FTC v. AT&T: BLACK MIRROR BROUGHT TO LIFE?

"The internet is the first thing that humanity has built that humanity doesn't understand, the largest experiment in anarchy that we've ever had."

~ Eric Schmidt, Google, Inc., CEO[1]

I. INTRODUCTION

The Netflix original series, Black Mirror, paints the grim picture of a not-too distant future dominated by nefarious entities preying on the public through the titular black mirrors we all carry around in our pockets. Equal parts disjointedly surreal and horrifyingly familiar, Black Mirror features allegorical stories of the dangers of the use and abuse of technology. The episode, The Entire History of You, shows an alternate reality wherein every member of society is equipped with a device that records their every memory, leading the characters to obsess and degenerate over such memories.[2] Meanwhile, the episode titled Nosedive, follows a protagonist obsessed with her rankings in a fictitious social media platform, and shows how this obsession drives her deeper and deeper into violent insanity.[3] While the world of Black Mirror is fictitious, our own world is creeping ever closer to that dystopia.

Since revelations about the United States National Security Agency's PRISM program broke in 2013, internet data security is back in the forefront of American attention.[4] While concerns over privacy in the age of technology are by no means new,[5] the omnipresence of smartphones, satellite posit

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-fears-for-generation-facebook-2055390.html [https://perma.cc/ZH2Q-XWP].

Black Mirror: "The Entire History of You", NETFLIX (2016), https://www.

the ubiquity of companies (e.g., Google, Apple, Facebook) providing these services, the PRISM revelations have raised new and concerning questions over the privacy of all Americans.[6]

keep their unlimited plan ad infinitem.[16] However, t2 747.t2 7474 -0 /P <</M(2/TT19t2 747.t2 7474 -0 /Pe4.2

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deceptive practices in misrepresenting its privacy policy to users of its short-lived) social media platform, Buzz.[47] In that case, Google deceived users by using consumers' personal information even when the users opted out of the service.[48] Google eventually settled these charges, agreeing to a consent order

III. THE PERILS OF NON-REGULATION

By ruling that the common carrier exception is status-based, the Ninth Circuit panel has established a truly wide-open loophole through which internet superpowers can avoid any federal oversight of their handling of consumers' sensitive information. By the Ninth Circuit's logic, if any superpowers offer or acquire any common carrier service, such as telecommunication services, then the entirety of their business is untouchable by any current regulatory force. Indeed, many of these internet superpowers might already be able to take advantage of such a loophole.

Internet superpowers have recently begun offering or acquiring telecommunication services that would likely confer common carrier activity status under judicial scrutiny. Google's "Google Fiber" would likely be considered a common carrier service, and Verizon's recent acquisitions of AOL and Yahoo would likewise absolve it of any oversight.[55] Furthermore, it would seem that Facebook could be poised to acquire such common carrier services as part of its goal to "connect a billion additional people to the internet."[56] With such a massive loophole looming, these tech giants could very easily engage in covert surveillance of their customers. This begs the question: What is the worst that can happen?

As Americans increasingly spend their time online, one would think that they would be increasingly careful about privacy issues given the complex nature of computers and the internet. However, a recent Pew Research Center survey actually shows just the opposite.[57] In a survey conducted in 2014, ninety-one percent of adults admit that we have lost control over how personal information is recorded and used by companies.[58] Eighty percent of adults say that they are concerned about advertisers or businesses accessing information gained through social networking sites.[59] Sixty-four percent say that the government should do more to regulate these companies.[60] However, despite these sentiments, there has not been any large public outcry protesting these

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the watched party, leads to chilling effects in speech and even thought.[70] In the United States, this phenomenon has led to robust protections of the First Amendment by the Supreme Court. In a now classic dissent, Justice Holmes wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[71] In Whitney v. California, Justice Brandeis captured the spirit of free thought when he wrote:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . .

5 of the FTC Act.[79] While many areas of the common law provide for special rules for common carriers, it is unlikely, as suggested by AT&T and the Ninth Circuit panel, that the drafters of the 1914 FTC Act envisioned mobile service providers to be considered common carriers.

A long-standing feature of the common law, the common carrier doctrine holds at its heart the notion that some businesses are subject to different rules because they hold themselves out to the public for service.[80] In modern law, common carriers are most often entities in the business of transporting people or cargo.[81] According to the Restatement (Second) of Torts:

> (1) A common carrier is under a duty to its passengers to take reasonable action
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> (a) to protect them against unreasonable risk of physical harm, and
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> (b) to give first aid after it knows or has reason to know they are ill or injured, and to care for them until they can be cared for by others.[82]

new rule, leaving millions of abused consumers without a remedy for their grievances.

Furthermore, a common carrier exception protects carriers from their own negligent wrongdoing, not their own knowingly deceptive practices. Comment E of the Restatement summarizes the duties of common carriers as one of "reasonable care under the circumstances."[92] Therefore, it should be clear that intentionally deceptive practices are unreasonable per se, and so are in contravention of the fundamental purpose of common carrier protections. In this case, AT&T's deceptive practices are intentional actions taken that injure consumers whose private information warranted common carrier protections in the first place.[93] This is completely antithetical to the purpose of the common carrier designation and cannot stand.

Therefore, the Ninth Circuit's ruling goes against the long history of the common law outlining the rights and responsibilities of common carriers.

B. Privacy

The Ninth Circuit's ruling not only turns a blind eye to the traditional role and interpretations that common carriers have played in the digital economy, but has also betrayed longstanding principles of privacy established in the United States. Even 125 years ago, legal scholars were advocating for stronger privacy rights, and the call to action from Justice Warren and Justice Brandeis in their classic article, *The Right to Privacy*, remains hauntingly relevant to the issues presented in this case.[94] There, the (soon to be) Justices wrote, "[r]ecent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone'."[95]

Although the right to privacy is found

However, it is not just the internet superpowers that need FTC oversight, as large and small companies across the nation have succumbed to the temptation of improper data usage. Perhaps most troublingly, the FTC brought suit against the television provider VIZIO for secretly collecting viewing data from eleven million consumers through its Smart TVs.[103] In this case, the FTC alleged that VIZIO's Smart TVs collected "second-by-

For obvious reasons, the FTC action against AT&T has attracted attention from scholars across the nation, many of whom have submitted amicus briefs on one side or another. One such brief, submitted by a collection of Data Privacy and Security Law Professors, points to many regulatory gaps that would result from allowing the panel's decision to stand.[108] This brief points out the limits of FCC regulation which AT&T argues is the intent of the common carrier exemption in the first place. However, the FCC's ability to regulate companies like AT&T would be limited only to information gained by virtue of its provision of a telecommunications service as proscribed in the Telecommunications Act.[109] The amici curiae further point out that these companies take in vast amounts of personal data from portions of their operations that would not be covered by the Telecommunications Act, such as their mobile data services, leaving regulation of such to a largely unregulated

these massive Internet Service Providers ("ISPs" and "ISP") admit at the outset that "[a]t first glance, amici's position might seem surprising."[115] However, the amici go on to argue that "the important regulatory goals that are at stake in this case cannot be achieved if the en banc Court accepts the panel's interpretation."[116] Charter, et al. argue that "[t]he panel's decision undercuts the regulatory need for consistency and expertise in enforcing consumer protection laws."[117] These ISPs(s)2.6 (ocT31.7 42 (. a)0.8 (r)1 (t.Tw 5.7(117)(er)2.4-3603.48 Tm2(C 6.96

D. Statutory Interpretation

In addition to these wider policy arguments against allowing AT&T (and similarly situated companies) to claim immunity for its deceptive practices as a common carrier, the Ninth Circuit's opinion is flawed in and of itself. The opinion issued by the Ninth Circuit panel devotes the majority of its space to discussing the statutory interpretive rules followed by the Circuit in finding the common carrier exception as one concerning "status" of the company, and not the activity that the company is conducting.[123] However, the district court, in ruling against AT&T, relied on a number of Supreme Court decisions that held it is possible for companies to lose their protections as common carriers if they engaged in activity that "is outside the performance of its duty as a common carrier."[124]

In concluding that common carrier is an activity-based analysis and not a status-based one, the district court made a convincing case of its own statutory interpretation.[125] The district court pointed to the meaning of common carrier as understood at the passing of the FTC Act in 1914 as one that includes the activity in question.[126] The court also pointed to statements made by members of Congress in debating the bill that suggests that activity should be a part of the common carrier analysis.[127] Furthermore, the court noted that the FTC's interpretation of the Act was entitled to some deference per Skidmore v. Swift & Co.[128] The Ninth Circuit disagreed with all of these points.[129]

The panel cited to the established presumption that Congress is aware of prior judicial interpretations of issues being legislated[130] to show that the bare terms of common carrier was an intentional exclusion of the activity-based interpretations found in earlier Supreme Court cases.[131] However, by this same

123. FTC v. AT & T, 835 F.3d at 998-1000.

124. Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Constr. Co., 228 U.S. 177, 185 (1913) ("[T]his rule has no application when a railroad company is acting outside the performance of its duty as a common carrier."); R.R. Co. v. Lockwood, 84 U.S. 357, 377 (1873) (stating that a company can become a private carrier when it "undertakes to carry something which it is not [its] business to carry").

125. FTC v. AT & T Mobility LLC, 87 F.Supp.3d 1087, 1104 (N.D. Cal. 2015).

126. Id. at 1092.

127. Id. at 1094 (quoting Representative Stevens, a manager of the bill, who said: "They ought to be under the jurisdiction of this commission in order to protect the public, in order that all of their public operations should be supervised, just the same as where a railroad company engages in work outside of that of a public carrier. In that case such work ought to come within the scope of this commission for investigation. . . . [E]very corporation engaged in commerce except common carriers, and even as to them I do not know but what include their operations outside of public carriage regulated by the interstate commerce acts.").

128. Id. at 1101 (holding "a non-controlling agency opinion may carry persuasive weight").

129. FTC v. AT & T Mobility LLC, 835 F.3d 993, 999, 1002-03 (9th Cir. 2016).

130. Id. at 999.

131. Id.

Section 202 jurisdiction.[136] However, many observers remain skeptical of the FCC's regulatory potency and its proposed policy's effect on internet privacy.

One major critique of the FCC's new proposed regulations is its failure to address the sensitivity of information gathered. The FCC's newly adopted rules 846.3 (o)10.4 (w)

the FCC, and as such, a repeal would allow for better inter-agency cooperation in service of consumer protection.[144] Legislation to repeal the common carrier exception, introduced by Congressman Jerry McNerney, was referred to committee in May 2015[145] and has the support of the FTC.[146]

Such legislation would be consistent with the recent trend of increasing, rat

outclassed language of a statute written over 100 years ago, clinging to that language in the face of a period of the most rapid promulgation of technology known to the human race. Because the Ninth Circuit panel that heard AT&T's appeal addressed none of these issues, the Ninth Circuit hearing the case en banc must address these issues. If these issues are addressed, there is only one conclusion: the Ninth Circuit must affirm the district court's ruling, invalidate the panel's decision, and ensure that individual American citizens are not used and abused by those lurking behind black mirrors.

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