 77 NW. U. L. REV. 536 (1982).

99. *See supra* notes 93 and 98 and accompanying text. The *Whalen* Court provides support for this first aspect of the Constitutional right of privacy: “The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion.” *Whalen*, 429 U.S. at 599 n.24.

100. *See supra* notes 93 and 98. In *Roe v. Wade*, the Supreme Court expanded the right to privacy, to include personal autonomy or decisionmaking in matters of childbearing. 410 U.S. 113 (1973). The Court held, “We, therefore, conclude that the right of personal privacy includes the abortion decision, . . .” *Id.* at 154. This aspect of the constitutional right to privacy is beyond the scope of this article.



constitutional invasion of privacy, Justice Brennan's concurring opinion opened the door to future claims against information gathering technologies like Intellidata.<sup>101</sup> Further, *Whalen's* patient information discussion is analogous to Intellidata because both involve the use of computerized databases to retrieve and store personal information.

In *Nixon v. Administrator of General Services*,<sup>102</sup> the Court held that a statute permitting government archivists to examine President Nixon's private documents and taped conversations did not violate his constitutional right to privacy.<sup>103</sup> However, the Court explicitly reaffirmed the constitutional right to informational privacy recognized in *Whalen*<sup>104</sup> and concluded that Nixon had a legitimate expectation of privacy in his personal communications.<sup>105</sup> In its holding, the *Nixon* Court balanced the intrusion on a person's right to privacy against the public's interest in the information gathered.<sup>106</sup>

The *Nixon* balancing test between an individual's right to privacy and public's interest in obtaining information applies equally to Intellidata.<sup>107</sup> In the context of Intellidata, the question becomes whether the public is more interested in the general statistical and demographic information provided by Intellidata's Summary Report than the specific, personal information in the Call Detail Report. A caller's name, number, address, and business or residence origin in the Call Detail Report appears to be more personal than the general statistical and demographic information in the Summary Report, but Call Detail Reports may be less personal than the patient drug records in

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For more discussion on this issue, see Marlan C. Walker & Andrew F. Puzder, *State Protection Of The Unborn After Roe v. Wade: A Legislative Proposal*, 13 STETSON L. REV. 237 (1984).

101. Justice Brennan stated, "The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology." *Whalen*, 429 U.S. at 607.

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

103. *See id.* at 457 ("We agree with the District Court that the Act does not unconstitutionally invade appellant's right of privacy.")

104. *See id.* The Court said, "One element of privacy has been characterized as 'the individual interest in avoiding disclosure of personal matters. . .'" *Id.* (citing *Whalen*, 429 U.S. at 599).

105. *See Nixon*, 433 U.S. at 458.

106. *See id.* The Court said, "[A]ny intrusion must be weighed against the public interest in subjecting the Presidential materials of appellant's administration to archival screening. Under this test, the privacy interest asserted by appellant is weaker than that found wanting in the recent decision of *Whalen v. Roe*, *supra*." *Id.* (citations omitted). In its conclusion on the challenged privacy issue, the Court considered the limited intrusion of the screening, Nixon's status as a public figure, his lack of an expectation of privacy in the majority of materials, the public interest in possessing the information, and the difficulty in separating the small quantity of private materials from the public documents and statements. *See id.* at 465.

107. *See supra* note 106 and accompanying text.

*Whalen*. On the other hand, the dissemination of personal information in Intellidata's Call Detail Report is more widespread than the dissemination of the patient files in *Whalen*.<sup>108</sup>

In addition to the guidelines set forth in *Whalen* and *Nixon*, the Supreme Court, developed a twofold requirement for "right to privacy" cases in *Katz v. United States*.<sup>109</sup> First, a person must have an actual, subjective expectation of privacy.<sup>110</sup> Second, that expectation must be objectively reasonable.<sup>111</sup> In *Katz*, FBI agents used an electronic listening device to record a telephone conversation conducted in a public phone booth.<sup>112</sup> The Court held that the government agents' conduct constituted an unlawful search and seizure that violated *Katz's* expectation of privacy<sup>113</sup> under the Fourth Amendment.<sup>114</sup>

In *Smith v. Maryland*,<sup>115</sup> the Court held that the installation and use of a pen register<sup>116</sup> by a telephone company at the request of police did not constitute an unlawful search within the meaning of the Fourth Amendment.<sup>117</sup> Applying *Katz's* two-part test,<sup>118</sup> the Court "doubt[ed] that

108. See *supra* notes 96-97 and accompanying text.

109. 389 U.S. 347 (1967). Justice Harlan stated: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). The Court also stated:

For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . . But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear.

*Id.* at 351-52; see also *infra* note 112.

110. See *Katz*, 389 U.S. at 351-52.

111. See *id.*

112. See *id.* at 348.

113. See *id.* at 361. The Court concluded, "[t]he critical fact in this case is that 'one who occupies it, [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume' that his conversation is not being intercepted." *Id.*; see also *supra* note 109.

114. See *Katz*, 389 U.S. at 360. A discussion of the Fourth Amendment's privacy protections against search and seizure lies beyond the scope of this article. See James Francis Barna, Note, *Reforming The Katz Fourth Amendment "Reasonable Expectation Of Privacy" Test: The Case Of Infrared Surveillance Of Homes*, 49 WASH. U. J. URB. & CONTEMP. L. 247 (1996); Tracey Maclin, *Informants And The Fourth Amendment: A Reconsideration*, 74 WASH. U. L.Q. 573 (1996).

115. 442 U.S. 735 (1979).

116. A pen register is essentially the opposite of Intellidata. Rather than recording incoming phone numbers, a pen register records outgoing phone numbers.

A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations.

*United States v. Giordano*, 416 U.S. 505, 549 n.1 (1974).

117. See *Smith*, 442 U.S. at 745-46.

people in general entertain any actual expectation of privacy in the numbers they dial."<sup>119</sup> The Court also concluded that people should expect telephone companies to record and use their calling information "for a variety of legitimate business purposes."<sup>120</sup> In contrast to the majority's view, Justice Stewart's dissent expressed a desire to protect telephone information as well as telephone conversations.<sup>121</sup>

Whether a caller's expectation of privacy from Intellidata's information gathering is reasonable under *Katz*<sup>122</sup> depends on whether Intellidata can be distinguished from the pen register in *Smith*.<sup>123</sup> *Smith* relied on telephone customers' knowledge of the use of pen registers because they received monthly statements with a list of the numbers they dialed.<sup>124</sup> Although billing statements do not convey similar information about the use of Intellidata, SWB could warn customers about Intellidata to reduce their expectation of

118. *See id.* at 740. The Court stated:

Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action. This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions.

*Id.* (citations omitted); *see also supra* notes 109-11 and accompanying text.

119. *Smith*, 442 U.S. at 742. Furthermore, the Court stated:

All telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. . . . Telephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes.

*Id.* at 742-43 (emphasis added). The Court said that a subjective expectation of privacy in the phone numbers is not objectively reasonable and therefore fails to satisfy the second prong in *Katz*. *See id.* at 743-44.

120. *Id.* at 743; *see supra* note 115. The Court also suggests that a telephone user assumes the risk that the telephone company will disclose his personal information to the police or another third party. *See Smith*, 442 U.S. at 744 (analogizing that a bank depositor has no legitimate expectation of privacy in financial information voluntarily disclosed to banks in the ordinary course of business).

121. *See Smith*, 442 U.S. at 747 (Stewart, J., dissenting) ("I think that the numbers dialed from a private telephone—like the conversations that occur during a call—are within the constitutional protection recognized in *Katz*."). Justice Stewart's dissent concludes with a point particularly relevant to the facts surrounding Intellidata:

Most private telephone subscribers may have their own numbers listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.

*Id.* at 748.

122. *See supra* note 109 and accompanying text.

123. *See supra* note 117 and accompanying text.

124. *See Smith*, 442 U.S. at 742.

privacy from Intellidata's information gathering.<sup>125</sup>

In conclusion, Intellidata does not fit the traditional mold of privacy under Fourth Amendment search and seizure jurisprudence.<sup>126</sup> However, if opponents of Intellidata can overcome the state action hurdle, it is possible that the "penumbras" will protect the caller's privacy. Yet, there are two substantive obstacles to applying the Constitution to Intellidata. First, opponents must distinguish Intellidata from the pen register in *Smith*. Second, opponents must satisfy the *Katz* test by demonstrating that callers have an actual expectation of privacy that is objectively reasonable.

### B. Other Legal Implications

Overcoming the procedural hurdle of state action and applying the "penumbras" of the Constitution to informational privacy matters such as Intellidata presents a formidable and unpredictable task. However, statutes, common law, and administrative regulations can provide a more direct and certain approach to addressing informational privacy matters.

#### 1. Statutory Law: Wiretap Statutes

Congress enacted the Electronic Communications Privacy Act of 1986<sup>127</sup> to "update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies."<sup>128</sup> This statute prohibits the unauthorized interception of wire and electronic communications.<sup>129</sup> It also prohibits the unauthorized use of a trap and trace device,<sup>130</sup> defined as a "device which captures the incoming electronic or

125. An expectation of privacy from telecommunications services like Intellidata may also depend on whether the caller's number and address are listed in the phone directory.

126. See *supra* note 113 and accompanying text.

127. Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended at 18 U.S.C. §§ 2510-2513, 2515-2521, 2701-2710, 3117, 3121-3126 (1994)).

128. S. REP. No. 99-541, at 1-2 (1986), reprinted in 1986 U.S.C.C.A.N. 3555-56. For more information about federal statutory law with respect to informational privacy, the Privacy Protection Act of 1980, and the Electronic Communications Privacy Act of 1986, see Raphael Winick, *Searches And Seizures Of Computers And Computer Data*, 8 HARV. J.L. & TECH. 75, 90-102 (1994). For a discussion of the Digital Telephony Act of 1994, see Michelle Skatoff-Gee, Comment, *Changing Technologies And The Expectation Of Privacy: A Modern Dilemma*, 28 LOY. U. CHI. L.J. 189, 204 (1996).

129. See 18 U.S.C. § 2511(1)(a) (1994). This section codifies Title I of the Electronic Communications Privacy Act of 1986, which prohibits the unauthorized interception and disclosure of wire, oral, and electronic communications. See *id.* There is an exception to this prohibition "where one of the parties to the communication has given prior consent to such interception." *Id.* § 2511(2)(d). For a more detailed discussion of this statute, see Thomas R. Greenburg, Comment, *E-Mail And Voice Mail: Employee Privacy And The Federal Wiretap Statute*, 44 AM. U. L. REV. 219 (1994).

130. See 18 U.S.C. § 3121(a) (1994). This section also prohibits the unauthorized use of a pen

other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.”<sup>131</sup> Most importantly, the exceptions to this general prohibition apply more directly to Caller ID than Intellidata.<sup>132</sup> Consequently, federal statutes provide a more direct attack on Intellidata than the federal constitution. Additionally, Missouri’s wiretap statute prohibits the interception of wire communications.<sup>133</sup>

## 2. Common Law: Tort Invasion of Privacy

Common law invasion of privacy is actually a set of four distinct torts.<sup>134</sup> The first deals with unreasonable invasions into an individual’s private

register, which is the same device that the Supreme Court held does not violate a person’s reasonable expectation of privacy in *Smith v. Maryland*. See *supra* notes 123 and 125, and accompanying text.

131. 18 U.S.C. § 3127(4) (1994).

132. There are three exceptions to the general prohibition against use of trap and trace devices by a provider of electronic or wire communication services:

- (1) relating to the operation, maintenance, and testing of a wire or electronic communication service or to the protection of the rights or property of such provider, or to the protection of users of that service from abuse of service or unlawful use of service; (2) to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire communication, or 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.

18 U.S.C. § 3121(b)(1)-(3) (1994). The first and second exceptions above have sparked discussion over whether Caller ID is exempt from the general prohibition against trap and trace devices because one of the purposes of Caller ID is to prevent abusive use of the telephone. See *Oates*, *supra* note 24, at 222-25. However, unlike Caller ID, Intellidata does not qualify under these exceptions because the service is not designed to prevent abusive use of wire or electronic communications. See *supra* notes 26-34.

Therefore, if Intellidata is a “trap and trace” device, it may be exempt from the general prohibition against trap and trace devices only if “the consent of the user of that service has been obtained.” 18 U.S.C. 3121(b)(3) (1994). With respect to the consent requirement in 18 U.S.C. § 3121(b)(3) (1994), the FCC has stated:

We conclude that a telephone carrier obtains the ‘consent’ of the user to have incoming calls trapped and traced when that user subscribes to the carrier’s Caller ID service, often by agreeing to pay a fee for it. Although not every court or commentator agrees with us, we conclude that the relevant ‘user’ of the wire communication service with respect to a trap and trace device is the subscriber whose incoming calls are being trapped and traced, not those subscribers whose outgoing calls happen to be identified by such device.

*In re* Rules and Policies Regarding Calling Number Identification Service—Caller ID (1994), 9 F.C.C.R. 1764 9 FCC Rcd 1764, 1777 (1994), available in 1994 FCC LEXIS 1858, at \*94 n.6 (1994) (Part III of Appendix D of this report and order of proposed rulemaking).

133. See MO. REV. STAT. § 542.402.1(1) (1995); see James R. Wyrsh & Anthony P. Nugent, Jr., *Missouri’s New Wiretap Law*, 48 J. MO. B. 21 (1992); see also *supra* note 24 and accompanying text.

134. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389-410 (1960); see also W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 117 (5th ed. 1984).

affairs,<sup>135</sup> but does not require actual physical intrusion. Examples of nonphysical intrusion covered by this tort include eavesdropping, wiretapping, and peering into the windows of a home.<sup>136</sup> Public disclosure of private facts is a second type of privacy invasion.<sup>137</sup> The third tort involves the public portrayal of a person in a false light.<sup>138</sup> The fourth tort, known as appropriation,<sup>139</sup> involves the commercial exploitation of a person's notoriety or prestige without permission.<sup>140</sup>

The invasion of privacy torts present several practical problems when applied to Intellidata. Public portrayal of a person in a false light does not apply because the information sold is not false.<sup>141</sup> This tort and the public disclosure of private facts tort also require that the information be public. Intellidata opponents must argue that the sale of reports to business customers is public in order to state a viable claim under these torts. Such an argument is tenuous, however, because the reports are sold to select business customers rather than the general public. Contrary to publishing personal information in magazines or newspapers, selling information to select customers is not truly public.

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135. See JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 930 (1994). This tort is also known as intrusion upon the seclusion of another in some states.

136. See *id.* In *Hamberger v. Eastman*, 206 A.2d 239, 240 (N.H. 1964), the plaintiffs, husband and wife, alleged that the defendant invaded their privacy by installing and concealing a listening and recording device in their bedroom. The Supreme Court of New Hampshire phrased the issue as "whether this state recognizes that intrusion upon one's physical and mental solitude or seclusion is a tort." *Id.* The court concluded that the defendant's conduct was a violation of their right of privacy and constituted a tort. See *id.* at 242.

137. See HENDERSON, *supra* note 135, at 930-31. The disclosure must be public, the facts must be private, and the disclosure must be offensive to a reasonable man. See *id.* An example is where a newspaper publishes an offensive statement about a person's private life.

138. See *id.* at 931-32. This tort occurs when a book, article, or advertisement uses ideas purportedly of the plaintiff to promote its own products or ideas. See *id.* Like the intrusion tort, *supra* notes 139-40, this tort requires publicity. Unlike the intrusion tort, this tort involves lies rather than truthful statements.

139. See HENDERSON, *supra* note 135, at 932-33.

140. Unlike the other three torts for invasion of privacy, appropriation is meant to protect the plaintiff's proprietary interest in her name and identity rather than mental distress. That is, the tort of appropriation involves property law. See *State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987). *Elvis* involved a dispute between two not-for-profit corporations concerning their respective rights to use Elvis Presley's name. See *id.* At issue was whether Elvis' name was property and therefore descendable upon death. See *id.* at 93. The court answered this question in the affirmative, and referred to such a right as a right to publicity. See *id.* at 97. However, the court noted the difficulty in distinguishing between a right to publicity and a right to privacy. See *id.* at 93-94. The court concluded that a person's name is a species of intangible personal property worthy of the same bundle of rights and legally protected interests as tangible personal property. See *id.* at 97. Included in this bundle of rights is the ability to control and exclude others. See *id.* at 96.

141. One might argue that the demographic statistics based on a caller's zip code + 4 put the caller in a false light. This argument is somewhat tenuous because it claims that the public portrayal is a misrepresentation rather than a false statement, as required by this tort.

The public disclosure of private facts tort likewise appears problematic because the information provided by Intellidata arguably is not private. Yet this does not apply to callers whose personal information is unlisted or unpublished. Nevertheless, this tort probably would fail to satisfy the publicity requirement. Appropriation requires the commercial exploitation of a person's name and notoriety. Intellidata exploits names but not the notoriety or likeness of those names. Also, the appropriation of a person's name must be offensive to a reasonable man, which is unlikely in light of the public success of Intellidata's predecessor, Caller ID.<sup>142</sup> Finally, the tort of intrusion into a person's private affairs is most applicable to Intellidata.<sup>143</sup> However, this tort also may be inapplicable to Intellidata because it requires an invasion of private facts that is offensive to a reasonable man. As stated earlier, it would be difficult to argue that a person's name, number, and address are private if that information is listed or published in a public directory.

### 3. Administrative and Regulatory Law

Administrative and regulatory law can have a greater impact on Intellidata than constitutional, statutory, or common law.<sup>144</sup> The Federal Communications Commission ("FCC") can regulate Intellidata under the Communications Act of 1934, which grants the FCC the authority to regulate "all interstate and foreign communications by wire."<sup>145</sup> As a federal agency, the FCC can enact rules regulating services, such as Intellidata, that preempt state regulations.<sup>146</sup> At the state level, the MPSC has the authority to both approve and regulate Intellidata.<sup>147</sup> Regulation by the MPSC presents the most direct method of attacking Intellidata.<sup>148</sup>

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142. See *supra* note 18.

143. See *supra* notes 139-40.

144. For example, the FCC began regulating Caller ID seven years after its introduction. See *In re Rules and Policies Regarding Calling Number Identification Service – Caller ID*, 9 FCC Rcd. 1764 (1994), available in 1994 FCC LEXIS 1858 (1994) (FCC adopts a report and order of proposed rulemaking); Calling Number Identification, 59 Fed. Reg. 18,318 (1994) (to be codified at 47 CFR pt. 64 subpart P (1996)); Calling Number Identification Service – Caller ID, 60 Fed. Reg. 29,489 (1995) (amendments to be codified at 47 CFR pt. 64 subpart P); see also *Caller ID to be Available Nationwide: FCC Adopts Federal Policies for Regulation*, 1994 FCC LEXIS 995 (March 8, 1994).

145. 47 U.S.C. § 152(a)-(b) (1994). For more information about administrative and regulatory law with respect to informational privacy, the Privacy Protection Act of 1980, and the Electronic Communications Privacy Act of 1986, see Winick, *supra* note 128, at 90-102.

146. See Laura V. Eng, Article, *Blocking Preemption: Convergence, Privacy, and the FCC's Misguided Regulation of Caller ID*, 14 CARDOZO ARTS & ENT. L.J. 407, 430-35 (1996).

147. See MO. REV. STAT. § 386.250 (Supp. 1996).

148. See Part VI of this Note, which proposes two regulatory solutions to the privacy issues raised by Intellidata.

## V. CONCLUSION

Intellidata launches an aggressive information gathering campaign against people who call businesses. Intellidata has created privacy issues that are more pervasive and controversial than those surrounding its predecessor, Caller ID.

The privacy issues raised by Intellidata originate from the specific personal information in the Call Detail Report rather than the general demographic information in the Summary Report. The Call Detail Report provides information such as a caller's business or residence origin, first and last name, area code and phone number, street address, and zip code + 4. The Summary Report provides general statistical summaries of demographic information.<sup>149</sup> Despite this, the demographic information in the current version of Intellidata does not invade privacy primarily because this information is not personal—yet.

The demographic information in the Summary Report is not personal for two reasons. First, Intellidata does not take demographic information directly from the caller's household; rather the information provided represents an average based on the number of households within the caller's zip code + 4.<sup>150</sup> Second, each caller contributes to the demographic information in Summary Reports, but the information is not associated with a particular caller.<sup>151</sup> That is, Intellidata does not attach a symbol denoting a demographic code to the caller's name in the Call Detail Report. Fortunately, the current version of Intellidata does not permit this potential problem.<sup>152</sup> Therefore, the statistical analysis in the Summary Report, including the information provided by demographic codes, most likely does not violate any area of law involving privacy. The privacy issues implicated by Intellidata are the result of the specific personal information contained in the Call Detail Report.

This Note examined the various areas of the law implicated by the privacy issues described above. Specifically, it addressed how those privacy issues raise constitutional, statutory, administrative, regulatory, and common law concerns.<sup>153</sup>

The constitutional right to privacy creates two problems for Intellidata

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149. *See supra* notes 31-39 and accompanying text.

150. *See supra* note 33.

151. *See supra* notes 33-34 and accompanying text.

152. The demographic code could be tied to a particular caller by marking a symbol, such as P for Poor, next to a caller's name. The current version of Intellidata does not do this, but future versions of Intellidata, or other computer and telecommunications services may invade privacy by tying general demographic information to a particular caller.

153. *See* Part IV of this Note concerning Legal Implications of Caller Intellidata.



opponents.<sup>154</sup> First, a court must determine that the MPSC's approval of Intellidata constitutes state action.<sup>155</sup> Second, considerable uncertainty surrounds the constitutional right to informational privacy as it applies to new technologies like Intellidata.<sup>156</sup> However, the federal wiretap statute provides a more direct attack on Intellidata. More importantly, unlike Caller ID, Intellidata does not qualify under any exceptions to the general prohibition against trap and trace devices.<sup>157</sup> The common law tort of intrusion into a plaintiff's private affairs is applicable to Intellidata.<sup>158</sup> However, the information gathered by Intellidata most likely does not constitute an intrusion upon private facts unless the caller's information is unlisted. Finally, this Note concludes that administrative and regulatory law at both the state and federal levels present the most effective approach to address the privacy issues raised by Intellidata.<sup>159</sup>

## VI. PROPOSAL

The test articulated in *Nixon* that balanced personal intrusion against the public's interest in acquiring a caller's first and last name, area code and phone number, street address, city, and zip code + 4<sup>160</sup> should weigh in favor of protecting a caller's personal profile from disclosure every time he or she calls a business. However, any proposal regarding Intellidata should balance the non-personal information that helps businesses improve the production, quality, marketing, and distribution of their goods and services against the caller's personal information. Two proposals achieve this result.

The first proposal is modeled after the regulatory scheme employed by the Texas Public Utilities Commission, which simply does not permit Call Detail Reports in its version of Intellidata.<sup>161</sup> This type of regulatory scheme could be implemented at the state level by the MPSC or at the federal level by the FCC.<sup>162</sup> Under this scheme, Intellidata could still provide the general statistical summaries and demographic information provided by Intellidata's Summary Report.

The second proposal follows the regulatory scheme adopted by the

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154. See Part IV(A) of this Note.

155. See *supra* notes 44-90 and accompanying text.

156. See *supra* notes 91-126 and accompanying text.

157. See *supra* notes 22, 127-33 and accompanying text.

158. See *supra* notes 134-43.

159. See *supra* notes 144-48 and accompanying text.

160. See *supra* note 106.

161. See *supra* note 29. The brochures and pamphlets provided by SWB specify that the Call Detail Report is not included in Texas Intellidata reports.

162. See *supra* notes 144-48 and accompanying text.

California Public Utilities Commission ("CPUC") with respect to Caller ID.<sup>163</sup> The CPUC provides free per-line blocking from Caller ID to all California residents.<sup>164</sup> This scheme gives the caller the option of automatically preventing the disclosure of personal information every time he or she places a call to a business.<sup>165</sup> However, Intellidata customers would have the right to reject callers who activate this option.<sup>166</sup> Under this approach, in order to contact the Intellidata customer, the caller must take an affirmative step to unblock his or her number in order to access the business.<sup>167</sup> This affirmative step would constitute consent as required by federal<sup>168</sup> and state<sup>169</sup> wiretap laws, and would also eliminate a constitutional attack on privacy.<sup>170</sup> Consequently, Intellidata could provide both Call Detail and Summary Reports.

The original tariff to introduce Intellidata in Missouri in 1995 invades privacy because it allows technology surreptitiously to gain personal information provided in the Call Detail Report without the caller's consent. The foregoing proposals tip the scales in favor of individual privacy rights and consent. The result is a balance between information gathering that allows businesses to make informed decisions and a person's right "to be let alone."<sup>171</sup>

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163. In *In re Pacific Bell*, 134 P.U.R.4th 184 (Cal.P.U.C. 1992), the California Public Utilities Commission ("CPUC") interpreted section 2893 of the public utilities code as requiring a minimum per-call blocking standard for Caller ID. Nevertheless, it extended the blocking options available to California residents to ensure greater privacy. *See id.* CPUC made three blocking options available: 1) per-call blocking; 2) per-line blocking; and 3) per-line blocking with per-call enabling. *See id.* at 199. It made the per-line blocking with per-call enabling the default option for residents with unlisted or nonpublished telephone numbers. *See id.* at 201. CPUC also authorized Anonymous Call Rejection to allow the receiving party to 'Block the Blocker.' *See id.* at 205-06. This option forces the calling party to take an affirmative step towards consent by unblocking his or her number in order to access the receiving party. *See id.*; *see also In re Pacific Bell*, 141 P.U.R.4th 320 (Cal.P.U.C. 1992) (CPUC changes default blocking option from per-line blocking with per-call enabling to per-line blocking until technological issues are resolved).

164. *See Pacific Bell*, 134 P.U.R.4th at 186, 200.

165. *See id.*

166. *See id.* at 206.

167. *See id.*

168. *See* 18 U.S.C. § 3121(b)(3) (1994).

169. *See* MO. REV. STAT. § 542.402.2(3) (1995).

170. *See Smith v. Maryland*, 442 U.S. 735, 743-44 (1979) (recognizing that "This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties") (citations omitted).

171. *See supra* note 42 and accompanying text.