

Will the FCC's New Privacy Rules Survive?

Marc Rotenberg
EPIC.ORG
Washington, DC
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“Absolutely!” Tom Brady, New England Patriots

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“No question!” Jacoby Ellsbury, Boston Red Sox

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The FCC CPNI Privacy Rules Upheld

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Materials on Talk

- EPIC CPNI Page
 - Search “EPIC CPNI” (#1) or
 - Search “Privacy CPNI” (#1) or
 - Search “CPNI” (#3)
 - Materials are “very useful”

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CPNI Rule Background

- EPIC filed a petition with FCC (Aug 2005)
- What was the problem?
 - Pretexters targeting phone records
 - Sale of calling records
 - Telcos lacked adequate security
 - Identity theft on the rise (FTC)
 - Privacy safeguards lagging technology and business practices

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Telecommunications Carriers') CC Docket No. 96-115
Use Of Customer) CC Docket No. 96-149
Proprietary Network Information)

To: The Commission

COMMENTS OF
THE ELECTRONIC PRIVACY INFORMATION CENTER, AMERICAN CIVIL
LIBERTIES UNION, AMERICAN LIBRARY ASSOCIATION, CENTER FOR
DIGITAL DEMOCRACY, CENTER FOR MEDIA EDUCATION, COMPUTER
PROFESSIONALS FOR SOCIAL RESPONSIBILITY, CONSUMER ACTION,
CONSUMER FEDERATION OF AMERICA, JUNKBUSTERS, MEDIA ACCESS
PROJECT, NATIONAL CONSUMERS LEAGUE, NETACTION,
PRIVACYACTIVISM, PRIVACY JOURNAL, PRIVACY RIGHTS
CLEARINGHOUSE, PRIVACY TIMES, PUBLIC CITIZEN LITIGATION
GROUP, AND US PIRG

November 1, 2001

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EPIC Petition Recommendations

- Require customer-set passwords
- Require security breach notification
- Audit trails
- Encryption
- Limiting data retention

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The FCC CPNI Rule (Apr 2007)

- Carrier Authentication Requirements
- Notice to Customer of Account Changes
- Notice of Unauthorized Disclosure of CPNI (with law enforcement delay)
- Joint Venture and Independent Contractor Use of CPNI (opt-in)
- Annual CPNI Certification
- CPNI Regulations Applicable to VoIP Service epic.org

FCC Chairman Martin

- "The 'opt-in' approach adopted in this Order clearly is supported by the record, is consistent with applicable law, and directly advances our interest in protecting customer privacy."

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FCC Comm. Copps

- "The Commission adopts a process by which customers could be left totally uninformed of unauthorized access to their CPNI for 14 days . . . as some have described it, it is akin to not telling victims of a burglary that their home has been broken into because law enforcement needs to continue dusting for fingerprints."

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FCC Comm. Tate

- "Indeed the law places a duty on telecommunications providers to protect this information and today, we take important steps to better secure private telephone records."

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FCC Comm. Adelstein

- "[T]his order set up a process which can result in the unnecessary and even indefinite delay of consumer notification without any accountability."

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FCC Comm. McDowell

- "[O]ur rules should strike a careful balance . . . the Further Notice seeks comment on [finding this balance]."

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EPIC Support (July 2007)

- “[T]hese safeguards defend consumer privacy at a time when data security tops the list of consumer concerns. In 2006, the Federal Trade Commission listed identity theft as the No. 1 consumer complaint for the seventh year in a row, accounting for 36 percent of filed complaints and generating more than five times the amount of complaints of the second-place item.”

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EPIC Further Recommendations

- Limiting Data Retention Reduces Customer Vulnerability
- Personal Information on Cell Phones Creates Privacy Risks
- Carriers Must Immediately Notify Customers of Data Breaches
- Comprehensive Opt-In Policy

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Recent Developments

- Congress enacts legislation
- The National Cable and Telecommunications Association filed a complaint with a federal appeals court challenging the FCC's rule. The NCTA claims a First Amendment right to disclose customer information.

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NCTA Brief (Aug 2007)

- “[T]he FCC’s final rule requiring telecommunications carriers and providers of interconnected voice-over-IP services to obtain ‘opt-in’ customer approval before disclosing . . . CPNI to joint ventures and independent contractors is arbitrary and capricious and violates the First Amendment . . . Petitioner does not challenge the Order apart from the imposition of this ‘opt-in’ requirement.”

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First Amendment and CPNI Redux

- EPIC, *US West v. FCC* -- The Privacy of Telephone Records (1999)
- www.epic.org/privacy/litigation/uswest/
- Search "US West privacy"

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US West v. FCC (1999)

- 10th Circuit strikes down FCC CPNI rules (opt-in), 2-1
- Very odd opinion - 1st Amd review of a reg
- FCC filed a Petition for Rehearing -- "this case involves questions of exceptional importance affecting governmental efforts to protect the privacy of telephone customers and to promote competition in the telephone industry."

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EPIC in US West v. FCC

- EPIC, 15 consumer privacy organizations and 22 privacy scholars filed a motion in support of the FCC's petition (Oct 1999)
- Tenth Circuit Court of Appeals granted the petition to file an amicus brief in support of the FCC's petition (Nov 1999)
- But the Tenth Circuit denied the petition for rehearing 6-5 (Nov 1999)

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CPNI Privacy Review in NCTA v. FCC

1. Much better privacy record
 - Pretexting and identity theft
 - Lax telco security practices
 - Legislation
2. Much better privacy law
 - Courts have rejected First Amendment challenges to privacy rules post-US West

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CPNI Privacy and Boston Sports History

- World Series ("US West era")
 - 3-4, St. Louis (1946)
 - 3-4, St. Louis (1967)
 - 3-4, Cincinnati (1975)
 - 3-4, NY Mets (1986)
- World Series ("Current Era")
 - 4-0, St. Louis (2004)
 - 4-0, Colorado (2007)

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“Definitely!” EPIC

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