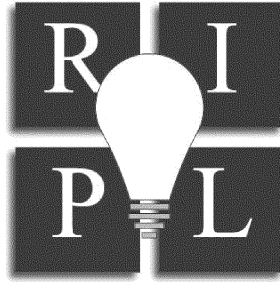


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



RIGHT OF PUBLICITY: IS BEHAVIORAL TARGETING VIOLATING THE RIGHT TO CONTROL YOUR IDENTITY ONLINE?

ANDREA STEIN FUELLEMAN

ABSTRACT

Behavioral targeting (“BT”) is an advertising technique that receives a great deal of attention due in part to the balkanized self-regulatory policies that address consumer protection issues. The majority of the self-regulation policies, including the BT principles proposed by the Federal Trade Commission (“FTC”) focus on privacy issues but fail to discuss the impact BT may have on the right to control the commercial use of one’s identity. In discussing the right of publicity, many legal scholars agree that everyone has a right to control the commercial use of his or her identity, regardless of his or her status as a celebrity. Further, some theories of determining what constitutes one’s “identity” would cover the information that is collected for BT purposes. Under this theory, BT practices may be violating more legal issues than those addressed in the current self-regulatory policies. Often, when regulating activities on the internet, jurisdictional boundaries are blurred and federal mandated rules are more effective than self-regulatory ones. This comment discusses how the current self-regulatory approach of BT may overlook legal issues, mainly one’s right of publicity. Additionally, this comment proposes that the FTC enact a new rule to enforce best BT practices to avoid right of publicity violations when utilizing this advertising tool.

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I. INTRODUCTION

Imagine you visit a sporting goods store. You look at new running shoes. A salesperson starts to follow you around and points out every other athletic shoe that comes in flashy colors, has extra support, or is ultra light. He will not leave you alone. You get annoyed and you leave. The salesperson now follows you out of the store, into your car, back to your job and then home. All the while he is trying to interest you in something flashy, supportive and light.¹

The above situation is illustrative of behavioral targeting (“BT”), which is the advertising technique that collects, compiles, and sells data without potential consumers’ knowledge or express consent.² This popular tool is used to “target” online advertisements that are relevant to internet users’ interests.³ BT raises numerous consumer concerns in the online context.⁴ The most obvious concerns are those related to privacy rights.⁵ Under the umbrella of privacy laws is right of

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¹ Matt Timothy, *Behavioral Targeting is Just Like Selling Cars*, ADOTAS.COM (Sept. 8, 2010), <http://www.adotas.com/2010/09/behavioral-targeting-is-just-like-selling-cars/>.

² FED. TRADE COMM’N, ONLINE PROFILING: A REPORT TO CONGRESS 4, 6 (June 13, 2000), available at <http://www.ftc.gov/os/2000/06/onlineprofilingreportjune2000.pdf> [hereinafter 2000 FTC REPORT TO CONGRESS].

³ Catherine Dwyer, *Behavioral Targeting: A Case Study of Consumer Tracking on Levis.com* 2009 AM. CONF. ON INFO. SYS. 15, available at <http://csis.pace.edu/~dwyer/research/AMCISDwyer2009.pdf>.

⁴ FED. TRADE COMM’N STAFF REPORT, SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING: BEHAVIORAL ADVERTISING, TRACKING, TARGETING, & TECHNOLOGY i–ii (Feb. 12, 2009) [hereinafter 2009 FTC SELF-REGULATORY PRINCIPLES], available at <http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf>. See Miguel Helft & Tanzina Vega, *Retargeting Ads Follow Surfers to Other Sites*, N.Y. TIMES, Aug. 30, 2010, at A1, available at <http://www.nytimes.com/2010/08/30/technology/30adstalk.html>; Juliana Gruenwald, *Poll Finds Public Concern Over Online Privacy*, NAT’L J.: TECH. DAILY DOSE BLOG (June 8, 2010, 3:01 PM), <http://techdailydose.nationaljournal.com/2010/06/poll-finds-public-concern-over.php>.

⁵ 2009 FTC SELF-REGULATORY PRINCIPLES, *supra* note 4, at i–ii; see Press Release, Congressman Cliff Stearns, Fla. 6th Cong. Dist., Stearns, Boucher Release Discussion Draft of Privacy Legislation: Measure Confers Privacy Rights on Internet Users (May 4, 2010), <http://stearns.house.gov/News/DocumentSingle.aspx?DocumentID=183894>; Cecilia Kang, *Senate Preps Online Privacy Legislation as Advertisers Promise Self Regulation*, WASH. POST TECH. BLOG (July 27, 2010, 8:00 AM), http://voices.washingtonpost.com/posttech/2010/07/senate_online_privacy_hearing.html.

publicity, which is an intellectual property (“IP”) right that protects individuals’ ability to control the commercial use of their identities.⁶

Utilizing BT technology online without users’ affirmative consent introduces a consumer concern not already addressed in the self-regulatory scheme: advertisers collect and use individual identities online for a commercial gain. This issue sounds strikingly similar to the right of publicity.⁷

This comment discusses how current BT practices violate the right of publicity and how to prevent this unfair practice. Part II provides background on BT, advertising regulations, and the right of publicity. Part III analyzes the potential right of publicity infringement in the context of BT. Part IV proposes a plan to police this unfair exploitation through Congressionally mandated legislation.

II. BACKGROUND

This section provides a definition for BT and describes the type of information that BT collects. Additionally, this section discusses how BT is regulated. Next, this section explores the FTC rulemaking process, and then the right of publicity.

A. Behavioral Targeting

1. What is Behavioral Targeting?

BT is the collection of user internet session activity which is compiled, classified and used to target advertisements to potential consumers.⁸ Advertisers can infer this information from users’ internet search history.⁹ Advertisers and third party networks then collect or purchase this information to customize messages to individual consumers based on their demographic and personality traits.¹⁰ BT exists offline through efforts like customer loyalty programs and club cards which gather information about consumers’ purchasing behavior.¹¹ Whereas customers in the offline context opt-in to such programs, online customers do not have this choice.¹²

⁶ 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 3:1 (2d ed. 2011); see Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954); Alain J. Lapter, *How the Other Half Lives (Revisited): Twenty Years Since Midler v. Ford: A Global Perspective on the Right of Publicity*, 15 TEX. INTELL. PROP. L.J. 239, 252 (2007). See generally *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (explaining where the right of publicity came from and what policy rationale it supports); see Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT L.J. 213, 213–14 (1999).

⁷ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, cmt. a (2006).

⁸ 2009 FTC SELF-REGULATORY PRINCIPLES, *supra* note 4, at 2, 46.

⁹ *Id.* at 2, 27.

¹⁰ Dwyer, *supra* note 3, at 2.

¹¹ Andrew J. McClurg, *A Thousand Words are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling*, 98 NW. U.L. REV. 63, 65–66 (2003).

¹² *Id.* (explaining that offline users typically have to make a purchase in order to be tracked).

BT efforts, both online and off, serve the same purpose but the process online is very complex.¹³ Online BT involves the use of advanced algorithms which track and mathematically analyze users' online activity behaviors, including which sites they visit, how long they stay, and where they go next.¹⁴ This data is primarily collected by the use of cookies, which are small files dropped on users' hard drives that can essentially follow users' online activity.¹⁵ Using this information, the process then classifies users into specific behavioral profiles.¹⁶ These profiles are very valuable because they allow advertisers to cut through online clutter and speak directly to consumers.¹⁷

The information collected for BT is generally categorized based on its ability to identify a specific individual.¹⁸ The data collected for BT is typically considered "anonymous" because it does not include readily identifiable information like names or addresses.¹⁹ Non-personally identifiable information ("non-PII") generally includes Internet Protocol addresses, browser types, browser languages, search history and the date and time of users' requests.²⁰ When data that can personally identify individuals ("PII") is misused, however, it raises consumer concerns.²¹ PII and non-PII have been regulated differently in the past,²² but the line that divides this information is blurring.²³

Not all types of targeting are problematic. Contextual advertising, for example, delivers ads relevant to the content on a particular website, based on keywords contained in that website and does not follow users throughout their entire internet experience like BT does.²⁴

¹³ *Id.* at 71–74, 82.

¹⁴ See, e.g., Laurie Sullivan, *Yahoo's Algorithm Aims to Improve Behavioral Targeting*, MEDIAPOST PUBLICATIONS BLOGS (Jan. 13, 2010, 3:45 PM), http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=120527 (explaining the algorithm process implemented by Yahoo's BT technology).

¹⁵ Dwyer, *supra* note 3, at 2.

¹⁶ *Behavioral Advertising: Industry Practices and Consumers' Expectations: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection, and the Subcomm. on Communications, Technology, and the Internet of the H. Comm. on Energy and Commerce*, 111th Cong. 3–4 (2009) (statement of Jeff Chester, Executive Director, Center for Digital Democracy) [hereinafter Chester Testimony].

¹⁷ 2000 FTC REPORT TO CONGRESS, *supra* note 2, at 9. See Kate Alexander, *Consumers Should Not Fear a Diet of Cookies, says Improve Digital*, IMPROVEDIGITAL.COM (Aug. 17, 2010), <http://www.improvedigital.com/consumers-should-not-fear-a-diet-of-cookies-says-improve-digital>.

¹⁸ See generally 2009 FTC SELF-REGULATORY PRINCIPLES, *supra* note 4, at 20–25 (discussing the types of information collected for BT purposes and its ability to identify the internet user).

¹⁹ *Id.* at 20–21.

²⁰ *Id.* See 2000 FTC REPORT TO CONGRESS, *supra* note 2, at 4.

²¹ See, e.g., 2009 FTC SELF-REGULATORY PRINCIPLES, *supra* note 4, at 23–24, 31 n.26 (addressing various consumer concerns regarding data collection including some commenters' fear of data misuse).

²² *Id.* at 21–23, 25.

²³ *Id.* at 21–22.

²⁴ Courtney A. Barclay, *Implementation and Administration of the Broadband Stimulus Act: Protecting Consumers by Tracking Advertisers Under the National Broadband Plan*, 19 MEDIA L. & POLY 57, 66–67 (2009); 2009 FTC SELF-REGULATORY PRINCIPLES, *supra* note 4, at 29.

2. *The Data Collected for Behavioral Targeting Paints a Fairly Accurate Picture*

Naturally, consumers are concerned about the collection of their data online, regardless of whether the information is characterized as PII or non-PII.²⁵ The harm associated with BT may be intangible, but once personal information gets into the wrong hands or is used in an unfair way, consumers are quick to recognize that something is not right.²⁶

A recent case involving Netflix is a prime example of information misuse.²⁷ In that case, Netflix tried to plan a contest that involved the use of “anonymous” customer movie viewing data.²⁸ The Federal Trade Commission (“FTC”) intervened and claimed that despite Netflix's efforts to “anonymize” customer data, it would be possible for third parties to re-identify specific customers.²⁹ This example illustrates that users do not have to disclose their actual name or address in order to be identifiable.³⁰ In fact, the collaboration of independent pieces of non-PII data can also lead to the same person.³¹

3. *Regulation Policies for Behavioral Targeting*

In the United States there are no laws, state or federal, which expressly address and enforce online BT.³² Regulations do exist, however, and the FTC plays an integral role in shaping such general advertising best practices, including those that affect BT.³³ In 2000, the FTC recommended online BT legislation, but the effort ultimately failed.³⁴ In response to the lack of Congressional action, BT advertising networks and organizations opted to employ various self-regulation guidelines.³⁵ In

²⁵ See, e.g., 2009 FTC SELF-REGULATORY PRINCIPLES, *supra* note 4, at 24 n.52 (addressing series of surveys indicating that a majority of consumers are not comfortable with online behavioral advertising).

²⁶ See, e.g., William McGeeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1154 (2009) (explaining how the injury is abstract).

²⁷ Sharon Waxman, *Whoops! Netflix Gets Caught by FTC, Cancels Contest*, THE WRAP MOVIES BLOG (Mar. 13, 2010, 10:45 AM), <http://www.thewrap.com/movies/column-post/whoops-netflix-gets-caught-ftc-cancels-contest-15231>.

²⁸ *Id.*

²⁹ Letter from Maneesha Mithal, Associate Director, Division of Privacy and Identity Protection, Federal Trade Commission, to Reed Freeman, Counsel for Netflix, Inc., Morrison & Foerster L.L.P. (Mar. 12, 2010), <http://www.ftc.gov/os/closings/staffclosing.shtm> (follow “Mar. 2010” hyperlink; then follow “Netflix, Inc., File No. 102 3027” hyperlink); see Symposium, *Robust De-anonymization of Large Sparse Datasets (How to Break the Anonymity of the Netflix Prize Database)*, 2008 IEEE SEC’Y & PRIVACY 111 (2008), available at http://www.cs.utexas.edu/~shmat/shmat_oak08netflix.pdf.

³⁰ See Letter from Maneesha Mithal to Reed Freeman, *supra* note 29.

³¹ William J. Fenrich, *Common Law Protection of Individuals’ Rights in Personal Information*, 65 FORDHAM L. REV. 951, 952 (1996).

³² McClurg, *supra* note 11, at 89–90.

³³ See generally Lydia B. Parnes & Carol J. Jennings, *Recent Development: Federal Agency Focus: Federal Trade Commission: Through the Looking Glass: A Perspective on Regulatory Reform at the Federal Trade Commission*, 49 ADMIN. L. REV. 989, 992–93 (1997) (explaining the FTC’s use of guides and rules to regulate against unfair and deceptive advertising practices).

³⁴ Barclay, *supra* note 24, at 75.

³⁵ *Id.*

2009, the FTC issued a staff report on Self-Regulatory Principles for Online Behavioral Advertising (“2009 FTC Principles”), which set the stage for the current state of the BT market.³⁶

The 2009 FTC Principles focus on four governing concepts.³⁷ One in particular, “transparency and consumer control,” suggests that websites which work with BT networks provide notice to consumers and offer consumers the choice to allow such collection and use of their personal information.³⁸

Consumer interest groups’ opinions vary regarding the scope of the transparency and control concept.³⁹ Some groups argue that an opt-out choice would be sufficient, when dealing with certain personal data.⁴⁰ Others call for an affirmative opt-in choice before the collection of any type of data for BT purposes.⁴¹

Although the 2009 FTC Principles recognize that transparency and control is a critical issue of concern, the Principles do not specifically address when, where, and how disclosures and choice should apply.⁴² Nonetheless, the 2009 FTC Principles constitute a next step in an ongoing process to encourage lawful data collection practices for BT purposes.⁴³ In fact, several media organizations, including the Network Advertising Initiative (“NAI”) as well as private companies follow the FTC’s self-regulatory approach and have adopted similar principles.⁴⁴ This indicates that several self-regulatory policies govern BT but no one governing body mandates participation, or has established uniform rules.

Progress, however, continues to evolve. In October 2010, self-regulatory advocates expressed interest in an initiative to implement a new Advertising Option Icon (“AOI”) to support a general opt-out program.⁴⁵ The program’s mission is to give consumers more control over how and whether they are targeted online.⁴⁶ To achieve this, the icon is embedded in participant ads and will link to more information about how the ad was targeted. This allows users to opt-out of participating BT

³⁶ 2009 FTC SELF-REGULATORY PRINCIPLES *supra* note 4, at i–iv.

³⁷ *Id.* at 11–12.

³⁸ *Id.* at 30.

³⁹ *Id.* at 31–32.

⁴⁰ *Id.* at 42.

⁴¹ *Id.* at 32.

⁴² *Id.* at 35.

⁴³ *Id.* at 47.

⁴⁴ Barclay, *supra* note 24, at 78; *see, e.g.*, THE NETWORK ADVERTISING INITIATIVE, 2008 NAI PRINCIPLES: THE NETWORK ADVERTISING INITIATIVE’S SELF-REGULATORY CODE OF CONDUCT 3 (2008), *available at* http://www.networkadvertising.org/networks/2008%20NAI%20Principles_final%20for%20Website.pdf (illustrating one ad network’s self-regulatory principles framed after the FTC’s); AM. ASSOC. OF ADVER. AGENCIES, ET AL., SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING 1 (2009), *available at* <http://www.iab.net/media/file/ven-principles-07-01-09.pdf> (illustrating the self regulatory principles from a cross-industry organization); *Ads Preferences Manager: Internet-Based Advertising: How it Works*, GOOGLE.COM, <http://www.google.com/ads/preferences/html/about.html> (last visited June 9, 2011) (demonstrating one private company’s self-regulatory approach).

⁴⁵ Kate Kaye, *Google, Yahoo, AOL Join Self-Regulation Push for Behavioral Advertising*, CLICKZ (Oct. 3, 2010), <http://www.clickz.com/clickz/news/1740225/google-yahoo-aol-join-self-regulation-push-behavioral-ads>; *see also* Grant Gross, *Online Groups Introduce Labeling for Targeted Ads*, PCWORLD (Oct. 4, 2010), http://www.peworld.com/businesscenter/article/206924/online_groups_introduce_labeling_for_targeted_ads.html.

⁴⁶ Kaye, *supra* note 45.

programs.⁴⁷ Participation by advertisers and third party advertising networks, however, is not mandatory.⁴⁸

Even with the various self-regulation approaches, many opponents, including various Congressional committees, consumer privacy advocate groups, and internet service providers (“ISP’s”), still believe that self-regulation is not sufficient.⁴⁹ Opponents agree that some government regulation of data collection is necessary to ensure the data collection does not run afoul of privacy laws.⁵⁰

B. FTC’s Rule Making Authority

The FTC’s authority to police online consumer protection stems from its power to protect consumers from unfair or deceptive trade practices.⁵¹ FTC rulemaking authority is either pursuant to the Magnuson-Moss Warranty Act (“Mag-Moss”),⁵² or more commonly, pursuant to Congressional mandate, which typically adopts the Administration Procedures Act (“APA”).⁵³

The Mag-Moss procedures impose a strict rulemaking process on the FTC to balance out the broad scope of the terms “unfair” and “deceptive” in the FTC Act.⁵⁴ Mag-Moss procedures require multiple notices, opportunities for informal hearings, cross-examination and public comment prior to the submission of the final

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Chester Testimony, *supra* note 16, at 2; 2009 FTC SELF-REGULATORY PRINCIPLES, *supra* note 4, at 12, 14, 31 n.61. Opponents who favor mandated regulation over self-regulation include the Center for Digital Democracy; Congressman Bobby Rush and Rick Boucher representing the views of the House Energy and Commerce Subcommittee on Communications, Technology, Internet, the Commerce, Trade, and Consumer Protection Subcommittee. Conversely, self-regulatory advocates include companies like Yahoo!, Google and Microsoft, advocacy groups including the Direct Marketing Association, National Advertising Initiative, the Association of National Advertisers, the Interactive Advertising Bureau and the Counsel for Better Business Bureau.

⁵⁰ Barclay, *supra* note 24, at 84–85; see Steven Vine, *Consumers Should Be Able to Opt Out of Targeting, But Websites Should Also Be Able to Block Those Who Do*, ADAGE (Aug. 12, 2010), http://adage.com/digitalnext/post.php?article_id=145346; Tanzina Vega, *Code That Tracks Users’ Browsing Prompts Lawsuits*, N.Y. TIMES (Sept. 20, 2010), http://www.nytimes.com/2010/09/21/technology/21cookie.html?_r=2; Dianna Dilworth & Chantal Tode, *Internet Marketers, Web Publishers, Privacy Groups Eye House BT hearings*, DIRECTMARKETINGNEWS.COM (June 19, 2009), <http://www.dmnews.com/internet-marketers-web-publishers-privacy-groups-eye-house-bt-hearings/article/138790/2/>.

⁵¹ Fed. Trade Comm’n Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–77 (2006)) (establishing the rule making authority of the FTC); see *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority* § II(A)(1)(b), FTC.GOV (July 2008), <http://www.ftc.gov/ogc/brfvrvw.shtm>.

⁵² Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–2312 (2007); see Joshua D. Wright, *Expanding FTC’s Rulemaking and Enforcement Authority*, THE FEDERALIST SOCIETY (May 26, 2010), http://www.fed-soc.org/publications/pubid.1881/pub_detail.asp.

⁵³ Administrative Procedures Act, 5 U.S.C. § 553 (2006); see also 15 U.S.C. § 57a(b) (2006).

⁵⁴ Parnes & Jennings, *supra* note 33, at 995–96; see Mark E. Budnitz, *The FTC’s Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATH. U. L. REV. 371, 449 (1997).

recommendation to Congress.⁵⁵ Due to this high standard, it can take the FTC years to implement new rules or revise old ones under this procedure.⁵⁶

Conversely, when rulemaking is undertaken in response to Congressional directives, the process is streamlined. Because Congress has already made a determination, the FTC does not have to investigate the prevalence of problematic conduct.⁵⁷ When a federal statute addressing similar unfair issues already exists, the process is streamlined even further.⁵⁸ In this situation, the original statute is amended to include a procedural provision that specifically requests the FTC adopt a rule addressing the particular unfair issue.⁵⁹

The FTC can only promulgate a rule when consumer injury is present.⁶⁰ Under the FTC Act, consumer injury must be: (1) substantial; (2) not be outweighed by any countervailing benefits to consumers or competition; and (3) not reasonably avoidable.⁶¹ Addressing the first requirement, it is easy to recognize that the most obvious type of consumer injury is monetary.⁶² Although this is generally the case, financial loss is not necessarily required.⁶³

A regulatory solution appropriate at one time in history is not necessarily appropriate at another, so the FTC often utilizes a flexible approach to implementing its rules and guides.⁶⁴ For instance, technologies and marketing techniques frequently change and laws can be revisited, reinterpreted or revised to address specific problems associated with technological growth.⁶⁵

One particular area of law, the right of publicity, exemplifies how law change and give rise to new issues over time as a result of growing technology.⁶⁶

⁵⁵ Parnes & Jennings, *supra* note 33, at 995.

⁵⁶ *Id.*; *see, e.g.*, Pa. Funeral Dir. Ass'n, Inc. v. Fed. Trade Comm'n, 41 F.3d 81, 84 (3d Cir. 1994) (illustrating why it took the Commission nearly six years to amend the casket handling fee in the Funeral Rule, while discussing the FTC amendment procedures).

⁵⁷ Parnes & Jennings, *supra* note 33, at 996; *see, e.g., id.* at 996 n.55 (noting recent FTC rules enacted pursuant to congressional mandate).

⁵⁸ Telephone Interview with Brian Husemann, former FTC Chief of Staff from May 2006–Apr. 2008 (Sept. 16, 2010) (explaining the rule making process); *see, e.g.*, Parnes & Jennings, *supra* note 33, at 1004 (describing the enactment of Telemarketing Consumer Fraud Abuse and Prevention Act of 1994 (codified as 15 U.S.C. §§ 1601–1608) which was done pursuant to congressional mandate, using existing legislation as a guide).

⁵⁹ Husemann, *supra* note 58.

⁶⁰ 15 U.S.C. § 45(a) (2006).

⁶¹ *Id.* § 45(n).

⁶² Letter from Michael Pertschuk, FTC Chairman, et al., to Hon. Wendell H. Ford, Chairman, Consumer Subcommittee, and Hon. John C. Danforth, Ranking Minority Member, Consumer Subcommittee (Dec. 17, 1980), *available at* <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

⁶³ *See, e.g., id.* (noting emotional impact and other more subjective types of harm will not ordinarily make a practice unfair); *but see id.* at n.12 (noting, for example, that an “injury may be sufficiently substantial, however, if it does a small harm to a large number of people, or if it raises a significant risk of concrete harm”).

⁶⁴ Parnes & Jennings, *supra* note 33, at 989, 996.

⁶⁵ *See, e.g., id.* at 996–97 (illustrating instances where rules were amended or taken off the books because they were no longer serving their intended purpose).

⁶⁶ *See generally* I.J. Schiffrès, *Invasion of Privacy by Use of Plaintiff's Name or Likeness in Advertising*, 23 A.L.R. 3d 865, 4(a) (1999) (explaining that because a cause of action under right of publicity or misappropriation requires commercial use in advertising, defendant's uses are often interpreted liberally).

C. Right of Publicity

1. What is the Right of Publicity?

The right of publicity is an Intellectual Property right, which is an extension of the right of privacy.⁶⁷ The right of publicity is a state-based right, and to date, nineteen states have enacted right of publicity legislation, while twenty-eight other jurisdictions recognize a common law right of publicity.⁶⁸ In many states, it is defined as “the right to control and choose whether and how to use an individual’s identity for commercial purposes.”⁶⁹

Generally, to prevail on a right of publicity claim, one must prove four elements: (1) that the other party used his identity; (2) for the other party’s advantage, commercial or otherwise; (3) without the first party’s consent; and (4) such use resulted in injury.⁷⁰ While most jurisdictions agree on the basic elements, many differ on the scope of protection, or what type of harm warrants protection.⁷¹ Nonetheless, the right of publicity exists in many variations.⁷²

2. What is Protected Under this Right?

The right of publicity seeks to protect a person’s “name, voice, signature, photograph, or likeness” from non-consensual commercial exploitation.⁷³ Generally,

⁶⁷ NIMMER, *supra* note 6, at 216; see Jonathan Faber, *Brief History of Right of Publicity*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> (last visited June 9, 2011); Samuel Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 196–99 (1890); *Haelan Labs. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, cmt. b (2005).

⁶⁸ *E.g.*, CAL. CIV. CODE § 3344.1 (West 2009); 33 FLA. STAT. § 540.08 (2006); IND. CODE § 32-36-1-1 (2002); 765 ILL. COMP. STAT. 1075/1 (2006); 34 KY. REV. STAT. § 391.170 (West 2000); MASS. GEN. LAWS ch. 214 § 3A (2006); N.Y. CIV. LAW § 50 (Consol. 2000); NEB. REV. STAT. § 20-208 (2006); 52 NEV. REV. STAT. § 597.800 (2000); OHIO REV. CODE ANN. § 2741.01 (LexisNexis 2000); 42 PA. CONS. STAT. § 8316 (2003); R.I. GEN. LAWS § 9-1-28.1 (2000); TENN. CODE ANN. § 47-25-1104 (2006); 4 TEX. PROP. CODE ANN. § 26.002 (West 2010); UTAH CODE ANN. § 45-3-2 (LexisNexis 2006); VA. CODE ANN. § 8.01-40 (2000); WASH. REV. CODE § 63.60.040 (2006); WISC. STAT. § 895.50 (2006); see Faber, *supra* note 67, at Statutes.

⁶⁹ 765 ILL. COMP. STAT. ANN. 1075/10; see also OHIO REV. CODE ANN. § 2741.01(D); TENN. CODE ANN. § 47-25-1103(a); TEX. PROP. CODE ANN. § 26.002; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, cmt. a (2005).

⁷⁰ Lapter, *supra* note 6, at 272.

⁷¹ Compare *Allen v. Nat’l Video, Inc.*, 610 F. Supp. 612, 621 (S.D.N.Y. 1985) (merely suggesting certain characteristics of the plaintiff, without literally using his name, portrait, picture or voice, is not actionable under the narrow New York right of publicity statute), with CAL. CIV. CODE § 3344.1 (2009) (California’s Civil Code is narrow, restricting protectable traits to “name, voice, signature, photograph and likeness.” *But see* Lapter, *supra* note 6, at 260 (noting that the California common law “embraces an expansive, yet ultimately ambiguous, set of indicia . . . that has significantly expanded one’s exclusive right to control the commercial use of his identity.”).

⁷² Jennifer L. Carpenter, *Internet Publication: The Case for an Expanded Right of Publicity for Non-Celebrities*, 6 VA. J.L. & TECH. 3, 10 (2001).

⁷³ CAL. CIV. CODE § 3344(a) (2009); see IND. CODE ANN. § 32-36-1-6 (2009); 12 OKLA. STAT. § 1449(A) (1985).

the right of publicity protects a person's likeness when an attribute is readily identifiable and its exploitation is non-incidental.⁷⁴ While most right of publicity violations occur in the context of celebrities used in commercial advertisements, courts and legal scholars agree that every person has a right to publicity, famous or not.⁷⁵ Unlike private individuals, because celebrities have a measureable value associated with their image, they have a greater incentive to litigate when an infringement occurs.⁷⁶ Accordingly, damage remedies exist to protect the economic value of a celebrity's likeness, while non-economic remedies exist to protect individual autonomy and personal property rights inherent in both celebrity and non-celebrity claims.⁷⁷

3. *How is the Right of Publicity Regulated?*

The various justifications of damage remedies demonstrate the range of important interests the right of publicity seeks to protect. It follows that the right of publicity is applied inconsistently in various jurisdictions, in some instances to protect aspects of an individual's persona that are not as obvious as one's name or picture.⁷⁸

The Ninth Circuit, adopting one of the most expansive views, found that a recognizable racecar is considered protectable as an extension of the driver's identity.⁷⁹ Conversely, in New York, which is in the Second Circuit, the right of publicity only prohibits use of the name, picture, or voice of a living person in advertisements without first obtaining that person's written permission.⁸⁰ Under this narrow approach, any commercial use of someone's identity that does not

⁷⁴ *Williams v. Newsweek, Inc.*, 63 F. Supp. 2d 734, 737–38 (E.D. Va. 1999); *see, e.g.*, CAL. CIV. CODE § 3344(b)–(c) (explaining that the use must readily identify the individual but notes an exception for incidental uses).

⁷⁵ *Nimmer*, *supra* note 6, at 215–16; *see also* *McGeveran*, *supra* note 26, at 1150–51; *MCCARTHY*, *supra* note 6, § 4:16.

⁷⁶ *Carpenter*, *supra* note 72, at 11, 17.

⁷⁷ *Compare* *Midler v. Ford*, 549 F.2d 460, 463–64 (9th Cir. 1988) (finding liability for sound-alike advertisement, sought to prohibit free-riding and unjust gain that came from unauthorized commercial appropriation), *and* *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (finding liability for an unauthorized commercial which featured a look alike robot of Vanna White), *with* *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904, 913–14 (D.C.N.J. 1986) (demonstrating how the autonomy rationale supports a right of publicity claim for private individuals); *see* *Alice Haemmerli, Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 413 (1999); *see also* *Mark P. McKenna, The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 264–65 (2005).

⁷⁸ *See, e.g.*, *White*, 971 F.2d at 1399 (protecting game show assistant's identifying attributes and mannerisms); *Midler*, 549 F.2d at 463 (extending scope of "identity" to prohibit sound-alike from using singer's distinctive voice); *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 624 (S.D.N.Y. 1985) (extending scope of "picture or portrait" to prohibit impersonation of actor's recognizable look); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) (extending scope of "identity" to talk show host's distinctive catch phrase).

⁷⁹ *Motschenbacher v. R.J. Reynolds*, 498 F.2d 821, 827 (9th Cir. 1974).

⁸⁰ N.Y. CIV. LAW § 50 (Consol. 2000).

squarely fit within one of the enumerated uses, like using one's name, picture or portrait, is lawful.⁸¹

The lack of uniformity poses problems, especially when right of publicity is identified in the context of a borderless vehicle, like advertising on the internet.⁸² Although BT has become a prevalent problem, the FTC and its rulemaking process can address these growing consumer concerns. An effective way to combat this intellectual property issue may be to enact a new, narrow federal law that speaks directly to the problem.

III. ANALYSIS

Naturally, the privacy issues arising from data collection and BT practices generate a great deal of concern.⁸³ Privacy advocates long to see federal regulation targeting this practice, while others favor the current self-regulation.⁸⁴ Privacy is not the only problem associated with BT. In fact, the right of publicity is another, overlooked, problem in this context. Until a uniform regulatory body provides a meaningful solution, internet users' right of publicity will continually be violated.

This analysis explores how the right of publicity extends to provide protection of users' identities that are utilized for BT purposes. First, Part A discusses the foundation for establishing a right of publicity infringement in the BT context. Next, Part B presents several theories on this concept, and then discusses why those arguments fail. Lastly, Part C explains why this problem needs to be addressed.

A. The Elements of a Right of Publicity Claim

As mentioned, four elements must be met for one to establish a right of publicity violation.⁸⁵ This test requires the plaintiff to prove that the defendant: (1) used his identity; (2) appropriated his name or likeness to defendant's advantage, commercial or otherwise; (3) without his consent; and (4) that use resulted in injury.⁸⁶ This first section discusses how the current BT practices satisfy each of these factors, thereby resulting in right of publicity infringement.

⁸¹ See, e.g., *Burck v. Mars, Inc.*, 571 F. Supp. 446, 452 (S.D.N.Y. 2008) (finding that the M&M look-alike of the Times Square icon, Naked Cowboy, was not a "picture" or "portrait" of a "living person").

⁸² Jonathon W. Penney, *Privacy and the New Virtualism*, 10 YALE J.L. & TECH. 194, 201 (2008).

⁸³ See, e.g., Gruenwald, *supra* note 4 (discussing various consumer privacy concerns associated with BT practices).

⁸⁴ 2009 FTC SELF-REGULATORY PRINCIPLES, *supra* note 4, at 18.

⁸⁵ Lapter, *supra* note 6, at 272.

⁸⁶ *Eastwood v. Superior Court of L.A. Cnty.*, 149 Cal. App. 3d 409, 417 (1983).

1. Data Collected for Behavioral Targeting Sufficiently Establishes Users' Identity

The first element a plaintiff must prove in a right of publicity infringement claim is that the defendant used his identity.⁸⁷ The easiest way to identify an individual is to use his or her name or image, but many jurisdictions recognize that other characteristics can also help to identify individuals through other characteristics including gestures and mannerisms, voice, distinctive traits, likeness, and signature phrase.⁸⁸ While individual pieces of non-PII may not constitute an actual identity, when this data is aggregated and combined in an attempt to create marketable categories that mimic individual's behaviors and personal attributes, this can constitute a recognizable identity.⁸⁹

2. The Information Collected for Behavioral Targeting is Used for a Commercial Purpose

The second element that the plaintiff must prove in a right of publicity infringement claim is that the defendant's use of the plaintiff's identity is for a commercial purpose.⁹⁰ Behavioral advertising is a commercial use because advertisers pay a premium to target their message directly to potential customers.⁹¹ If the data had no value to the advertisers, they would have little incentive to pay to use it.⁹² Accordingly, by using internet users' data in commercial manner, advertisers are recognizing that there is commercial value in one's online behavioral data.⁹³ While BT is arguably a service to the consumers, it is mainly driven by commercial profits.⁹⁴

3. Information Is Collected Without User's Express Consent

The third element that a plaintiff must prove in a right of publicity infringement claim is that the individual plaintiff's identity was used without permission.⁹⁵ Advertisers must obtain permission from an individual before using his image or

⁸⁷ *Id.*

⁸⁸ *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992); *Midler v. Ford*, 549 F.2d 460, 463 (9th Cir. 1988); *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 624 (S.D.N.Y. 1985); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836 (6th Cir. 1983); *Motschenbacher v. R.J. Reynolds*, 498 F.2d 821, 827 (9th Cir. 1974).

⁸⁹ McClurg, *supra* note 11, at 125; *see also* Fenrich, *supra* note 31, at 951.

⁹⁰ *Eastwood*, 149 Cal. App. 3d at 417; *see also* Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn From Trademark Law*, 58 STAN. L. REV. 1161, 1217–20 (2006); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c.

⁹¹ Chester Testimony, *supra* note 16, at 20–21.

⁹² McClurg, *supra* note 11, at 72 n.57.

⁹³ Ann Bartow, *Our Data, Ourselves: Privacy, Propertization, and Gender*, 34 U.S.F. L. REV. 633, 686–87 (2000); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d; MCCARTHY, *supra* note 6, § 4:17.

⁹⁴ Fenrich, *supra* note 31, at 951; Bartow, *supra* note 93, at 652.

⁹⁵ *Eastwood*, 149 Cal. App. 3d at 417; *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. f.

aspects of his identity for a commercial purpose.⁹⁶ Generally, individuals have to sign a release if they attend an event where pictures may be taken and used in a commercial context. Failure to do so may subject the publisher to liability.⁹⁷ Although this practice is not followed in the context of BT, it should be considered.

4. Harm Results When One's Identity Is Unknowingly Used for Behavioral Targeting

Finally, a claimant in a right of publicity action must prove that he or she was harmed by the defendants' unlawful use of his or her identity.⁹⁸ There are various theories of analyzing harm, both economic and personal.⁹⁹ One is a labor theory which preserves "the right of the individual to reap the reward of his endeavors."¹⁰⁰ Others are rooted in the notions of individual autonomy and personal property rights.¹⁰¹ While harm analyses vary, the majority of jurisdictions that have a right of publicity statute protect *all* individuals, regardless of their fame.¹⁰² Conversely, a small number of jurisdictions require that the plaintiff's identity must have an existing commercial value to recover under this IP right.¹⁰³

B. Counterarguments and Rebuttals in Recognizing Behavioral Targeting as Infringing the Right of Publicity

Advertising networks, various industry trade groups, and the FTC support the concept of self-regulated advertising.¹⁰⁴ These groups would not recognize BT as infringing the right of publicity. Arguably, if BT were to fall under the umbrella of right of publicity, these groups would require express consent prior to collecting any data to avoid liability. Many fear that obtaining prior consent will significantly reduce the pool of consenting users, thus reducing the commercial value of BT.¹⁰⁵

Conversely, there are arguments supporting liability in the BT context. These arguments embrace the emerging concept that identity is more than just a name, and

⁹⁶ Compare *Brinkley v. Casablanca*, 438 N.Y.S. 2d 1004, 1006 (App. Div. 1981); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 409 (9th Cir. 1996), with *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10, 11 (1975); *New Kids on the Block v. News Am. Publ'g Inc.*, 971 F.2d 302, 310 (9th Cir. 1992).

⁹⁷ *Christoff v. Nestle U.S.A., Inc.*, 7 Cal. Rptr. 3d 798, 802 (2009).

⁹⁸ *Eastwood*, 149 Cal. App. 3d at 417.

⁹⁹ See *supra* text accompanying note 77.

¹⁰⁰ *Zacchini v. Scripps Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

¹⁰¹ See *Haemmerli*, *supra* note 77, at 413 (arguing that the proper focus of the right of publicity should be on the person, not the work product because identity appropriation infringes individual's control as to the use of their persona); see also *McKenna*, *supra* note 77, at 279–80.

¹⁰² *MCCARTHY*, *supra* note 6, § 4:16.

¹⁰³ *Id.* § 4:15.

¹⁰⁴ See generally FTC SELF-REGULATORY PRINCIPLES, *supra* note 49.

¹⁰⁵ 2009 FTC SELF-REGULATORY PRINCIPLES, *supra* note 4, at 31, 43; Jon Fine, *The Threat of an Online Privacy Bill*, BUSINESSWEEK (July 2, 2009), http://www.businessweek.com/magazine/content/09_28/b4139084408781.htm.

value is more than just a dollar sign.¹⁰⁶ This section first addresses various theories rejecting right of publicity liability in BT, then establishes why those arguments fail.

1. Identifiability of the Data Collected for Behavioral Targeting

The first theory addresses the type of data collected for BT. One argument is that the information collected does not readily identify individual users, or use an “identity”, and, therefore, advertisers that engage in BT practices cannot be subject to liability.¹⁰⁷ Under this theory, data is not subject to the current BT regulations as long as it does not contain information that can directly identify specific individuals.¹⁰⁸ Arguably, data such as clickstream data, IP addresses, and browser language, the information commonly used for BT, does not directly identify an individual.¹⁰⁹

Conversely, privacy advocate groups, scholars, and concerned consumers argue that using non-PII is even more valuable and personally defining than some aspects of one’s physical identity because such data sheds light on one’s mental impressions and behaviors.¹¹⁰ In fact, the concept of an internal, or digital identity, which is deduced from the collection and compilation of online activity, is an extremely accurate picture of one’s actual identity.¹¹¹ While physical characteristics are usually the focal point of one’s identity or likeness in a majority of right of publicity cases, courts have held many non-physical traits are also part of an individual’s persona.¹¹² Because courts often revisit and amend laws in an effort address new technological and innovative issues, it follows that the same should be done with regard to laws that define identity.¹¹³

The concept of collecting individual pieces of data, personally identifiable or not, and aggregating and organizing them into personality or behavioral profiles, ultimately can create an identifiable personality.¹¹⁴ On the one hand, if Netflix’s user viewing preferences, and AOL’s search queries are comprehensive enough to identify individual users, then BT databases—which collect much more than movie preferences or search queries—are also capable of capturing users’ actual identities.¹¹⁵

¹⁰⁶ See generally Penney, *supra* note 82, at 198, 226 (explaining that identities formed from online behaviors can be very comprehensive and provide value in ways that they cannot offline).

¹⁰⁷ 2009 FTC SELF-REGULATORY PRINCIPLES, *supra* note 4, at 2.

¹⁰⁸ *Id.* at 21.

¹⁰⁹ *Id.* at 2.

¹¹⁰ McClurg, *supra* note 11, at 124–25; see also Fenrich, *supra* note 31, at 961; Penney, *supra* note 82, at 226.

¹¹¹ McClurg, *supra* note 11, at 124–25; Penney, *supra* note 82, at 226.

¹¹² See *supra* text accompanying note 78; see also Joseph J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, 16 BERKELEY TECH. L.J. 1165, 1269 (2001).

¹¹³ See Carpenter, *supra* note 72, at 4; Parnes & Jennings, *supra* note 33, at 997.

¹¹⁴ 2009 FTC SELF-REGULATORY PRINCIPLES, *supra* note 4, at 25.

¹¹⁵ Waxman, *supra* note 27; see also 2009 FTC SELF-REGULATORY PRINCIPLES, *supra* note 4, at 23 n.51.

2. *When, if at all, Have Internet Users Consented to the Collection and Use of their Online Data?*

The second theory addresses consent. The internet blurs the issue of consent because many websites have policies that define a lack of response as implied consent to waive any ownership rights to the digital trail left on the website.¹¹⁶ For example, in a recent class action case, Facebook executives argued that its targeted ads are lawful because users already agree to receive such messages through their participation on the site.¹¹⁷

This argument fails in the context of right of publicity law because when consent is implied or informal it should be construed narrowly against the service provider.¹¹⁸ Under some versions of the right of publicity, such as the law in New York, written consent for identity use is required.¹¹⁹ Thus, implied consent, like that on Facebook, would be inadequate.

Understanding the difference between contextual advertising and behavioral advertising is imperative to rejecting the ‘implied consent’ argument. For example, by simply interacting with a website, users may consent that their activity on *that particular site* may be collected for further use. This consent, however, is for use solely by that site in an effort to understand how its users behave on that particular site.¹²⁰

Analogous to this notion is an example in the context of videography. For instance, someone might know that he is being filmed, and in fact may even pose for the video camera. These actions may imply consent to be filmed, but not imply consent for the director to sell that film.¹²¹ Similarly, consent to have pictures appear in one magazine does not imply consent for those pictures to appear in another.¹²² Likewise, internet users have not expressly consented to the collection, compilation, and commercial use of their information beyond their activity on a particular site.

3. *Can both Celebrities and Non-Celebrities Bring a Right of Publicity Action?*

The third counterargument is that non-celebrities have no cause of action because they have no commercial value, which eliminates the element of harm. The minority presumption is that right of publicity is limited to celebrities.¹²³ The logic behind this view is that the right of publicity only protects property that has already

¹¹⁶ McClurg, *supra* note 11, at 129.

¹¹⁷ Complaint at 3, *Lane v. Facebook, Inc.*, No. 5:08-cv-03845, 2008 WL 3886402 (N.D. Cal. Aug. 12, 2008); *see also* McGeeveran, *supra* note 26, at 1153.

¹¹⁸ MCCARTHY, *supra* note 6, § 10:24 (citing RESTATEMENT (SECOND) OF TORTS § 892(A) cmt. e).

¹¹⁹ N.Y. CIV. R. § 51 (Consol. 2011); *see* McGeeveran, *supra* note 26, at 1153.

¹²⁰ Barclay, *supra* note 24, at 66–67.

¹²¹ Ann Margaret Eames, *Caught on Tape: Exposing the Unsettled and Unpredictable State of the Right of Publicity*, 3 J. HIGH TECH. L. 41, 54–55 (2004).

¹²² *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985).

¹²³ Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. 227, 253 (1999); *see also* McClurg, *supra* note 11, at 107.

been commercially exploited, thereby making it measureable, so anyone without a measureable property interest has no cause of action.¹²⁴

Alternatively, even though McCarthy suggests that demonstrating damages for aspects that are not commercially exploitable, like “indignity and mental distress” are “all over the map,” he and Nimmer agree that everyone should be given control over the commercial use of his identity regardless of their celebrity status.¹²⁵ One example of this is a case involving a relatively unknown individual, who successfully asserted his right of publicity after discovering that his face had been used without his knowledge or consent on millions of Nestle coffee packages.¹²⁶ Although the plaintiff was not a celebrity, the court found that the right of publicity allowed him to protect his identity from commercial exploitation by Nestle.¹²⁷ Thus, if information about an individual is to be bought and sold, as it is with BT, sellers must first obtain the individual’s consent.¹²⁸

4. How Can Harm Be Measured?

Most statutes that address the right of publicity fail to specify that the harm element must be monetary, or explore how much harm warrants recovery.¹²⁹ Because injury is not explicitly limited to a monetary loss, any type of harm including a loss of the ability to control a property or dignitary right should theoretically suffice.¹³⁰ Accordingly, many famous figures have sued under the right of publicity to vindicate an emotional or personal harm rather than an economic loss.¹³¹

An instrumental case demonstrating this principle involved Frito-Lay’s appropriation of a celebrity’s voice by using a sound-alike in a commercial.¹³² In that case the court awarded the celebrity plaintiff more than two million dollars in

¹²⁴ Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1591 n.78 (1979); see also Goodman, *supra* note 123, at 253.

¹²⁵ J. Thomas McCarthy, *Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1710–12 (1987); McGeeveran, *supra* note 26, at 1154; see also William Sloan Coats & Jennifer P. Gossain, *Right of Publicity: Who, What, When, Where, Why, and More Importantly, How Much?*, in UNDERSTANDING THE INTELLECTUAL PROPERTY LICENSE 2009, at 271, 274 (Pats., Copyrights, Trademarks, & Literary Prop. Course Handbook Ser. No. 985, 2009), available at WL, 985 PLI/Pat 271.

¹²⁶ Christoff v. Nestle U.S.A., Inc., 97 Cal. Rptr. 3d 798, 799 (Sup. Ct. Cal. 2009).

¹²⁷ *Id.* at 802.

¹²⁸ Bartow, *supra* note 93, at 687.

¹²⁹ CAL. CIV. CODE § 3344.1(a)(1) (2009); N.Y. CIV. R. § 51 (Consol. 2011); 765 ILL. COMP. STAT. ANN. 1075/40 (2009); 33 FLA. STAT. § 540.08 (2010).

¹³⁰ Dogan & Lemley, *supra* note 90, at 1209–11.

¹³¹ See, e.g., Ali v. Playgirl Inc., 447 F. Supp. 723, 728–29 (S.D.N.Y. 1978) (filing lawsuit for the personal harm suffered to boxer’s reputation from association with publication of this nature); Grant v. Esquire, 367 F. Supp. 876, 870–80 (S.D.N.Y. 1963) (allowing litigation solely for the purpose of establishing rights, not to recover from economic loss for actor who wanted to keep his name from being profited); Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 263 (N.Y. Sup. Ct. 1984) (suing for purpose of obtaining injunctive relief, and not for monetary damages when a look-alike posed in an advertisement).

¹³² Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1096 (9th Cir. 1992).

damages for humiliation, mental distress, and undermining the integrity of the plaintiff's artistic persona.¹³³

The right to bring an action for personal harm is not limited to those with deep pockets.¹³⁴ If the overall picture of an individual's persona can be made up of online behaviors, then unauthorized use of her identity interferes with her personal autonomy.¹³⁵ An isolated unauthorized use "rarely hurts customers enough to justify a lawsuit."¹³⁶ Compounded through user's entire internet experience over time, however, "is a pervasive loss of identity control, [which is] troubling."¹³⁷

C. This Problem Is Not Adequately Addressed Under Existing Law

The balkanized right of publicity laws illustrate the inconsistency in online data regulation and users' expectations of commercial use.¹³⁸ Similarly, by employing various data collection and self-regulation BT policies, which provide different levels of protection depending on what type of information is collected and how it is used, add to the inconsistencies.¹³⁹

Many existing data collection and privacy regulations focus on specific aspects, thereby failing keep pace with advancing computer technology.¹⁴⁰ These regulations include financial information, advertising to children, medical records, and unsolicited commercial emails.¹⁴¹ These subject-matter regulations primarily address privacy and fraud concerns, and are narrow in application.¹⁴²

The current self-regulated BT industry has not agreed on how and when to obtain user consent. Thus, the most effective plan to protect users' digital identities from unfair use is for Congress to mandate best practices.¹⁴³ "Without ensuring [a] meaningful polic[y] that will promote consumer trust," transparency, and choice, "online marketing in the U.S. will be undermined by a lack of confidence."¹⁴⁴

¹³³ *Id.* at 1105.

¹³⁴ Coats & Gossain, *supra* note 125, at 285.

¹³⁵ Haemmerli, *supra* note 77, at 415–18.

¹³⁶ McGeeveran, *supra* note 26, at 1154.

¹³⁷ *Id.*

¹³⁸ See David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn From Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J. 913, 929 (2008).

¹³⁹ FTC 2009 SELF-REGULATORY PRINCIPLES *supra* note 4, at 38.

¹⁴⁰ Fenrich, *supra* note 31, at 965–70.

¹⁴¹ See, e.g., Fair Credit Reporting Act, 15 U.S.C. § 1681 (1994) (targeting the financial industry and regulates credit histories); Children's Online Privacy Protection Act, 15 U.S.C. § 6502(a) (2006) (regulating online data-collection practices involving children's personal information); Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320(d) (2009) (safeguarding personally identifiable medical information); Gramm-Leach-Bliley Act, 15 U.S.C. § 6801(b) (2006) (ensuring privacy in certain data maintained by financial institutions); Controlling the Assault of Non-Solicited Pornography and Marketing Act, 15 U.S.C. § 7701 (2006) (protecting against deceptive commercial emails).

¹⁴² See Fenrich, *supra* note 31, at 963–69.

¹⁴³ See Chester Testimony, *supra* note 16, at 5, 25.

¹⁴⁴ *Id.* at 6.

IV. PROPOSAL

“The [i]nternet has allowed advertisers to target individual consumers in ways other media cannot”.¹⁴⁵ Accordingly, current offline regulations do not adequately extend protection online. This section proposes a solution to bridge this gap. Part A discusses why a new rule should be enacted. Then, Part B provides implementation and enforcement recommendations for the new rule.

A. A New Rule Should Be Enacted.

Consumers cannot adequately shield themselves from unwarranted uses of their identity online because of the lack of uniform regulations mandating BT practices. The right of publicity can provide a source of protection for private individuals, but the varied statutory and common law regulations do not extend consistent protection. The digital world presents a challenge because jurisdictional parameters are difficult to define.

A new rule will allow private individuals to claim a right of publicity violation on a sui generis theory of harm, if behavioral marketers use individuals’ information without their consent. Further, it will provide consumers a choice to grant or withhold permission, “thereby preventing unwanted disclosures” by behavioral advertisers.¹⁴⁶

Under a new rule, commercial use of an individual’s identity in online BT would require that person’s affirmative consent as an opt-in.¹⁴⁷ An opt-in will not only allow online users to authorize the commercial uses of their information, but the genuine consent eliminates unfairness and enhances consumer trust.¹⁴⁸

The idea of federally mandating BT principles and giving consumers a choice is not entirely new.¹⁴⁹ Many privacy organizations and Congressional representatives have expressed their optimistic views on federal regulation, and criticism on the recently proposed AOI opt-out program.¹⁵⁰ In fact, FTC Commissioner Jon Leibowitz has commented that federal regulation may be the next necessary step.¹⁵¹ These advocates have similar concerns about the current-self regulatory scheme and recognize that something more, like federal regulation, is needed.

The opt-out mechanism has flaws because there is a misunderstanding that a failure to opt-out implies consent.¹⁵² This failure to opt-out, however, does not

¹⁴⁵ Barclay, *supra* note 24, at 65.

¹⁴⁶ McGeeveran, *supra* note 26, at 1154–55.

¹⁴⁷ *Id.* at 1158–59.

¹⁴⁸ *Id.*

¹⁴⁹ See, e.g., REEDSMITH, DATA PRIVACY: THE EUROPEAN COMMISSION HAS COMMENCED INFRINGEMENT PROCEEDINGS AGAINST THE UK GOVERNMENT IN RELATION TO THE UK’S COMPLIANCE WITH THE EUROPEAN UNION EPRIVACY DIRECTIVE (2009), <http://reedsmithupdate.com/ve/ZZ28sh85773190836158Q4> (explaining how Europe is already regulating and enforcing such regulation).

¹⁵⁰ *Industry, Consumer Group Nudge Congress For Changes To Consumer Protection Proposals*, 11 WASH. INTERNET DAILY 141 (July 23, 2010) [hereinafter *Industry*].

¹⁵¹ FED. TRADE COMM’N, FTC STAFF REPORT: SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING n.4 (Feb. 2009) (concurring Statement of Comm’r Jon Leibowitz).

¹⁵² McClurg, *supra* note 11, at 129–33.

constitute sufficient consent in the right of publicity context.¹⁵³ Therefore, the best way to ensure express affirmative consent is to require an opt-in.¹⁵⁴ None of the current policies require an opt-in for data collected for BT, an absence that only furthers the need for a new rule.

B. Implementation and Enforcement

Having established the need for a new rule, the next step is to implement and enforce the legislation. Part 1 explores some implementation considerations, many of which are derived from a proposed bill. Next, Part 2 recommends potential statutory language with Part 3 explaining why the FTC is best suited to enforce this new rule.

1. Implementation Considerations

Proposed House Bill 5777 (“Best Practices Act”) should be used as a guideline for a new rule.¹⁵⁵ The new rule should consider the Best Practices Act’s definitions, consent requirements, a safe harbor to limit liability, and the FTC rulemaking procedure provisions.¹⁵⁶

The new rule, using this legislation as an example, should address a right of publicity in the context of behavioral advertising. Additionally, the new rule should include a safe harbor for first party advertisers, such as individual websites and businesses. The safe harbor will specifically target liability to third-party BT ad networks. This consideration, suggested by the Interactive Advertising Bureau’s Vice President of Public Policy is particularly important because it will ensure the contextual advertising practices are not adversely affected.¹⁵⁷

The new rule should also include right of publicity elements, and should be modeled after an expansive approach to the right of publicity, like laws in California, Florida and Illinois. Under this approach, the identity element easily extends to protect the aggregation of online behaviors.¹⁵⁸ The consent element, however, should be stringent, like that in New York, to ensure that consent is affirmative express consent, and not implied.¹⁵⁹ These considerations will provide a feasible enforcement mechanism.

2. Proposed Language for the New Rule

The new rule should include specific provisions that address what type of information is included, what type of uses are subject to the regulation, who is liable

¹⁵³ See *id.* at 136–37.

¹⁵⁴ See McGeeveran, *supra* note 26, at 1158–59.

¹⁵⁵ Best Practices Act, H.R. 5777, 111th Cong. (2010).

¹⁵⁶ *Id.* §§ 2, 104, 401, 602.

¹⁵⁷ See *Industry*, *supra* note 150.

¹⁵⁸ See CAL. CIV. CODE § 3344.1(a)(1) (2009); 765 ILL. COMP. STAT. 1075/5 (2009); 33 FLA. STAT. § 540.08 (2010).

¹⁵⁹ N.Y. CIV. LAW § 50 (Consol. 2000).

for infringement, and how the regulation should be enforced. For example, covered information should be defined as “any information or aggregation thereof that can either directly identify, or infer identity of a specific internet user.” This should include “any unique identifier that is used to collect, store, or identify information about a specific individual or to create or maintain a preference profile.”¹⁶⁰ Preference profile should be defined as:

a list of preferences, categories of information, or interests (a) associated with an individual or with an individual’s computer or device; (b) inferred from actual behavior of the individual, the actual use of the individual’s computer, or information supplied directly by the individual; and (c) compiled and maintained for purposes related to marketing, advertising, or sales.¹⁶¹

In general, it “shall be unlawful for a third-party advertiser to collect, use or disclose covered information about an individual without the express affirmative consent of that individual.” Express affirmative consent “shall be obtained by means of an opt-in” unless: (1) the collection, use, or disclosure is used for fraud detection; (2) the collection, use, or disclosure is necessary to prevent imminent danger to personal safety; or (3) is required in order to comply with a federal, state, or local law, or rule.¹⁶² These provisions, among many others, will keep the scope narrow and specific as to not encroach existing areas of legally protected uses.

Consumer concerns within behavioral advertising are constantly growing and changing, so it is imperative that this is addressed in a timely fashion.¹⁶³ Regarding enforcement, this new law should mirror the language in the Best Practices Act, which gives the FTC authority to make appropriate rules pursuant to the APA and expedites implementation.¹⁶⁴

3. *The FTC is Best Suited to Enforce this Rule*

The administrative body best suited to address this practice is the FTC, because it protects against unfair and deceptive acts in commerce.¹⁶⁵ As mentioned, a consumer injury must: (1) be substantial; (2) not be outweighed by any countervailing benefits to consumers; and (3) be an injury that consumers cannot reasonably avoid.¹⁶⁶ First, the harm is recognized, even if it is not monetary. Second, the burdens on consumers would be minimal at best and will likely increase trust. Finally, the only way to avoid this injury is to avoid the internet, which is an extremely difficult task in a society becoming increasingly computerized.¹⁶⁷ Therefore, this type of problem fits within the scope of the FTC.

¹⁶⁰ See H.R. 5777 § 2.4(A)(vii).

¹⁶¹ *Id.* § 2.6.

¹⁶² See *id.* § 106.

¹⁶³ *E.g., Industry, supra* note 150.

¹⁶⁴ H.R. 5777 § 602.

¹⁶⁵ 15 U.S.C. § 57a(a).

¹⁶⁶ Ford & Danforth, *supra* note 62.

¹⁶⁷ See Fenrich, *supra* note 31, at 955.

As mentioned, the problem can be easily addressed in a new proposed rule, which the FTC has the authority to draft. This rule making process has been effective in the past and is the best solution to address the problem embodied in this comment.¹⁶⁸

V. CONCLUSION

The practice of behavioral advertising exhibits problems that extend beyond privacy, which is the focal point in most of the proposed legislation and self-regulatory policies relating to this issue. This practice also violates users' rights of publicity by using a collaboration of their online behavioral traits for commercial use, without their consent. The combination of the balkanized, incohesive laws governing the right of publicity and the lack of mandatory BT practices establishes why the current legal landscape cannot adequately address this problem. The best way to fix this problem is for the FTC to use its rulemaking authority to enact a new rule, pursuant to a Congressional mandate. This new rule will require third party advertisers to obtain affirmative express consent before they can collect, use, and disclose users' behavioral data. This way, consumers will regain control over the use of their identities.

¹⁶⁸ See, e.g., Telemarketing Sales Rule, 16 C.F.R. § 310 (1997) (creating new rule targeting fair practices for telemarketing); Test Procedures and Labeling Standards for Recycled Oil, 16 C.F.R. § 311 (1995) (creating new rule for ensure fair labeling for recycled oil); Automotive Fuel Ratings, Certification and Posting, 16 C.F.R. § 306 (1996); Appliance Labeling Rule, 16 C.F.R. § 305 (2010) (creating new rule for ensuring fair labeling for appliances).

