2013

# Striking a Balance Between Privacy and Online Commerce

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# STRIKING A BALANCE BETWEEN PRIVACY AND ONLINE COMMERCE

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It is becoming commonplace to note that privacy and online commerce are on a collision course. Corporate entities archive and monetize more and more personal information. Citizens increasingly resent the intrusive nature of such data collection and use. Just noticing this conflict, however, tells us little. In *Informing and Reforming the Marketplace of Ideas: The Public-Private Model for Data Production and the First Amendment*,[1] Professor Shubha Ghosh not only notes the tension between the costs and benefits of data commercialization, but suggests three normative perspectives for balancing privacy and commercial speech. This is valuable because without a rich theoretical framework for assessing the tradeoff between speech and privacy, important values will be shortchanged by courts assessing the constitutionality of commercial data regulation. As Professor Ghosh points out, a judicial response that simply argues for the marketplace to sort all this out on its own is undertheorized and insufficient.[2]

By themselves, the three perspectives articulated by Professor Ghosh do not pinpoint how to balance data commercialization and online privacy. Instead, they offer a broad view of the policy interests relevant to this balance. Courts deciding data privacy cases will need to go further, building doctrinal structures that specifically take these policy interests into account. This does not mean, however, that courts will need to reinvent the wheel. In this Response, I want to explore an already existing doctrinal structure for considering rights in information. My particular focus is the field of intellectual property, which has already wrestled, to a large degree, with the three perspectives identified by Professor Ghosh.[3] Here, I will identify one intellectual property regime—the right of publicity—and two particular doctrinal innovations—the "transformativeness" test and the "newsworthiness" test. These tests are used by courts to determine when an

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[1] Shubha Ghosh, *Informing and Reforming the Marketplace of Ideas: The Public-Private Model for Data Production and the First Amendment*, 2012 UTAH L. REV. 653 (2012).

[2] *See id.* at 654–55 (recognizing the "inherent tension between democratic values of transparency and accountability and the market goal of wealth creation," and arguing that "regulation of the marketplace of information is consistent with freedom of speech").

[3] In his article, Professor Ghosh offers a thorough description of the existing legal structures for owning data, including intellectual property rights. *See id.* at 667–91. This Response focuses on a different aspect of intellectual property law: how courts, once ownership of data has been established, evaluate expression-based challenges to such ownership.

entity's First Amendment right to speak should trump a celebrity's property interest in her name, likeness, or other information surrounding her persona. The tests are not perfect, but they may prove useful to future courts struggling to reconcile new privacy regulations with the expressive interests of commercial speakers.

According to Professor Ghosh, there are three normative frames for assessing the First Amendment clash between data commercialization and privacy.[4] A "classic liberal perspective" posits that the market for online speech is controlled by fully autonomous actors.[5] Government actors can effectively use their own voices to warn consumers of undesirable data collection practices, and consumers can simply opt out of such practices. Consequently, there is little need for legal safeguards against data collection and use.[6] An "autonomy perspective" is not so sanguine about market forces.[7] More sensitive to intrusions into individual private space, this perspective seeks to balance a corporation's right to speak through others' personal data with an inherent reservoir of personal protected space.[8] Finally, a "fairness perspective" worries about aggregate social balance.[9] This perspective supports laws that preserve the rights of less powerful marketplace actors, particularly consumers, against those whose ability to communicate threatens to outstrip other voices.[10]

Quite rightly in my opinion, Professor Ghosh faults the Supreme Court for its myopic commitment to the liberal perspective and neglect of the autonomy and fairness approaches.[11] In its 2011 decision, *Sorrell v. IMS Health Inc.*,[12] the Court rejected the idea that regulation of the prescribing information held by pharmacies was needed to prevent pharmaceutical marketers from gaining too great of an advantage in their efforts to appeal to prescribing physicians.[13] Instead, the Court embraced the liberal perspective, viewing doctors, pharmaceutical marketers, and consumers as all equally capable of making informed decisions regardless of the marketers' ability to use prescribing information to generate individually tailored commercial appeals.[14]

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[4] *Id.* at 654.

[5] *See id.* at 705.

[6] *See id.* at 682–83.

[7] *See id.* at 668.

[8] *See* Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1161 (2012) (describing discussion on animating values behind First Amendment as reflecting, in part, "concern with the autonomy interests of individual speakers or listeners in their personal or private affairs").

[9] Ghosh, *supra* note 1, at 668.

[10] *See id.* at 683–84.

[11] *Id.* at 705–06.

[12] 131 S. Ct. 2653 (2011).

[13] *Id.* at 2671–72.

[14] *See id.*

Despite *Sorrell*,[15] the liberal perspective does not invariably hold sway when courts attempt to balance commercial speech rights with other concerns. In fact, in other situations, courts explicitly consider issues of autonomy and fairness in calibrating this balance. A great example of this—one that could translate nicely to resolving the tensions between privacy and free speech—is intellectual property law. Just as privacy regulation can prevent the speech of others, intellectual property laws routinely block unauthorized expression. As I describe in a recent article, different intellectual property regimes address free speech concerns in different ways.[16] These efforts to accommodate the First Amendment reflect multiple normative perspectives, not just the classic liberal one. In the space remaining here, I will discuss how just one of these intellectual property regimes, the right of publicity, addresses free speech through a broader, normative frame than that found in the *Sorrell* decision.[17]

"The right of publicity may be defined as [an individual's] right to the exclusive [commercial] use of his or her name or likeness."[18] The right often conflicts with the expressive rights of others as celebrities have become common subjects for all kinds of discourse. Recognizing this, courts routinely turn to the

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[15] The Supreme Court's *Citizens United v. FEC*, 130 S. Ct. 876 (2010), decision is another example of the liberal approach, blithely assuming that the marketplace of ideas offers the same opportunities for communication and persuasion, regardless of the technical and economic advantages of particular speakers. *See id.* at 907 ("Factions should be checked by permitting them all to speak . . . and by entrusting the people to judge what is true and what is false."). One scholar notes that the First Amendment "remains almost completely unconcerned with market failure in the marketplace of ideas and with imbalance among speakers, their resources, and their persuasive power." Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 917 (2010).

[16] Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech*, 81 GEO. WASH. L. REV. 1 (2013).

[17] As Professor Ghosh and I have discussed, the willingness of courts adjudicating right of publicity disputes to consider autonomy and fairness concerns is a relatively recent development. In fact, in the Supreme Court's only consideration of the right of publicity, *Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Court rejected the defendant broadcaster's First Amendment argument, seeming to equate the market for the celebrity performance at issue with the market for news reporting. *Id.* at 567–68. In other words, the Court gave short shrift to interests outside of those of the celebrity rights holder. *See id. Zacchini* was a factually unique case, however, involving the rebroadcast of an individual's entire human cannonball act, *id.* at 563–64, and it has had only a limited impact on subsequent publicity rights decisions. *See* 2 J. THOMAS MCCARTHY, THE RIGHT OF PUBLICITY AND PRIVACY § 8:27 (2d ed. 2009).

[18] Toffoloni v. LFP Publ'g Grp., 572 F.3d 1201, 1205 (11th Cir. 2009) (quoting Martin Luther King, Jr. Ctr. for Soc. Change v. Am. Heritage Prods., 296 S.E. 2d 697, 700 (Ga. 1982)).

First Amendment in resolving right of publicity disputes.[19] These decisions do not simply assume that the downstream user's speech rights should triumph. Instead, judges have introduced two doctrinal mechanisms—the "transformativeness" and "newsworthiness" tests—to satisfy both free speech interests and the interest in controlling use of one's persona.

In assessing a First Amendment defense to a celebrity's charge of publicity rights infringement, courts examine the "transformativeness" of the defendant's expressive activity. This is an independent and absolute defense to a prima facie violation of the right of publicity. The standard is a broad one: "[W]hether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question."[20] Essentially, this is "a balancing test between the First Amendment and the right of publicity."[21]

In contrast to the Court's approach in *Sorrell*, when applying the transformativeness test, courts have demonstrated a nuanced recognition of the tradeoffs between free speech and other social interests. Autonomy concerns are front and center in these discussions. For example, in evaluating the "transformativeness" of an unauthorized painting of Tiger Woods, the Sixth Circuit noted not only the First Amendment's goal of advancing knowledge through "a free marketplace of ideas," but also its "fulfillment of the human need for self-expression," an autonomy interest.[22] Similarly, when a federal court recently had to determine the duration of publicity rights under New Jersey common law, a decision with direct implications for free speech, it noted that "one of the rationales for recognizing a right of publicity remains its protection of an individual's interest in personal dignity and autonomy."[23] The plaintiff was the purported beneficiary of Albert Einstein's publicity rights under his will.[24] The defendant, an advertiser that used Einstein's image without permission, contended that whatever rights the beneficiary held, they were no longer valid since Einstein had been dead for over fifty years.[25] Ultimately, the court denied the plaintiff's request for a right of longer duration, explaining that "the personal interest that is at stake becomes attenuated after the personality dies."[26] Hence, the court adopted an autonomy perspective, calibrating the temporal length of the right according to one's personal interest in self-fulfillment.

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[19] Bartholomew & Tehranian, *supra* note 16, at 29–31.

[20] Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 809 (Cal. 2001).

[21] *Id.* at 799.

[22] ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 955 (6th Cir. 2003).

[23] Hebrew Univ. of Jerusalem v. Gen. Motors, LLC., No. CV10-03790, 2012 WL 4868003, at *5 (C.D. Cal. Oct. 15, 2012) (internal quotation marks omitted).

[24] *Id.* at *1.

[25] *Id.*

[26] *Id.* at *5.

Courts have also evaluated the free speech-publicity rights balance from a fairness perspective, assessing the power dynamics of the different speakers and audiences involved. The *Sorrell* decision suggested that the only remedy for problematic speech (like individualized marketing based on pharmacy prescription data) is more speech, regardless of the costs to patients, prescribing doctors, or the Vermont health care system.[27] The right of publicity's transformativeness test does not assume, however, that more speech is a cure-all for any speech with socially-deleterious consequences. Instead, it asks whether the speaker is actually making a contribution. If not, the speaker loses First Amendment protection because it is not actually providing a competing voice. For example, when the Tenth Circuit had to decide whether right of publicity claims brought by major league baseball players for the unauthorized use of their names and likenesses on parodic baseball cards should yield to the First Amendment, it decided whether the cards were transformative. In doing so, the Tenth Circuit considered the impact of its decision on the allocation of societal resources. Responding to concerns that unauthorized uses threatened to cancel out celebrity's semiotic value, the court distinguished between "advertising" uses and uses on merchandise like t-shirts, coffee mugs, or the baseball cards at issue.[28] Only after assuring itself that the supply of celebrity images for public discourse would remain robust, even after the defendant's uses were allowed, did the court uphold the defendant's First Amendment defense.

Relatedly, a "newsworthiness" defense to right of publicity claims also demonstrates judicial sensitivity to fairness concerns. The defense attempts to reconfigure the relationship between speech and celebrity privacy, with the press helping balance out the communicative abilities of celebrities with a countervailing force. In determining whether the newsworthiness defense is satisfied, a court must ask whether the defendant's expression "concerns a matter of public interest" and is "informative."[29] To a large degree, these questions are proxies for a larger inquiry into whether the defendant's use of the celebrity persona represents a counterpoint to the celebrity voice or merely another request to engage in a commercial transaction. Hence, the newsworthiness defense has been upheld when the speech at issue represents some sort of news reporting[30] or "editorial

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[27] *See* Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2671 (2011) ("Vermont may be displeased that detailers who use prescriber-identifying information are effective in promoting brand-name drugs. The State can express that view through its own speech. But a State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction.").

[28] Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 974–75 (10th Cir. 1996).

[29] Davis v. Elec. Arts, Inc., No. 10-03328, 2012 WL 3860819, at *6–7 (N.D. Cal. Mar. 29, 2012) (citing Dora v. Frontline Video, Inc., 18 Cal. Rptr. 2d 790, 792 (Ct. App. 1993)).

[30] New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 309–10 (9th Cir. 1992).

opinion,"[31] but it has been disallowed when the defendant was motivated by commercial rather than journalistic purposes.[32]

So why did the Court in *Sorrell* ignore the autonomy and fairness perspectives? The novelty of the legal issue involved may have caused it to turn to a more Brandeisian view of the marketplace of ideas where the only permissible remedy for some kinds of speech is more speech. Or the unique legislative history of the Vermont statute may have created heightened concern over the content-based nature of the law. Regardless, additional data privacy legislation is in the works, and there will surely be First Amendment challenges to its implementation. In the next go around, a closer look at other bodies of law like the right of publicity would help the Court realize a richer normative frame like that advocated by Professor Ghosh and perhaps offer a better doctrinal structure for bridging the privacy-commercial speech divide.

[31] Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1185–86 (9th Cir. 2001).

[32] Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 805 (N.D. Cal. 2011).