The Direct Marketing Model and Virtual Identity: Why the United States Should Not Create Legislative Controls On the Use of Online Consumer Personal Data

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I. Introduction

[It ought to be remembered that there is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things... This arises... partly from the incredulity of men, who do not readily believe in new things until they have had a long experience of them.]

In recent history, direct marketers have approached the selection of marketing prospects with relatively simple information about individual consumers. Fueled by advances in

* The Author would like to express thanks and appreciation to his friend and editor, John Coles.
2. See Bob Stone, *Successful Direct Marketing Methods* 102-03 (3rd ed. 1986). Database marketers traditionally use a three-prong evaluation of potential customers. Marketers look to (1) recency of purchase—did the
computer and communications technology, modern database-driven businesses have become more sophisticated; the level of detail with which marketers examine individual customers has increased rapidly. Online consumer data is particularly suited to the business practicalities of database marketing. The Internet offers tremendous promise to business in its quest for more effective and efficient marketing practices.\(^4\)

customer order recently, (2) frequency of purchase—how many purchases did the customer make, and (3) the monetary value of the purchases. See id.

3. See Elizabeth deGrazia Blumenfeld, *Privacy Please: Will the Internet Industry Act to Protect Consumer Privacy Before the Government Steps In?*, 54 BUS. L. 349, 351 (1998). Companies want online consumer data because it allows them to conduct research at a previously unobtainable level of fine granularity. See id. Companies are interested in the quantity of consumers who visit their Internet site, or the frequency with which individuals access the site, because that information aids those companies in making accurate decisions as to what content should be offered, expanded, or removed. See id. DeGrazia Blumenfeld also added “[s]imilarly, if a merchant finds that product A sells better than product B through its web site, the company may want to discontinue offering product B and offer a product similar to product A instead.” Id.

4. STONE, *supra* note 2, at 103. Database marketers have attempted to refine their database customer files to achieve a high level of granularity from the beginning of the industry’s computerization. Maintaining detailed customer records is one, if not the, essential element in operating a direct marketing enterprise, or a business that uses direct marketing as part of its marketing mix. In 1984, Bob Stone wrote that a customer record “[S]hould be very specific. It is not enough, for example, to record that a customer bought shirts. The data should indicate type of shirts—dress shirts or sport shirts. (This says something about lifestyle.)” Id. Stone goes on to list the types of data that would make for a complete customer record. The information captured in the list below is the same type of information that marketers are seeking from the Internet.

> **Factors that should be included are:**
> - Mode of payment: cash, open account, installments, credit card.
> - Geographics: not only where your customer lives, but also correlating recency, frequency, monetary to geographic areas.
> - Type of product purchased: labeled by product categories—household, leisure, recreation, fashions, gourmet, travel, sports, do-it-yourself, etc.
> - Length of time on the file: an indication of interest in your publication, book club, catalog, etc.
> - Source: direct mail, radio, TV, space, telephone, cable TV, inserts, co-ops, etc. It is important to note that the use of multimedia contributes another lifestyle statistic to the database.
> - Date of last transaction: includes payment, change of address, correspondence, renewal, unsolicited contributions, etc.

Id. These are just some of the variables. Others should be determined based on what the company sells. See *id*.

“For quite some time, database marketers have had an interest in the type of information now available from electronic commerce. Data collection and processing technology have only recently made the collection and use of such data a reality.” deGrazia Blumenfeld, *supra* note 3, at 351.
At the same time, consumers and various consumer protection groups question the potential for abuse inherent in the powerful personal data collection abilities available via the Internet. In response to these concerns, some nations have erected legislative barriers to prevent the misuse of consumer data collected via transactions within the new medium. The United States has taken a different approach; the industries interested in exploiting the commercial promise of the Internet currently self-regulate their transactional personal data collection activity.

The issue in the United States: what is the appropriate balance between consumer privacy rights and the benefits the Internet may hold for consumers and businesses alike? This

5. See generally Peter McGrath, Knowing You All Too Well, NEWSWEEK, Mar. 29, 1999 at 48. Marketing imperatives quickly take advantage of new technology. For example, clickstream monitoring tracks web users as they move from site to site on the Web. A user’s clickstream can reveal that user’s interests with great precision. See id. “Did you go from slate.com to a Volvo dealer’s Web site? Did you then buy some brie from peapod.com, the online grocery? You may be one of those limousine liberals we’ve been hearing about.” Id. McGrath adds “[a]nd when Web merchants combine clickstream analysis with another new software technique known as “collaborative filtering,” which makes educated inferences about your likes and dislikes based on comparing your user profile with others in the database, they have a marketing tool of high potential not only for customer satisfaction but also for abuse.” Id.


Parties should be able to enter into legitimate agreements to buy and sell products and services across the Internet with minimal government involvement or intervention. Unnecessary regulation of commercial activities will distort development of the electronic marketplace by decreasing the supply and raising the cost of products and services for consumers the world over. Business models must evolve rapidly to keep pace with the break-neck speed of change in the technology; government attempts to regulate are likely to be outmoded by the time they are finally enacted, especially to the extent such regulations are technology-specific. Accordingly, governments should refrain from imposing new and unnecessary regulations, bureaucratic procedures, or taxes and tariffs on commercial activities that take place via the Internet.

Id.
comment advocates a free-market approach. The self-regulatory model of Internet commerce should continue within the United States. Adopting prospective limitations on the development of Internet business models could present serious obstacles to the creation of a highly efficient and effective means of commerce. The self-regulatory devices in place, and in development, will strike the appropriate balance between consumer protection and unfettered business development.

Part II of this comment will examine the historical practices of database marketers, while Part III will look at how the Internet promises to influence that business model. Part IV examines the affected consumer privacy interests as they exist today in the United States. Part V compares the practical online privacy rights of U.S. consumers to European initiatives. Part VI questions foreclosing the development of high-benefit/low-risk business models in reaction to the perceived potential for abuse of personal consumer data in the online environment.

II. The Development of the Consumer Data Marketing Model: The Importance of Economic Efficiency in Consumer Marketing.

To illustrate the importance of freely available consumer data to Internet businesses, an explanation of direct marketing economics is necessary. The direct marketing model captures economic efficiencies unavailable to traditional mass marketers. Internet marketers are able to capitalize on those efficiencies in new and powerful ways.

A. Brief overview of Mass Media Marketing Economics.

The traditional leverage points in consumer mass-marketing are the reach and frequency of particular media outlets.8 Reach and frequency measure how many consumers see a message, and how many times those consumers see that message.9 When

8. See PHILIP KOTLER, MARKETING MANAGEMENT: ANALYSIS, PLANNING, AND CONTROL 646 (5th ed. 1984). "Reach [is the] number of different persons or households exposed to a particular media schedule at least once during a specified time period. Frequency [is the] number of times within the specified periods that an average person or household is exposed to the message." Id. Note that this overview could be characterized as an oversimplification; however, it suffices for this discussion.

9. See Telephone Interview with Jennifer King, Senior Media Planner at Tierney and Partners, in Philadelphia, Pa. (May 30, 2000). Exposure, loosely defined, is the total open eyes and ears facing any particular medium. See id.
combined, those two factors establish the exposure that any particular marketing effort can generate.\textsuperscript{10} Advertising professionals express reach as the ratio between the total impressions created by an advertising message and the total number of persons available to see that message.\textsuperscript{11} Frequency is the number of times an individual audience member observes a particular advertisement.\textsuperscript{12} Together, these two factors aid in determining the effectiveness of a medium or combination of media.\textsuperscript{13}

Superior media outlets have an economically efficient gross rating in relation to the costs associated with their use.\textsuperscript{14} A simple illustration is the purchase of a magazine advertisement in two different magazines. The methodology used to evaluate the relationship between pricing and exposure is "cost per thousand" or CPM.\textsuperscript{15} Assume both magazine A and B have a monthly circulation of 1,000,000 readers. Magazine A sells full-page ads at a cost of $10,000 for a one-time placement. Magazine B sells the same for $20,000 for a one-time placement. Thus, the efficiency of magazine A is $100/CPM—it will cost the marketer $100 to reach each 1,000 persons who read magazine A (ten cents each). Magazine B on the other hand, has an efficiency of $200/CPM—it will cost the marketer $200 to reach each 1,000 persons who read magazine B (twenty cents each). All other things being equal, the marketer would purchase Magazine A—it is twice as efficient in reaching potential customers as magazine B. For marketers, however, the practical financial rewards of advertising in the two magazines may be wildly different because of the subject matter of

\begin{itemize}
  \item \textsuperscript{10} \textit{See Kotler, supra} note 8, at 645. "Media selection is the problem of finding the most cost-effective way to deliver the desired number of exposures to the target audience." \textit{Id.}
  \item \textsuperscript{11} \textit{See King, supra} note 9 (for example, 100 audience impressions out of 1000 audience members would be a reach of 10 percent).
  \item \textsuperscript{12} \textit{See id.}
  \item \textsuperscript{13} \textit{See id.} Note that gross rating points may be duplicative—persons who regularly watch the evening news will often see the same ad on several consecutive evenings or in other programs. \textit{See King, supra} note 9.
  \item \textsuperscript{14} \textit{See Kotler, supra} note 8 at 645. "[T]he media planning challenge is as follows. Within a given budget, what is the most cost effective combination of reach and frequency . . . to buy. [The question is] [h]ow many exposures does an average member of the audience need for the advertising to work?" \textit{Id.}
  \item \textsuperscript{15} \textit{See id.} at 649. When purchasing media one must calculate the cost per thousand persons reached by any particular media vehicle so that one may make meaningful comparisons between media outlets. \textit{See id.}
each magazine. The marketer must consider this difference in the effort to conduct a successful marketing campaign.¹⁶

B. Evaluation of Promotion Results

The effectiveness of advertising in one media vehicle versus another varies in large part because different vehicles will attract individuals interested in the subject matter of that vehicle.¹⁷ In turn, those individuals will respond at different rates depending on the advertisement.¹⁸ Thus, an attempt to reach consumers interested in Asian furniture is far more effective in Architectural Digest than in Field and Stream, even if the latter is a less expensive advertising purchase. To a furniture merchant, the fact that interested consumers have congregated around a particular media vehicle will increase the economic efficiency of purchasing advertising space within that vehicle.¹⁹ That segmentation of consumer interests around media vehicles and organizations is an essential consideration of the mass-market advertiser.²⁰ Thus, mass-marketers reach consumers in a second-hand manner through media outlets by evaluating the efficiency of various media in terms of reach, frequency, and exposure.²¹

C. Overview of the Economics of Direct Response Marketing

Much like a mass-marketer, direct marketers search for media outlets whose readers, viewers, or listeners have an affinity for the particular product or service the marketer offers.²² Among the outlets that appear promising, the direct marketer evaluates

¹⁶ See Kotler, supra note 8, at 650.

¹⁷ See generally Stone, supra note 2, at 131. Persons interested in travel information will read Conde Nast traveler, or watch the Travel Channel on cable-TV before they will seek travel information in non-travel related media outlets. See id.

¹⁸ See id. at 145-46. Modern media tend to be highly focused products, readers or viewers are interested in the subject matter of that particular media product. See id.

¹⁹ See generally Stone, supra note 2, at 131. Marketers seek out those media outlets that resemble low-rent, high-traffic retail locations. The customer volume is high in relation to the relative cost of the media on a cost per thousand basis. See id.

²⁰ See Kotler, supra note 8, at 650. Audience quality, i.e., the interest in the subject matter of the particular media outlet, is a prime concern for advertisers. See id.

²¹ See id. at 645-46.

the reach and frequency in making an advertising placement decision much like a mass marketer.\(^{23}\) The direct-marketing practitioner, however, imposes a level of quantitative analysis on media efficiency that mass marketers do not. Unlike the mass-marketer, the direct marketer evaluates each discrete media purchase in terms of the efficiency of the back-end of order production.\(^{24}\) Direct marketers perform back-end analysis on media purchases by virtue of the direct relationship established between the marketer and each responding consumer.

Those consumers interested in the direct marketer's promotion respond directly to the marketer on an individual basis. The traditional direct marketer thus compares the efficiency of media vehicles by calculating the total number of responses, and the financial profitability of those responses, to the expense of purchasing that particular media outlet.\(^{25}\)

For example, assume a direct marketer planned to invest a total of $30,000 in two media tests, and she buys ads in both magazines A and B above.\(^{26}\) Assume further that Magazine A produces 1,125 orders and Magazine B produces 2,320 orders.

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23. *See id.*


In many cases the direct marketer can measure the actual response to individual cells or promotion by putting a unique code number on the response piece in a direct mail package . . . . As keyed responses come in, the direct marketer can measure the response in magazine A versus magazine B, the response in January versus February, the response to list A versus list B, etc. This means that over the long run, the direct marketer can develop some reasonably scientific information about which media, offers, ads, seasons, and parts of the customer file pull the better rates of response and which pull the less good rates.

*Id.*

25. *See id.* "[O]ver a period of time, the direct marketer is able to plan future promotions on the basis of past history, not simply on the basis of personal opinion, individual preferences, or general attitude regarding promotion." *Id.*

26. Direct marketers test media outlets before they make a large advertising purchase in any particular media outlet or list of names. In fact, the ability to test is an essential premise in the efficiency of the direct marketing business model. *See* Passavant, * supra* note 24, at 7-9. Media tests consist generally of the smallest portion of the print run that will produce reliable results. *See generally* McKenzie, * supra* note 22, at 307-308. Direct marketers conduct list tests by mailing a sufficient number of names to produce a statistically reliable result. The actual number will vary depending upon the size of the list itself. *See generally* Ed Burnett, *Introduction to Mailing lists, in DIRECT MARKETING HANDBOOK 211, 219* (Edward L. Nash ed., 1984).
Which magazine merits more advertising investment? Clearly, Magazine B merits more advertising investment, in spite of its larger out-of-pocket expense. The 1,125 orders produced by Magazine A have a cost per order of $8.89 each. Magazine B’s 2,320 orders cost only $8.62 each. Thus, Magazine B is more efficient than Magazine A. To the direct marketer, Magazine B is a better buy, in spite of the fact that Magazine A is twice as efficient as B in a straight dollars-to-readers comparison.

Using that method, direct marketers develop lists of customers, who they themselves contact with marketing promotions, or sell to other database marketers who promote them in a like fashion. Once a customer is on file, the direct marketer attempts to gather data relevant to maintaining and expanding the customer relationship. Such “customer intelligence” allows the direct marketer to select names for promotion from within her own database, or to determine which lists of names to purchase in the selection of prospective customers.

When a direct marketer selects and promotes in-house or rental lists, the marketer subjects those list selections to a rigorous financial efficiency evaluation. The database marketer will measure the cost to promote each list, and the cost to promote each name individually within any list. The process is circular; lists are acquired through promotion or rental, are subsequently tested or re-promoted, and then are analyzed for profitability. The direct marketer promotes profitable rental lists in ever-larger

27. See generally David Shepard Associates, The New Direct Marketing: How to Implement a Profit Driven Direct Marketing Strategy 250-51 (2nd ed. 1995). Magazine B may be more efficient on the “front-end” but may lose its advantage on the “back-end.” Direct marketers not only consider purchase costs when choosing media, but they also must consider how many customers actually pay after responding, and how many go “bad debt” and are written-off as a business expense. Direct marketers perform those calculations only after extensive data collection on an individual customer. See id.

28. See Stone, supra note 2, at 272-73 (discussion of an AT&T case study applying the concepts of media selection, prospect evaluation, testing, and back-end analysis).

29. Direct Marketers analyze the financial viability of each marketing effort through a process that captures all costs and revenues associated with the marketing of any one particular media effort, list or individual. The process generally involves large computer spreadsheets with hundreds of cost and revenue data points that the marketer will analyze and adjust to achieve the maximum return on investment in all subsequent marketing efforts to that individual. For a detailed explanation of the process see generally David Shepard, supra note 27, at 241-70.

30. See id.
quantities (a "roll-out"). The direct marketer then applies intelligence gathered through analysis to acquiring more lists of names.

The higher the efficiency, the greater the profitability; the database marketer seeks to promote individuals with the same or substantially similar characteristics in the future with the knowledge that they too will prove highly profitable. Thus, direct marketing focuses on efficiently developing and maintaining the relationship between a marketer and those customers interested in that marketer's products or services. The direct marketing business model seeks to produce high profit transactions through targeted customer acquisition and retention by promoting only those customers interested in the products or services of the direct marketer.

1. The Customer Focus.—Both modern and traditional marketing practitioners have supplanted the term "direct marketing" with the more technically accurate term "database marketing." That change reflects the fact that many businesses (beyond the direct mail practitioners who developed the technique) have come to employ some form of promotion strategy customized to reach individual consumers directly.

That change in terminology, however, signals more than the global adoption of a marketing technique. Database marketing is a fundamental philosophical change in the way that marketers approach consumers. Database marketers do not merely seek to target niche groups; they also create niche groups by collecting data based on an individual's interests and past behavior. That

31. See id.
32. See id.
33. See id.
34. See DAVID SHEPARD ASSOCIATES, supra note 27, at 1. "The term 'database marketing' became a more accurate description of the process involved [with contacting individual customers] and it has become synonymous with the term 'direct marketing' among both traditional and nontraditional practitioners." See id.
35. See generally EDWARD L. NASH, THE DIRECT MARKETING HANDBOOK 3 (1984). "My company, BBDO Direct [a large direct marketing advertising agency], has been engaged in applications of direct marketing for companies one would never imagine to be users of this discipline, such as General Electric, ITT, Campbell Soups, and R.J. Reynolds." Id.
36. See DAVID SHEPARD ASSOCIATES, supra note 27, at 3-4. Collecting and exchanging consumer information is vital to effectively managing a brand or product in the modern marketplace. "... [m]arketers are able to use the information to develop customized marketing strategies and programs for individuals or small groups of customers and no longer have to settle for one single solution or program to best fit their complex marketing situations." Id.
shift is more than semantic, and in fact, is a paradigm shift from traditional direct marketing and mass-marketing techniques. The database marketer need not search for pre-existing lists of desirable prospects as a traditional direct marketer would; instead, she searches for desirable individuals using a set of characteristics she identifies as probative of promotional efficiency and profitability.

The fundamental reason for that change is the advent of high-speed computerized data processing. The free flow of consumer

37. See id. David Shepard wrote:
The new direct marketing is an information-driven marketing process, managed by database technology, that enables marketers to develop, test, implement, measure, and appropriately modify customized marketing programs and strategies. To implement the new direct marketing you need to know how to identify and gather relevant data about customers and prospects.
- Use database technology to transform raw data into powerful and accessible marketing information.
- Apply statistical techniques to customer and prospect databases to analyze behavior, isolate relatively homogeneous market segments, and score and rank individuals in terms of their probability of behaving in a variety of predictable ways (responding, buying, returning, paying, staying or leaving, and so on).
- Evaluate the economics of gathering, manipulating and analyzing data and capitalize on the economics of developing and implementing data-driven marketing programs.
- Creatively act on the marketing opportunities that emerge from these processes to develop individual customer relationships and to build business. Given the above elements, the new direct marketing is much broader in scope than what has been regarded traditionally as ... direct marketing.

In the past, direct marketing has been distinguishable from other marketing disciplines because of its emphasis on initiating a direct relationship between a buyer and a seller, a relationship that until recently centered primarily on the exchange of goods and services. However, in today's marketing environment... smart marketers are not just using the new direct marketing to efficiently consummate a sale, they are also using it to build store traffic and identify the most efficient ways to generate leads and sales across multiple communication and distribution channels.

38. See id. Computer data processing has "freed" marketing information from the labor-intensive work previously required in marketing analysis and extrapolation. Because of scale, the larger an organization's sales, the harder the analysis was to perform. Now, however, companies may "... develop ways to
information is critical to the development and maintenance of that business model; it is the key to the Internet's retail promise to consumers and businesses alike. 39

III. What Makes Internet-based Marketing So Enticing to Database Marketers?

Two factors make the Internet particularly compatible with the database marketing model. First, the Internet presents marketers with the ability to examine consumer behavior at a never-before-realized level of granularity. 40 Second, the Internet's inherent ability to minimize marketing and distribution costs is a powerful competitive advantage in an increasingly price-aggressive global marketplace. 41

A. Examining Consumer Behavior

Almost all retail consumer transactions on the Internet are, by virtue of being interactive, in the mode of database marketing. Consumers navigating to retail web sites inevitably have the opportunity to interact directly with the online retailer through a quantifying market size and market demand for products or services. Significantly, companies that are able to marry such individual customer information on an ongoing basis can more accurately and quickly evaluate opportunities and precisely identify who is buying what, how often, and why. Id.

39. See Clinton, supra note 7, at 3. This fundamental principle is not only central to database marketers who use the Internet, but is also an element essential to all Internet commerce. The Clinton Administration's Framework for Global Internet Commerce stated:

It is essential . . . to assure personal privacy in the networked environment if people are to feel comfortable doing business. At the same time, fundamental and cherished principles like the First Amendment . . . protect the free flow of information. Commerce [on the Internet] will thrive only if the privacy rights of individuals are balanced with the benefits associated with the free flow of information.

Id.

40. See id.

41. See Walid Mougayar, Opening Digital Markets: Battle Plans and Business Strategies for Internet Commerce 29-32 (2nd ed. 1998). The distribution chains of many retail products add a 40 to 60 percent markup, and by the time the product reaches the ultimate consumer, the markup could be as high as 135 percent. In an age of increasing competition and declining profit margins, both manufacturers and consumers are beginning to demand maximum efficiency; that each step in the distribution process adds value commensurate with the costs imposed. See id. "If manufactures are able to connect directly with consumers and shorten the traditional distribution chain they used to depend on, it is theoretically possible to get rid of the inefficiencies of the current structure." Id.
purchase or a request for information. If the customer opts for a choice other than leaving the site, they will provide some information to the online retailer. Generally, this may consist of name, email address, home address, telephone number, and perhaps some demographic information. Web retailers may then use that data in marketing efforts—be they on the web or through traditional channels.

In addition to the information listed above, retailers on the Internet may capture the "clickstream" of the customer. The clickstream is the procession of items or pages that an Internet user examines within a particular site, or the procession of sites that a user visits in arriving at any one particular site. An Internet retailer can use this information to "profile" a particular customer to determine the probable efficiency of exposing that customer to various acquisition efforts (banners, links, and referring sites) or offers. In addition, a retailer may use

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42. See generally Mary J. Culnan, Georgetown Internet Privacy Policy Survey: Report to the Federal Trade Commission 10 (Nov. 13, 1999) http://www.msb.edu/faculty.culnanm/gippshome.html. Dr. Culnan, a professor of the McDonough School of Business at Georgetown University, directed a study of the information practices of the most popular web sites among consumers. That study determined that web sites request the following: Name (81%), Email address (91%), Postal address (63%); Telephone number (52%). See id. In contrast, only 10% requested income and education data, and only 6% requested family information. See id.

43. See Derek Leebaert, Present at the creation, in THE FUTURE OF THE ELECTRONIC MARKETPLACE 1-33 (Derek Leebaert ed. 1999). "The key [for success in the future] for marketers will be to integrate traditional direct and database marketing techniques with their interactive activities." Id.


45. See id. EPIC describes how Internet companies may use online consumer data to enhance and improve marketing intelligence in terms of reach, frequency and granularity. See id. EPIC pointed to the Ultramatch promotional materials to make their point. "Ultramatch technology allows us to understand the reach and frequency of individual behavior groups at micro-behavioral level." Id. The Ultramatch materials added that the new technology helps overcome the difficulties inherent in crafting marketing messages to reach large, undifferentiated groups of consumers. By focusing on smaller and smaller groups of individuals, companies can more closely monitor the behavior of their customers. Before the Internet and online profiles, companies would have to rely on surveys or other sorts of mass data collection. Online profiling provides an unprecedented way of learning about online behavior at a detailed level.
statistical modeling techniques to determine which customers are most profitable to pursue, (perhaps paying a premium for those individuals), or to determine where it should seek customers in the future.\textsuperscript{46} Thus, online retailers can use that information to customize offerings for individual consumers, or the retailer may also use this information to adjust its overall product mix, or offer additional products or services.

The great advantage to using the Internet is that it can collect consumer information faster and easier than any other medium. In addition, the ability to observe the window-shopping habits of consumers is invaluable if one is operating a business based on customer traffic—be it a web site or a brick-and-mortar retail outlet.\textsuperscript{47} In addition, customers may now have a true one-on-one relationship with a retailer using that type of data. If a customer is interested in fly-fishing tackle, perhaps the equipment of a specific

\textit{Id.}

\textsuperscript{46} See SHEPARD, supra note 27, at 271. Statistical modeling is commonplace among direct marketers. David Shepard commented on increased interest in statistical modeling techniques among marketers. He wrote that

\textit{[T]he high level of interest in statistics is due directly to rising promotion costs and declining response rates. In light of shrinking margins many direct marketers can no longer rely on simple recency, frequency, monetary value (RFM) methods to manage their house files. Nor can direct marketers afford to make their new customer acquisition decisions based solely on the limited name selection criteria list owners have historically made available to them.}

\textit{Id.}

\textsuperscript{47} See Blumenfeld, supra note 3, at 351 (footnotes omitted). Elizabeth DeGrazia Blumenfeld of America On Line wrote:

\textit{[E]ach time a user clicks her mouse while on a web site, the potential exists for the company to record the location of her “click” and thus to collect information about her online behavior—where she goes, what she buys, when she buys, and how frequently she buys. Merchants want this granular information because of its consumer market research value. For example, one could surmise much from a visitor to a sports-related web site who spends most of the time in the figure skating area and does so on a weekly basis. This individual is likely to be a woman, as the majority of figure skating fans are women, a fan of the sport and therefore likely to be interested in related products or services that the company can then offer. From the visitor’s perspective, receiving promotions or information about ice skating would be a good thing and certainly better than receiving information about those sports in which she has little or no interest. Clearly, the Internet’s ability to collect such information allows for increasingly accurate and personally targeted marketing.}

\textit{Id.}
manufacturer, the retailer may notify the customer of new products, sales, or information through a relatively inexpensive email. In fact, the retailer could direct the customer to a digital catalog customized to her particular interests. Through traditional techniques, that type of relationship is impossible.48

The Internet marketer can both increase profit margins and pass savings on to consumers without having to expend large sums on customer acquisition efforts (that generally lose money within the first several years).49 For example, an e-commerce customer list purchased from a clothing store could be used to market to the fly-fishing enthusiast mentioned above. Such a list could come with a complete profile within the database of the list owner. Through an email, or perhaps a postcard directing the customer to the site, the retailer can present a shopping experience totally customized to that user—their measurements already being on file. The need to mail an expensive catalog and a reply envelope, or to maintain large numbers of high-cost customer service representatives is gone.

B. Minimizing Costs

Decreased distribution costs also play a role in the push for Internet commerce. The normal distribution chain of consumer goods is expensive to maintain, and adds little value for the cost it imposes on the ultimate customer.50 This disintermediation of the

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Mark Uncapher, Vice President and Counsel for the Information Technology Association of America, writes that “online sites are, in fact, seeking to duplicate the same personalized attention that consumers get from the best brick and mortar merchants. A traditional merchant often knows based upon past experience, or even conjecture, to be able to make recommendations. Consumers value the personal attention that this requires.” Id.

49. See DAVID SHEPARD ASSOCIATES, supra note 24, at 244. The financial return on new customers is less than that of existing customers who are re-promoted. David Shepard wrote that “... response rate[s] on new customer acquisition mailings [are] significantly less than the response rate to mailings to the customer file [that the cataloger already owns]. So in any one year, a dollar spent on new customer acquisition, as opposed to customer mailings, will reduce both sales and profits.” Id.

50. See MOUGAYAR, supra note 41, at 29-32. Mougayar stated that:
In general, for most retail products, a 40 to 60 percent markup from the most immediate handling channel is normal. By the time the product reaches the user, this markup could total 135 percent in many cases. Both manufacturers and consumers
“middleman” is one of the primary drivers of low-cost transactions on the Internet. In an increasingly competitive marketplace, distribution savings will ultimately flow to the consumer as manufacturers and retailers compete for the attention and dollars of those consumers. Unfettered access to transactional consumer data is a necessary condition for Internet commerce to manifest decreased prices and increased service gains.

The Economist magazine reported on Amazon.com’s application of the model described above. In that article, Jeff Bezos, the CEO of Amazon.com, commented on the intrinsic capabilities of that model, comparing it to traditional methods of conducting business-to-consumer transactions.

Amazon now has a vast database of customers’ preferences and buying patterns, tied to their e-mail and postal addresses. Publishers would kill for this stuff: they know practically nothing about their readers, and have no way of contacting them directly. That relationship has traditionally been monopolised by the bookshops, and even they rarely keep track of what individual customers like. Amazon offers publishers a more immediate link. “Ultimately, we’re an information broker,” says Mr Bezos. “Readers find books or books find readers.”

This is a generic model that could work in plenty of industries: anywhere with enough different products—and consumer tastes—to call for a big catalogue and a lot of advice. When Mr Bezos started Amazon, he knew nothing about the book trade; he simply understood the power of electronic commerce. As a former financial analyst, he picked books because existing margins and distribution patterns seemed most favourable to an online business. In future [sic], Amazon may expand into

have reason to worry about the perceived lack of value offered by [traditional] distribution channels. Manufacturers are becoming concerned that more customer revenue is being left with their distribution channels, and less with them, as they watch their profit margins get squeezed. On the other hand, consumers are realizing that a large part of what they are paying is actually staying with the distribution channels.

Id.

51. See id. By enabling manufacturers to connect directly with consumers, it is at least theoretically possible to create a distribution structure more efficient than the current structure. See id. The term disintermediation “refers to the removal of organizations or business process layers responsible for certain intermediary steps in a given value chain.” Id.

52. See id.
music and videos. Once you understand the model, the applications seem almost limitless.\textsuperscript{53}

IV. Consumer Privacy Interests and Protections

Consumer advocates and privacy watchdog groups have long questioned the data collection practices of database marketers. The advanced data collection capabilities of the Internet have fueled the fears of such groups.\textsuperscript{54} In the United States, advocacy groups such as Junkbusters and the Electronic Privacy Information Center (EPIC) claim that Internet marketers and advertisers, with their ability to track browsing patterns, purchase habits, and interests are secretly compromising the privacy interests of online consumers.\textsuperscript{55} Privacy advocates look to various consumer and Internet user surveys for evidence of widespread public concern for how Internet retailers and advertisers handle consumer information.\textsuperscript{56}

The community of marketers using the Internet has acted to allay perceived intrusions on the privacy interests of the public by creating a number of self-regulatory consumer privacy measures and guidelines.\textsuperscript{57} In addition, governments have responded in varying degrees to perceived consumer privacy fears in the face of Internet marketer's aggressive attempts to create efficient and


\textsuperscript{56} See id. See also ELECTRONIC PRIVACY INFORMATION CENTER DEPARTMENT OF COMMERCE AND THE FEDERAL TRADE COMMISSION PUBLIC WORKSHOP ON ONLINE PROFILING at http://www.ftc.gov/bcp/profiling/comments/shen.pdf (last visited Nov. 13, 1999).

\textsuperscript{57} See ELECTRONIC PRIVACY INFORMATION CENTER, supra note 56, 23.

\textsuperscript{58} An example of such industry action is the measures taken by the Direct Marketing Association (DMA). The DMA promulgates privacy protection measures that its members must follow. The measures relate to notice, opt-out requests, and suppression of opt-out names from promotions. See generally THE DIRECT MARKETING ASSOCIATION, PRIVACY PROMISE MEMBER COMPLIANCE GUIDE at http://www.the-dma.org/topframe/index7.html (last visited Nov. 13, 1999).
competitive business models through the acquisition of consumer data.\textsuperscript{59}

A. The Information Gathering Practices of Internet Marketers

The greatest concern of privacy advocates is that Internet marketers will secretly sift various data sources to isolate and exploit data on discrete Internet users.\textsuperscript{60} Advocates challenge the compilation of data on individual users into "interest vectors": the collection and segmentation of data on individual users across pre-defined categories.\textsuperscript{61} The president of Junkbusters summed up his worst-case scenario in his comments to the Department of Commerce and the Federal Trade Commission at the November 8, 1999 public workshop on online profiling. There he stated that

\textsuperscript{59} See Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31. The European Parliament and the Council of The European Union created Directive 95/46/EC to foster a uniform level of protection among the countries of the European Union. In contrast to the United States self-regulatory approach, the EU directive requires that organizations using consumer data disclose that use to the affected consumers. Article 11 states:

Where the data have not been obtained from the data subject, Member States shall provide that the controller or his representative must at the time of undertaking the recording of personal data or if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed provide the data subject with at least the following information, except where he already has it:

(a) the identity of the controller and of his representative, if any;

(b) the purposes of the processing;

(c) any further information such as

- the categories of data concerned,
- the recipients or categories of recipients,
- the existence of the right of access to and the right to rectify the data concerning him

in so far as such further information is necessary, having regard to the specific circumstances in which the data are processed, to guarantee fair processing in respect of the data subject."

\textsuperscript{60} See id. See also ELECTRONIC PRIVACY INFORMATION CENTER, supra note 56, at 23.

\textsuperscript{61} See JUNKBUSTERS CORPORATION, supra note 55, at 2.
"[t]he near term future of an unrestrained online ad industry is clear: hundreds of millions of secret electronic dossiers containing a vast range of information about every aspect of people's lives. It is an Orwellian vision about to be made real."

Advocacy groups point to the use of Internet protocol addresses to track users as an example of such practices. In that instance, the host computer records the Internet Protocol (IP) address of all computers that browse content within the files of the host computer. Currently, most users enter the Internet through large Internet Service Providers (ISP) such as America Online. Each ISP obtains a large block of IP addresses. Each time the user logs on via the ISP, the ISP provides the user with a new IP number, thus assuring some degree of privacy. Advocates point out that recent advances in technology such as Digital Subscriber Lines (DSL) or cable modems do not have this built-in random IP number anonymity feature. Thus, when consumers use DSL or cable modems the host computer records the discrete and unchanging IP address of the user's computer.

Privacy advocates admit that the identity of the user's computer is not equivalent to the user's identity, but they point out that only the ISP stands between the user's virtual identity and their real world identity. The problem, advocates claim, is that as the online industry matures and consolidates, ISPs and those concerns that track individual user information will begin to merge. Junkbusters claims that "there is a chain of ownership linking the profiling companies into other kinds of online and offline businesses. Furthermore, some of these companies offer for sale profiles to other businesses. It would be naïve to assume any containment of profiling activities to one particular sector or area."

Another technique, arguably the most common, is the introduction of "cookies" by a site owner onto the user's

62. Id.
63. See ELECTRONIC PRIVACY INFORMATION CENTER, supra note 56, at 7.
64. See id.
65. See id. at 8.
66. See id.
67. See id.
68. See ELECTRONIC PRIVACY INFORMATION CENTER, supra note 56, at 9.
69. See id.
70. See JUNKBUSTERS CORPORATION, supra note 55, at 1.
71. See id.
computer. Each cookie placed on a user’s computer has its own unique identification number. When a user returns to a website that previously placed a cookie on the user’s computer, the host computer recognizes that that particular computer has visited the site before. Privacy proponents point out that cookies do not reveal the identity of the user, and are essential for many of the customization practices that web users enjoy.

For example, if a stock owner wished to track her portfolio on a daily basis via the Internet, she would customize a web page to track the stocks compromising her portfolio using cookies. Once the cookies were on file in her computer she would no longer have to input her stock holdings each time she wished to view the current market valuation.

Privacy proponents question the use of cookies, however, when various site owners collude to share cookies. Junkbusters claims that cookies were intended to be site specific, but Internet businesses are using a technique referred to as “cookie synchronization.” Using this technique, once a site owner discovers a user’s identity, the web site owner may then share that knowledge with other web site owners. When the “tagged” user enters any web site with knowledge of the user’s cookie, the new web site knows that user’s identity, too.

Advocates also point to “data triangulation” as a threat to the privacy rights of Internet users. Data triangulation is the practice of obtaining several small items of data on an individual user, such as gender, date of birth, and zip code, and then attempting to match that data against a larger, more complete, identity file. For example, the list owner might attempt to run a user’s gender, age, and zip code against a public record database such as state driver licensing records. Where the data owner found a match,

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72. See ELECTRONIC PRIVACY INFORMATION CENTER, supra note 56, at 9.
73. See id.
74. See id. at 10.
75. See id.
76. See JUNKBUSTERS CORPORATION, supra note 55, at 2.
77. See id.
78. See id.
79. See id.
80. See id.
82. See id.
she could then sell the complete profile to others interested in marketing to that particular individual.83

B. Existing Consumer Data Privacy Rights

Consumers within the United States enjoy broad privacy protections against the actions of government via the United States Constitution.84 The Constitution does not regulate, however, the interactions of private parties concerning personal information.85 On those occasions when the advance of technology forced the issue before the Supreme Court, it has refused to expand the zone of protected interests to cover personal data exchanged in the private sphere.86 In addition, Congress has not taken sweeping action to preserve consumer privacy rights in personal information.87 Instead, Congress historically has addressed personal data privacy issues on an ad-hoc basis as problems have arisen.88

1. Common Law Privacy Protection of Consumer Personal Data.—Direct mail marketers have faced common law tort-based privacy challenges arising from the sale and use of names and addresses.89 In Shibley v. Time, Inc., the Ohio Court of Appeals addressed the issue of list sales90—a practice akin to the sale of consumer profiles. There, the consumer plaintiff challenged the defendant’s sale of his name, address, and personal data without his prior consent.91 The plaintiff asserted that the defendant’s unauthorized sale of that information was an appropriation of the plaintiff’s personality.92 That Court rejected that argument because the use of the plaintiff’s personal data merely determined what type of solicitation the plaintiff should receive; the defendant did not use the plaintiff’s data as a public endorsement of the

83. See id.
84. See Griswold v. Connecticut 381 U.S. 479 (1965). There, Justice Douglas wrote in the majority opinion that the “zone of privacy” created by the Bill of Rights was impenetrable to government. See id.
85. See Blumenfeld, supra note 3, at 354.
86. See id. at 356.
88. See id.
91. See Shibley, 321 N.E.2d at 792-93.
92. See Shibley, 341 N.E.2d at 339.
defendant’s business. Although criticized for its reliance on the “endorse-ment” aspect of Ohio’s personality appropriation law, the subtext of the decision supports the use of personal data as a prospect selection tool.

Courts have also rejected appropriation arguments that claim the collection and use of personal data is an appropriation of the value of an individual’s personal data. In the Illinois Court of Appeals case of Dwyer v. American Express Co., the plaintiff argued that the unauthorized use and sale of his personality profile for marketing purposes constituted an unlawful appropriation of the value attached to his name. The court rejected that argument reasoning that the plaintiff’s individual name had value only in that it is associated with other names on the lists developed by the defendant. The court stated that an individual name has no intrinsic value to a list owner, and that the owner creates value by aggregating names on lists. Thus, the defendant list owner did not deprive the plaintiff of the value of his individual data. Although commentators have criticized the basis of the Dwyer decision, they agree that the appropriation argument has to date proven unsuccessful in tort actions challenging third party personal data use.

2. Legislative Privacy Protection of Consumer Personal Data.—Congress has enacted privacy protection statutes that center on the consumer/retailer relationship. In 1984, Congress enacted The Cable Communications Privacy Act, which limits the use of cable television viewing and subscription data by cable operators. The Act provides that cable subscribers will be given notice as to the marketing uses to which their names will be put, and prohibits cable operators from disclosing information on those consumers who have opted-out of the cable operator’s marketing program.

93. See id.
94. See generally Fenrich, supra note 86, at 991.
96. See id. at 1356.
97. See id.
98. See Fenrich, supra note 89, at 992-93.
In 1998 Congress enacted the Video Privacy Protection Act.\(^{101}\) That Act regulates the disclosure of customer video rental activity, providing for an opt-in scheme whereby customer records cannot be released without the express written permission of the customer.\(^{102}\) However, that Act contains an exception for marketing activities.\(^{103}\) The Video Privacy Protection Act only requires that customers receive conspicuous notice that they have the ability to prevent releases of personal data for marketing purposes.\(^{104}\)

In 1991, Congress enacted the Telephone Consumer Protection Act to regulate unsolicited telephone calls.\(^{105}\) The regulations developed from that Act contain the familiar opt-out exception present in the aforementioned Acts.\(^{106}\) Although the

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   (2) Video tape rental and sale records.—(1) A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d).

   (2) A video tape service provider may disclose personally identifiable information concerning any consumer—

   (D) to any person if the disclosure is solely of the names and addresses of consumers and if—

   (i) the video tape service provider has provided the consumer with the opportunity, in a clear and conspicuous manner, to prohibit such disclosure; and

   (ii) the disclosure does not identify the title, description, or subject matter of any video tapes or other audio visual material; however, the subject matter of such materials may be disclosed if the disclosure is for the exclusive use of marketing goods and services directly to the consumer . . . .

See id.


106. Section 227 of Title 47 authorized the creation of regulations governing the telemarketing industry. The regulations cover the use of automatic dialing machines and prerecorded messages. The pertinent section reads:

   (e) No person or entity shall initiate any telephone solicitation to a residential telephone subscriber:

   (2) Unless such person or entity has instituted procedures for maintaining a list of persons who do not wish to receive
Act does limit the manner and time of calls, it is incumbent upon individuals wishing to avoid telemarketing calls to affirmatively block those calls. In addition, the Act provides legislative authority for the creation of a national database of telephone customers who wish to block such calls. A national “supression” database was not created. Instead, self-regulatory measures adopted by the telemarketing industry were deemed sufficient to protect the interests of consumers.

3. Constitutional Protection of Consumer Data.—The obvious question is whether Constitutional protection applies outside the sphere of government action, but that is only part of the issue. Courts, including the Supreme Court, have indicated an unwillingness to create constitutional protections for an individual’s consumer personal data in the commercial sphere. Courts consistently hold that there cannot be an “expectation of privacy” where an individual voluntarily places personal information into the stream of commerce, or places personal information into the hands of third parties. The Supreme Court has held that there is no expectation of privacy in telephone dialing records, bank accounts, or even in curbside trash.

In the case of Internet consumer transactions, all privacy-canceling elements come into play. First, there is no government
involvement in a private retailer-consumer transaction. Second, the consumer is dealing with multiple third parties—the merchant, the consumer’s Internet service provider, the Internet portal used to find the merchant (Yahoo, Excite, etc.) and perhaps a third party contractor who maintains the merchant’s web site. Third, consumers enter such transactions on a voluntary basis. Given the unwillingness of courts to extend privacy protection to individuals against government action involving voluntary third party transmittals, it is unlikely that such protection extends to voluntary, private, multiple party transactions and transmittals.114

a. First Amendment Challenges to Personal Data Protection Legislation.—Congress enacted the Telecommunications Act of 1996 in an effort to regulate the use of personal data obtained by telecommunications carriers in the course of the service provider-customer relationship.115 The Federal Communications Commission (FCC) interpreted the Act to require telecommunications carriers to obtain express permission from customers before using any personal data for certain marketing purposes.116 That interpretation of the Act directly challenged the prior congressional scheme of allowing parties to obtain permission to use personal data implicitly via an opt-out scheme.117 U.S. West, Inc., challenged the FCC’s interpretation of the Act, arguing that it was an impermissible attempt to regulate commercial speech.118 The Tenth Circuit applied the Central Hudson test to determine if the opt-in procedure was a permissible restriction on commercial speech.119 The court found

114. Others disagree. See Blumenfeld, supra note 3, at 356 (personal email communications provided with a level of protection similar to mail sent through post office, even though entrusted to third party).
117. See id. at 1230 (stating that Congress made §222 much broader in scope than previous requirements on similar data).
118. See U.S. West, 182 F.3d at 1230.
119. See id. at 1233. The Central Hudson test analyzes the constitutionality of government restrictions on commercial speech under the First Amendment via four factors:
(1) Is the commercial speech concerned with lawful activity, and is the speech misleading?
(2) Is there a substantial state interest in regulating the speech in question?
(3) Does the regulation directly and materially advance that interest?
(4) Is the regulation not overly broad in serving that interest?
Speech failing to meet the first test may be regulated freely by the government.
that it was not, and thus, the regulation could not withstand a First Amendment challenge. The court stated:

In the context of a speech restriction imposed to protect privacy by keeping certain information confidential, the government must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals, such as undue embarrassment or ridicule, intimidation or harassment, or misappropriation of sensitive personal information for the purposes of assuming another's identity. Although we may feel uncomfortable knowing that our personal information is circulating in the world, we live in an open society where information may usually pass freely. A general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial state interest under Central Hudson for it is not based on an identified harm.

The U.S. West Court reasoned that for Congress to protect consumer personal data via legislation, the government must show a proper balancing between the benefits and the harms of restricting that particular information. The U.S. West court specifically pointed to the FCC's inadequate justification of the costs imposed on society by the restriction of consumer personal data. The court stated:

privacy interferes with the collection, organization, and storage of information which can assist businesses in making rapid, informed decisions and efficiently marketing their products or services. In this sense, privacy may lead to reduced productivity and higher prices for those products or services.

Any regulations restricting the use of personal data via an opt-in mechanism could conflict with the relatively high burdens imposed by the Central Hudson test. In fact, even under a "reasonable balancing" standard, the determination of the costs associated with restricting speech within the developing technology of the Internet may be extremely difficult.

The rights to lawful speech are then balanced against the remaining three factors to determine if it may be regulated. See id.
120. See id. at 1240.
121. See id. at 1235.
122. See id.
123. See U.S. West, 182 F.3d at 1235.
Although the U.S. West Court stated that they did not advocate an opt-out over an opt-in mechanism, the decision of that court does that very thing. By striking down an opt-in mechanism as an unconstitutional restriction of commercial speech, the U.S. West decision strikes the heart of regulatory proposals advanced by privacy advocates and pro-regulation commentators.

C. Advocating Privacy Protection Through Omnibus Regulation

A number of leading privacy advocates and commentators support the idea that privacy regulation is necessary because data privacy is a basic human right recognized around the world. They also support the idea that regulation is necessary because the economic viability of business on the Internet is dependant on consumer trust of the medium. Privacy advocates promote the idea that the narrow privacy “patches,” such as the Cable Privacy Act and the current online self-regulatory scheme, are inadequate to protect consumers from the aggressive data gathering practices of online marketers. Instead, they advocate omnibus legislative controls on the use of consumer information. Privacy advocates argue that the only way that online consumers can achieve an acceptable level of protection is for Congress to create legislation

124. See U.S. West, 182 F.3d at 1240.
127. See Reidenberg, supra note 126, at 781. See also KRAMER, supra note 126, at 1100.
129. See Reidenberg, supra note 126, at 782.
that secures consumer privacy rights and creates methods by which consumers may assert those rights.130

Privacy advocates and commentators frequently look to the 1980 privacy guidelines developed by the Organization for Economic Cooperation and Development (OECD) as a model on which to base privacy legislation within the United States.131 Those guidelines contain the following benchmark norms of fair information collection: (1) users should divulge the purpose of the data collection, (2) users should obtain the consent of individuals whose personal data is gathered, (3) users should make data processing transparent, such that access to personal data, and notice of that access, is available, (4) sensitive data should receive special treatment, and (5) enforcement mechanisms and remedies should be available against data abusers.132 Advocates suggest that this or a similar control scheme is required to balance the interests of online consumers against the large business interests involved in the use of personal information.133

The European Union embraced those basic data control guidelines from the OECD in the 1995 Directive on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (EU Directive).134 The purpose of the directive was to achieve uniformity in data protection throughout the European Union and to insure that personal data passing between countries would receive adequate protection from abuse.135 Privacy advocates commenting on the European Union's rapid adoption of the guidelines offer the justification that Europeans prefer a more proactive regulatory environment than Americans, placing less trust in the ability of business to regulate its own affairs.136 Privacy commentators and advocates explain that the EU Directive is a more secure approach to personal data protection because it places responsibility for data security in the hands of government, as opposed to

130. See id.
131. See id. at 773.
132. See id.
135. See id.
136. See id. at 2036. See also Reidenberg, supra note 129, at 782.
private industry. To Internet consumers, however, the EU Directive cuts both ways: it protects personal data at the cost of limiting the price and service benefits intrinsic in the online business model.

V. Privacy Protection in the Current Online Environment

To the extent that personal data can be protected, Internet consumers in the United States possess practical data protections similar to consumers under the EU Directive. The advantage of the U.S. approach is that it allows for the unfettered development of online business models while allowing privacy-minded individuals to conduct their affairs accordingly. The following comparison looks to how consumers conducting business online within the United States may achieve protection of personal data via a combination of personal vigilance and industry action.

137. See Reidenberg, supra note 129, at 782-83:
   Under the European model, framework legislation guarantees a broad set of rights to assure the fair treatment of personal information and the protection of citizens. In general, the modern European data protection laws define each citizen's basic legal right to "information self-determination." This European premise of self-determination puts the citizen in control of the collection and use of personal information. The approach imposes responsibilities on data processors in connection with the acquisition, storage, use, and disclosure of personal information and, at the same time, accords citizens the right to consent to the processing of their personal information and the right to access stored personal data and have errors corrected. Rather than accord pre-eminence to business interests, the European approach seeks to provide for a high level of protection for citizens.

138. See Bruno Giussani, Europe's Internet Lag: An American Frabrication, N.Y. TIMES, September 14, 1999, at http://www.nytimes.com/library/tech/reference/index-privacy.html (last visited Oct. 18, 1999). "...[T]he ability of companies to gather and sell data on consumers is drastically limited by the European Union's regulations on privacy protection. This makes it difficult in some cases to take systems based on profiling, cookie technology and other more sophisticated mechanisms and transfer them to Europe." See id. See also Robert J. Posch, Jr., Top Legal Issues In Internet Planning, DIRECT MARKETING, July 1, 1999, at 44:
   Despite all the hype to the contrary, the EC doesn't seek to protect the privacy of its citizens from the state-only from the mediating institutions that shield people from an intrusive state apparatus. The EC apparatikiks have created an overregulated group of nations that have thwarted service economy and mass computer/database utilization.
A. Consumer Awareness of How Marketers Use Their Personal Data.

Two-thirds of the most popular websites ask for some type of information from consumers who visit. Most online consumers visiting such sites are aware that the sites may request information from them and/or collect information on them as they browse within the site. At the same time, a majority of online consumers believe that online commerce will make their life easier, and that information on who uses a particular site improves the marketability of the site. Consumers have made the connection that information collected online is used to market and resell to them, sell to advertisers, and to other consumers. In addition to the innate awareness of online consumers, most commercial websites popular with consumers post information on the site describing the data practices of the site. Commentators argue that online consumers are unaware that sites collect information, and that sites should provide consumers with a choice as to what information is collected. As an example, several commentators point to cookie technology as a hidden means of collecting information. Many Internet sites use cookies to collect information on who is using the website. As a practical matter, the involuntary acceptance of cookies into an individual’s

143. See id. But cf. Graphics Visualization and Usability Center of the Georgia Institute of Technology, Tenth World Wide Web User Survey, at http://www.gvu.gatech.edu/user_surveys/survey-1998-10/graphics/privacy/q59.htm (last visited Nov. 21, 1999) (over 40% of those surveyed thought that new privacy laws were needed). But cf id. at http://www.gvu.gatech.edu/user_surveys/survey-1998-10/graphics/privacy/q63.htm (over 75% of those surveyed thought that users should have control of their online personal information).
144. See Culnan, supra note 139, at 13.
145. See Junkbusters Corporation, supra note 55, at 2.
146. See Electronic Privacy Information Center, supra note 44, at 9.
147. See id.
personal computer is easily disabled. Any individual interested in controlling this aspect of their online privacy can do so with little effort. With voluntary information, such as email addresses, telephone numbers, or other demographic information, online consumers may simply choose not to enter the data if they are not comfortable with the stated, or (in some cases) unstated, privacy policy of the site. In addition, online businesses have developed around privacy protection giving consumers the ability to navigate the Internet in anonymity. Finally, there are forums where consumers may investigate the reputation of online businesses before actually transacting with those businesses. These rating services, available at no cost to consumers, include the privacy practices of the businesses that they review. In addition, consumers may in fact prefer taking privacy measures into their own hands.

149. See id.
150. See Anonymizer.com, Privacy is your right at http://www.anonymizer.com/3.0/index.shtml (last visited Jan 15, 2000).
151. See Bizrate, at http://www.bizrate.com (last visited Jan 15, 2000). Bizrate’s on-site explanation of their service reads

If you wanted to identify the best store from which to buy, how would you decide? You could visit one store after another. You could even stop in a few and browse around. But after all that, you’ve spent a lot of time and still may be undecided. In the end, the best way to decide would be to ask people who have bought at these stores before you. There is no substitute for experience—that is the foundation of our ratings at BizRate.com. BizRate.com rates e-businesses in the best way possible—by asking tens of thousands of consumers to tell us about their actual shopping experiences each day. We accomplish this by inviting every purchasing customer at participating online stores to take part in a survey, immediately after buying, to give us feedback on their experience. We then follow up after the expected order delivery date to see if the delivery arrived on-time and met expectations.

See id.
153. See Steve Lohr, Seizing the Initiative On Privacy; On-Line Industry Presses Its Case For Self-Regulation, N.Y. TIMES, Oct. 11, 1999, at Cl. Some surveys indicate that consumers want to take privacy measures into their own hands. In a recent survey by the research firm of Privacy and American Business, “86 percent of 460 adult Internet users questioned earlier this year said they wanted to be able to essentially “trade” their own personal information with Web sites—as long as they were properly informed about how their data were
B. Obtaining Consumer Consent Before Using Personal Data

To many privacy commentators and advocates, obtaining consumer consent translates into promulgating regulations requiring opt-in data use schemes. As discussed in Part VI(B)(3)(a), serious questions exist as to the Constitutional validity of requiring data users to obtain prior consent from consumers. It may well be that opt-in schemes of the type supported by privacy advocates are not available in the United States as a matter of the First Amendment rights of the data users. The discussion in Parts II and III illustrates the substantial economic advantage (to both merchants and consumers alike) of permitting the unfettered use of consumer personal data.

As practical matter, online consumers may simply choose to avoid engaging in commerce with websites that do not adequately protect the privacy of customers. Businesses operating online are acutely aware that customers will not patronize those sites that ignore the privacy interests of customers. Consequently, a number of online certification organizations offer seal programs for Internet retailers. Programs such as Truste, BBBO, and CPAtrust offer third party verification of a retailer's privacy and data practices. Consumers who arrive at a website can readily determine if the privacy practices of that merchant are acceptable.

In addition, there are technological solutions such as P3P. P3P technology allows the consumer to set her privacy preferences before entering a site. When the consumer attempts to enter the site, the consumer's computer and the host computer exchange information on the website's privacy policies. If the policies are acceptable to the consumer she enters the site. If they are not used and were offered benefits for doing so," Id.

154. See Budnitz, supra note 130, at 878 (consumers should not be required to act affirmatively as in opt-out schemes).
155. See Beth Karlin, The Struggle Over Privacy: Whose Life is It Anyway?, INSURANCE NETWORKING, Mar. 1999, at 28 (commenting on how alienating customers by privacy invasions poses more questions of financial loss than gain).
156. See id.
158. See P3P and Privacy on the Web FAQ, What is P3, at http://www.w3.org/P3P/P3FAQ.html (last visited Oct. 11, 1999).
159. See id.
acceptable, she is offered the choice to enter under the existing policies, or to redirect her browser to her next chosen website. The DMA requires member organizations to suppress from promotion the data of those individuals requesting placement on the non-promote list.

C. Sensitive Data: Protection and Access

The United States has enacted a number of laws designed to protect consumers from the inaccuracy and misuse of highly sensitive personal data. An example is the Fair Credit Reporting Act. Under that act, consumers must consent to the release of credit information. In addition, they have the right of access to the financial data maintained by credit reporting agencies, and have procedural remedies for the resolution of disputes over accuracy. The statutes protecting consumer personal data relate to areas where perceived abuses have occurred, or the likelihood of harm is high.

The question in online retailing really comes down to “what is sensitive data?” The disclosure of financial information and certain types of content are clearly something the public wishes to limit. The disclosure of the fact that a particular consumer enjoys opera is one thing; the disclosure that that same consumer enjoys cable television pornography, however, is quite another. Privacy advocates argue that the flaw in the U.S. response to privacy protection is its reactive approach; under the U.S. scheme, the purchase of opera compact discs is not entitled to the same level of protection as the purchase of cable television pornography.

160. See id.
162. See id.
163. See supra notes 96-106 and accompanying text.
165. See Cody, supra note 104, at 1200.
166. See id.
167. See id.
168. See supra Part IV(B).
169. See Reidenberg, supra note 87, at 773-79.
In the practical terms of the online environment, however, consumers have the option of choice. Unlike forced commercial interactions with utility-like cable providers, consumers may interact only with those websites that are to their liking. Websites that post adequate privacy policies, and adhere to them, will earn consumer trust and consumer dollars.\textsuperscript{170} Online businesses are increasingly aware of that concern, and will compete in the arena of privacy service in the same manner in which they compete on terms such as price.

D. Enforcement and Remedies

Privacy advocates and pro-regulation commentators are wrong when they argue that consumers have no real remedies with which to enforce perceived privacy violations. An example of consumer enforcement is the recent Federal Trade Commission (FTC) action against the website operated by Geocities (a popular web portal and homepage site). In August 1998 the Federal Trade Commission charged Geocities with violating the privacy rights of over two million subscribers.\textsuperscript{171} Geocities initially promised subscribers that it would not sell information collected during the subscription process to third parties.\textsuperscript{172} In fact, Geocities did sell information concerning the online game-playing habits of children to third parties.\textsuperscript{173} The third parties who bought the data used it to target ads to the subscribers.\textsuperscript{174} Geocites settled the matter, agreeing to revise its privacy policy, and to give consumers the ability to remove data from the Geocities files.\textsuperscript{175} Clearly, the FTC has indicated that there are real penalties for violating privacy policy agreements.\textsuperscript{176}

Remedies are also available against those who surreptitiously gather data without notice in their privacy policies. In November of 1999, three suits were filed against Realnetworks, Inc., a company that provides downloadable music over the Internet.\textsuperscript{177}

\textsuperscript{170} See Karlin, supra note 155, at 26.
\textsuperscript{171} See Blumenfeld, supra note 3, at 379-80.
\textsuperscript{172} See id.
\textsuperscript{173} See id.
\textsuperscript{175} See id.
\textsuperscript{176} See Blumenfeld, supra note 3, at 381 (calling this a last-ditch by the FTC before regulations are imposed).
\textsuperscript{177} See Greg Miller, \textit{Realnetworks Breached Privacy, 3 Suits Contend Consumers: Firms Admitted Collecting Data on Users of Its Internet Software},
The suits allege that Realnetworks software secretly extracted information from user's computers concerning the songs housed on the user's computer, and the types of digital audio devices employed by the consumer. The suits, in part, that Realnetworks committed fraud by violating the Computer Fraud Act—a statute enacted in the late 1980's to deter computer hackers from stealing data from corporate computer networks. The suits also allege that this type of invasive use without disclosure is the equivalent of computer hacking to the average user. The availability of such measures show that consumers do, in fact, have data abuse remedies available under existing law.

VI. Conclusion

The argument for self-regulation is not an argument against all regulation; it is an argument that online businesses should have the freedom to expand the boundaries of a dynamic new medium without artificial limitations. The economic model described in Parts II and III is highly efficient at delivering low prices and highly personalized service. Improvements in these two facets of consumer/retailer relations are desirable and tangible benefits to those who choose to participate in the online economy. The efficiencies inherent in the database marketing model, and thus the online business model, are predicated on the economy of scale experienced by using computerized data management techniques. By limiting the horizon to which these technologies may reach, omnibus regulation works to prevent the economic gains these advances promise to consumers and retailers.

Both within and without the online retail realm, consumer privacy rights need protection. The rights of consumers, however, should not automatically trump the rights of online retailers in the use of personal data. Presently, courts have expressed a tendency to agree. The self-regulatory efforts of online businesses are currently seeking a fair balance between personal privacy and fair data use. Without a clear understanding of the economic pitfalls

Provoking the First Class Actions In Such a Case, L.A. TIMES, Nov. 11, 1999, at C1.

178. See id.
179. See id.
180. See id.
of omnibus regulation, the balance between personal data rights and data use should not tip artificially in a direction that limits free use.

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