

July 6, 2016

**VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: Protecting the Privacy of Customers of Broadband and  
Other Telecommunications Services, WC Docket No. 16-106

Dear Ms. Dortch:

IMS Health, Inc. respectfully submits this letter in connection with the above-captioned proceeding, to endorse the First Amendment objections that have been raised against the Commission's proposed broadband privacy rules. These constitutional arguments have been presented in comments by Professor Laurence H. Tribe of Harvard Law School, a noted constitutional law scholar, and other parties. This letter, focused on First Amendment objections, supplements the IMS Health May 27<sup>th</sup> comment letter urging the FCC to permit use of de-identification, the legal authority permitting de-identification, and the need to harmonize FCC privacy policy on de-identification across federal agencies.

IMS Health has a unique perspective on the constitutional issues, because it was the prevailing party in the U.S. Supreme Court case of *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), in which it successfully challenged (on First Amendment grounds) "privacy" opt-in consent rules adopted by the State of Vermont. *Sorrell* involved a Vermont law that prohibited the sale and use of patient de-identified data for targeted marketing to doctors. More specifically, the law sought to cut off the flow of patient de-identified information (like pharmacy records) regarding the prescribing practices of individual doctors – information that IMS Health and other companies would otherwise obtain from pharmacies and other entities involved in the course of filling a patient's prescription. The law sought to restrict this flow by imposing a requirement mandating the prescriber's opt-in consent before the records could be released. The law hindered speech, because the information in the records provided the necessary raw material to enable more targeted and effective drug marketing, to the benefit of both doctors and patients alike. The information helped manufacturers locate doctors treating the patients who were most in need of a new drug and identify those doctors who are "early adopters" and likely to be the most willing to prescribe the new drug.

The Supreme Court invalidated the Vermont law, finding it an unjustifiable and unconstitutional governmental interruption of the free flow of information to consumers about new products.

Representatives of our company have publicly noted the important constitutional implications of *Sorrell* for restrictions on targeted communications and marketing.<sup>1</sup> We have explained that *Sorrell* strongly suggests that any attempts to restrict targeted online advertising “would run afoul of the First Amendment.”<sup>2</sup> We submit this letter to underscore that *Sorrell* provides important lessons for the Commission’s proposed broadband privacy rules, and it demonstrates that the Supreme Court will not tolerate rules that flout the constitutional limits on governmental authority.

1. *Sorrell* held that gathering and analyzing customer data in preparation for marketing are activities protected by the First Amendment. The Supreme Court forcefully held that the law could not be categorized as a mere regulation of commerce and rejected the position that “heightened judicial scrutiny is unwarranted in this case because sales, transfer, and use of prescriber-identifying information are conduct, not speech.” *Id.* at 570. The Court opined that “the creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.” *Id.* The Court recognized that a “consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.” *Id.* at 566 (internal quotation marks and citation omitted).

The Court’s First Amendment reasoning was plainly correct. Suppose, for example, that Vermont attempted to prohibit anyone from telling reporters for the *Burlington Free Press* who their doctors were and which drugs they had prescribed for them. Suppose also that Vermont prohibited subscribers to the *Free Press* from using any information in the newspaper about doctors to conduct a pharmaceutical marketing program. The courts would have immediately recognized this restriction on speech as patently unconstitutional. The fact that IMS Health did not distribute its reports in the form of a newspaper, that it used sophisticated computer techniques to gather and disseminate information, and that not many people knew how IMS Health or other companies conducted their businesses, made this First Amendment violation slightly less obvious. But it was still apparent.

In fact, the Court left open the question whether restrictions on IMS Health’s expression should receive stricter First Amendment scrutiny than the intermediate standard of *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980), which is applicable to commercial

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<sup>1</sup> See Thomas R. Julin, Jamie Z. Isani & Patricia Acosta, “The Dog That Did Not Bark: First Amendment Protection of Data Mining,” 36 Vt. L. Rev. 881 (2012) (“This [*Sorrell*] decision is a loudly barking dog, baring its teeth at the red-handed murderer still in Silver Blaze’s stable—baldfaced government censorship through suppression of distribution of truthful facts.”); Thomas R. Julin, “Confronting Online Privacy Regulation: Time to Defend the First Amendment,” Washington Legal Foundation, Legal Backgrounder, May 27, 2016.

<sup>2</sup> Thomas R. Julin, “*Sorrell v. IMS Health* May Doom Federal Do Not Track Acts,” 10 Privacy & Security Law Report (BNA) 1262 (Sept. 5, 2011) (tracing the origins of the *Sorrell v. IMS* decision and applying decision to proposed behavioral advertising/Do Not Track legislation).

speech. *See Sorrell*, 564 U.S. at 571 (leaving open whether *Central Hudson* or a “stricter form of judicial scrutiny” should be applied).

2. Vermont’s scheme triggered First Amendment scrutiny because it employed an opt-in consent requirement to obstruct the ability of IMS Health and other speakers to develop and transmit targeted communications to their intended audience. The fact that the scheme operated through an opt-in consent requirement rather than a formal ban on speech did not excuse the impact on expression. The Court explained that it “has recognized that the ‘distinction between laws burdening and laws banning speech is but a matter of degree’ and that “[l]awmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.” *Id.* at 565-66.

The Commission’s proposed broadband privacy rules would have the same restrictive impact on speech. It would impose a highly burdensome opt-in consent requirement before broadband providers could analyze customer information to develop and communicate online ads on social media to enable consumers to receive targeted, useful information in a timely manner. In other words, the Commission’s proposed rules would operate in the same impermissible way as the Vermont law in *Sorrell*. Thus, the decision makes clear that the Commission’s proposed broadband privacy rules are subject to heightened First Amendment scrutiny and must be invalidated unless they can survive such scrutiny.

3. *Sorrell* struck down Vermont’s scheme because it was not sufficiently tailored to the State’s asserted interests to survive even the intermediate standard of *Central Hudson*. *See Sorrell*, 564 U.S. at 571-79. The Commission’s proposed rules suffer from the same flaw.

(a) *Sorrell* explained that Vermont’s scheme was particularly problematic because it applied to only certain speakers. The Court observed that “many speakers can obtain and use the information. But detailers cannot.” *Id.* at 571. The Court cited this “singling out” aspect of the Vermont scheme as an important reason that it was invalid. *See id.* at 573 (“The explicit structure of the statute allows the information to be studied and used by all but a narrow class of disfavored speakers. Given the information’s widespread availability and many permissible uses, the State’s asserted interest in physician confidentiality does not justify the burden that [Vermont law] places on protected expression.”). This, the opinion held, transcended content discrimination and amounted to the most offensive transgression of the First Amendment’s free speech guaranty—viewpoint discrimination—and required submission of the law to “heightened judicial scrutiny.” While the lower courts all had reached their conclusions through the traditional commercial speech doctrine, Justice Kennedy forcefully grounded the majority opinion in these grander speech protection principles. Use of the term “heightened” rather than “intermediate” or “*Central Hudson*” scrutiny, seemed to signal the court is willing to move away from intermediate scrutiny when faced with a law like this that specifically targets speech in order to advance a contrary legislative viewpoint.

By the same token, the Commission’s proposed privacy rules apply to only certain speakers – broadband access providers. Other speakers (including such significant players in the online ad market as Facebook and Google) would not be governed by the Commission’s proposed restrictions, even though they possess a great deal of information about consumer online activities. The proposed rules therefore suffer from the same “singling out” feature that doomed Vermont’s scheme.

And just as the Supreme Court struck down the Vermont law without affording the State an opportunity potentially to broaden its rules to govern other kinds of speech and other types of speakers, here the solution is for the Commission to withdraw its proposed rules rather than considering ways to broaden them.

(b) The court gave no deference to legislative findings regarding the law's impact. Indeed, *Sorrell* rejected the State's attempt to defend its scheme by pointing to findings that "[s]ome doctors in Vermont are experiencing an undesired increase in the aggressiveness of pharmaceutical sales representatives," and "a few have reported that they felt coerced and harassed." 564 U.S. at 575. The Court dismissed the State's argument that "concern for 'a few' physicians who may have 'felt coerced and harassed'" could sustain the restriction on speech. *Id.* "Many are those who must endure speech they do not like, but that is a necessary cost of freedom." *Id.* at 575. Foreshadowing the potential judicial reception for an Internet privacy rule, the Court also held that "[p]ersonal privacy even in one's own home receives 'ample protection' from the 'resident's unquestioned right to refuse to engage in conversation with welcome visitors.'" *Id.* (citation omitted).

Similarly, the Commission's proposed privacy rules cannot be sustained on the basis of hypothetical concerns and anecdotal examples. *Sorrell* echoes the Court's consistent teaching that the government's burden under intermediate First Amendment scrutiny "is not satisfied by mere speculation and conjecture," *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), or by "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). The rules will be invalidated in the absence of a thoroughly documented record demonstrating that the harms the Commission "recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71.

(c) *Sorrell* opined that "the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." 564 U.S. at 572. "There must be a 'fit between the legislature's ends and the means chosen to accomplish those ends.'" *Id.* (citation omitted). *Sorrell* concluded that, even if Vermont's stated policy goals were proper, the law did "not advance them in a permissible way," and the "state's own explanation of how" the law "advances its interests cannot be said to be direct." *Id.* at 577 (citation and internal quotation marks omitted).

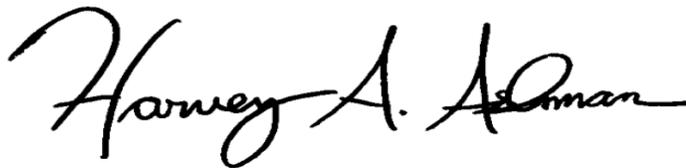
The Commission's proposed broadband privacy rules suffer from the same mis-matched tailoring. The Commission cites an interest in preventing the unauthorized *sharing* or *disclosure* of intimate personal information that would violate a consumer's privacy. For example, the Commission notes "very sensitive and very personal information that could threaten a person's financial security, reveal embarrassing or even harmful details of medical history, or disclose to prying eyes the intimate details of interests, physical presence, or fears." (NPRM ¶ 2.)

But the Commission's proposal is not tailored to this interest. Unlike other laws like the Health Insurance Portability and Accountability Act of 1996 privacy rules, or frameworks like that implemented by the Federal Trade Commission ("FTC"), or the Obama Administration's Consumer

Privacy Bill of Rights,<sup>3</sup> the Commission’s proposal makes no distinction between sensitive and non-sensitive data. It does not tailor the restrictions it seeks to impose according to the sensitivity of the consumer information at issue. Instead, it uses the same speech-suppressing approach for all types of information – whether it concerns private details of a customer’s life or not. For instance, the Commission’s approach could prevent a broadband provider from using mundane facts about its own customers to offer a discounted bundle of its own services to them or to offer accessories that are compatible with their devices. The Commission promotes no “privacy” interest by keeping broadband providers from using information already in their possession to serve consumers with more rather than less relevant advertising. To the contrary, the NPRM acknowledges that “many consumers *want* targeted advertising that provides very useful information in a timely (sometimes immediate) manner.” (NPRM ¶ 12 (*italics added*)).

For all these reasons, *Sorrell* vindicates fundamental First Amendment principles and highlights the constitutional defects in the Commission’s proposed broadband privacy rules.

Respectfully submitted,

A handwritten signature in black ink that reads "Harvey A. Ashman". The signature is written in a cursive, flowing style.

Harvey A. Ashman  
Senior Vice President, General Counsel  
& External Affairs

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<sup>3</sup> See Thomas R. Julin, Jamie Z. Isani & Patricia Acosta, “The Dog That Did Not Bark: First Amendment Protection of Data Mining,” 36 Vt. L. Rev. 881, 900-01 (2012) (discussing FTC authority to protect privacy).