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FRED H. CATE
Data and Democracy

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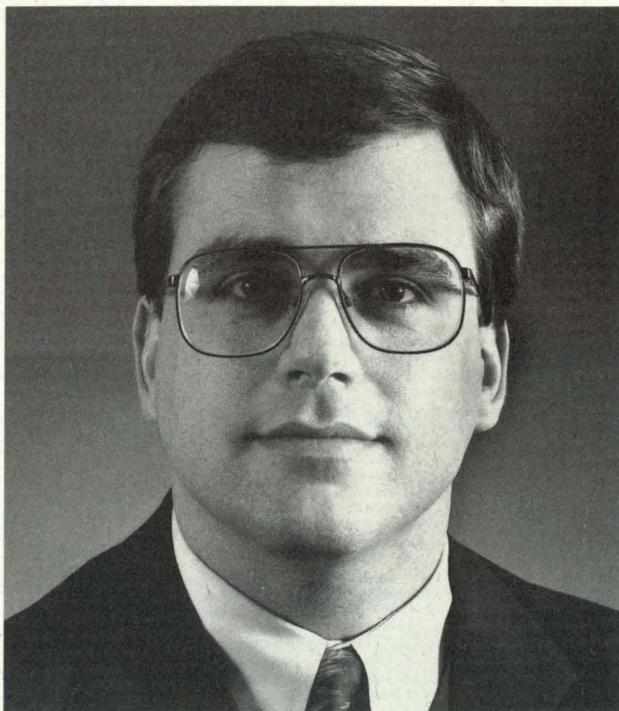
Herman B Wells Distinguished Lecture Series 1

Data and Democracy

FRED H. CATE

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Professor Cate specializes in privacy and other information law issues and appears regularly before Congress, state legislatures, and professional and industry groups on these matters. He directed the Electronic Information Privacy and Commerce Study for the Brookings Institution; chaired the International Telecommunication Union's High-Level Experts on Electronic Signatures and Certification Authorities; served as vice chair of the American Bar Association Section on Health Law's Electronic Communications and Privacy Interest Group; and was a member of the Federal Trade Commission's Advisory Committee on Online Access and Security. During the 2000 presidential race he advised the George W. Bush campaign on privacy matters.

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Data and Democracy

My topic tonight is "Data and Democracy." My thesis is simple: since the founding of the Republic, the U.S. legal system has fostered exceptionally open and vibrant flows of information. In the past twenty five years, however, as our economy has grown more information-dependent, the United States' protection of the right to access and communicate information has been challenged by diverse and expanding efforts to treat data as a valuable commodity that may be owned and restricted like other forms of property. Although often motivated by laudable goals, these efforts to create and expand property rights in information pose a significant threat to each of us as citizens and consumers.

This topic takes on special significance in the aftermath of the recent terrorist attacks on the World Trade Center and the Pentagon. To be sure, those attacks challenge the openness of our democracy. But they have also demonstrated anew the value of vibrant information flows to bind together the nation, motivate extraordinary acts of heroism and generosity, identify and locate witnesses and suspects, facilitate our recovery, and protect against future attacks. So rather than restricting the information flows on which our democracy and economy depend, I think—I hope—the more likely effect of the events of September 11 will be to make us more aware of the power of our freedom to communicate and more vigilant in its defense. But it will mean little if, while defending information flows from outside attack, we impede them with a self-constructed wall of property rights.

I would like to survey briefly the range of protection under U.S. law for the right to access and communicate information and then provide two sets of examples of recent developments that threaten to undermine that protection.

The Right to Access and Communicate Information

It is widely recognized that information plays a critical role in a democracy. Without access to information and the freedom to express ourselves, citizens cannot elect leaders and oversee the activities of the government. As James Madison wrote almost two centuries ago: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. . . . A people who mean to be their own Governors, must arm themselves with the power which knowledge gives."¹ The consent of the governed is the only legitimate source of sovereign power in a democracy, and it is only meaningful if informed.

Open information flows, of course, serve other valuable functions in our society, such as fostering individual development and self-fulfillment, furthering creativity and innovation, advancing science, promoting social evolution, and facilitating what the Supreme Court has called a "marketplace of ideas."² The marketplace is more than a metaphor: markets depend on information flows. Economists have long regarded access to information as one of the requirements of a competitive market and the practical absence of such information as an inefficiency, an external cost, and a market failure.

The First Amendment

Because information serves such a broad array of values, U.S. law provides extraordinary protection for the right to access and communicate data. The foundation of that protection is the Constitution, and especially the First Amendment—"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." The Supreme Court has interpreted these simple words to prevent the government from restricting expression prior to its utterance or publication or merely because the government disagrees with the sentiment expressed,³ and to forbid the government from making impermissible distinctions based on content,⁴ compelling speech, or granting access to the expressive capacity of another⁵ without demonstrating that the government's action is the least restrictive means for accomplishing a compelling governmental purpose.

Under the First Amendment, the Court has significantly limited recovery for defamation or invasion of privacy. Public officials and public figures may not recover for damage caused by false expression unless they can demonstrate with "convincing clarity" that the publisher knew of the falsity or was reckless concerning it.⁶ And the Court has eliminated entirely any recourse by public plaintiffs for the publication of true information, even if highly defamatory or personal.⁷ Other plaintiffs can recover for the harm caused by the publication of false and defamatory expression—if that expression is on a matter of public interest—only if the plaintiff can prove its falsity, an exceptionally difficult burden.⁸

When information is true and obtained lawfully, the Supreme Court has repeatedly held that the government may not restrict its disclosure without showing a very closely tailored, compelling governmental interest—"strict scrutiny"—the highest level of constitutional scrutiny. Under this requirement, the Court has struck down laws restricting the publication of confidential government reports,⁹ and of the names of judges under investigation,¹⁰ juvenile suspects,¹¹ and rape victims.¹²

Virtually without exception, the Court has upheld the right to speak or publish or protest under the First Amendment, to the detriment of privacy interests. The Court has rejected privacy claims by unwilling viewers or listeners in the context of broadcasts of radio programs in city streetcars,¹³ R-rated movies at a drive-in theater,¹⁴ and a jacket bearing a phrase that one publisher refused to print but instead made me describe as an "unseemly expletive," worn in the corridors of a courthouse.¹⁵

The Court interprets the First Amendment to restrict not merely Congress, but all federal and state governmental agencies,¹⁶ and to protect expression that the Court has determined does not independently warrant protection (such as false or defamatory expression),¹⁷ conduct that involves no speech (such as burning a flag or picketing),¹⁸ and activities ancillary to expression (such as funding expression).¹⁹

This protection, as these examples suggest, is by no means limited to noncommercial expression. Beginning in 1976, when the Supreme Court first extended the protection of the First Amendment to wholly commercial expression, our judicial system has recognized that readily available information and the legal right to express it are critical to the functioning of competitive markets. In that case, in which the Court struck down a Virginia statute that prohibited the advertising of pharmaceutical prices, the Court wrote:

It is clear . . . that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. Speech likewise is protected even though it is carried in a form that is "sold" for profit, and even though it may involve a solicitation to purchase or otherwise pay or contribute money. . . .

[T]he particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate.²⁰

Just this past June, the Supreme Court reiterated the remarkable nature of the U.S. legal system's protection for expression when it held that even the broadcast of an *illegally intercepted* cellular telephone conversation was protected by the First Amendment. The Court wrote:

Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." . . .

"Moreover, 'our decisions establish that absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech.'"²¹

The Copyright Clause

The First Amendment is not the only constitutional provision protecting information flows. The Copyright Clause recognizes the value of expression by empowering Congress to create an incentive for its creation. As the Supreme Court has written, copyright is "the engine of free expression. By establishing a marketplace right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."²²

Copyright law demonstrates how much we value the ability to access and use information in another way, as well. Neither it, nor any other branch of U.S. intellectual property law, permits ownership of data. Instead, copyright law protects only expression. In the words of the unanimous Supreme Court: "The most fundamental axiom of copyright law is that '[n]o author may copyright his ideas or the facts he narrates. . . .' [C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."²³

Although it may seem unfair that the law does not allow a creator or discoverer of data to own them, "this is not 'some unforeseen byproduct of a statutory scheme,'" the Court has written. "It is, rather, 'the essence of copyright,' and a constitutional requirement."²⁴

Given the constitutional importance of not extending copyright protection to facts or ideas, courts will not even protect expression if it includes one of a limited number of ways of conveying an idea, concept, or fact, or if it is necessary to implementing an idea or concept. Under the doctrine of "merger," courts withhold copyright protection from expression that "must necessarily be used as incident to" the work's underlying ideas or data.²⁵ In that situation, courts find that the expression and the underlying idea or fact have "merged."²⁶ The doctrine of merger highlights the importance of preventing copyright law from ever protecting a fact or idea: it is preferable to exclude otherwise protectable expression from copyright law's monopoly rather than to allow that monopoly to extend to any fact or idea.

Open Records and Open Meetings Laws

In addition to these constitutional provisions, statutes and regulations also demonstrate a sweeping preference for open information flows. For example, Congress and every state legislature have enacted laws guaranteeing access to

public records and government meetings. Although because of separation of powers issues, these laws do not apply to the judiciary, the Supreme Court has found a constitutional right of access to every phase of a criminal trial and to judicial records as well.²⁷ Access is required even over the objections of both the defendant and the prosecution,²⁸ and may be restricted only when necessary to serve a compelling state interest.

Mandatory Disclosure in the Marketplace

This commitment to access is not limited to government information and bodies. Mandatory disclosure is at the heart of virtually all market regulation and consumer protection law. In 1988 the Supreme Court wrote that: "There cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy."²⁹ The "fundamental purpose," therefore, of U.S. industry regulation is to implement "a philosophy of full disclosure."³⁰ This philosophy is reflected in thousands of laws requiring mandatory disclosure of critical information in every facet of our lives—from notices of borrowers' rights in banks to food labeling.

In sum, then, as the Federal Reserve Board has written, "it is the freedom to speak, supported by the availability of information and the free-flow of data, that is the cornerstone of a democratic society and market economy."³¹

The Growing Threat to Data Access and Use

Against this panoply of legal protections for the right to access and use information, we are witnessing the emergence of new laws, and new applications and interpretations of existing laws, that would treat information as property or invest individuals with property-like rights in data. These have the effect of undermining that protection for information flows.

Unfortunately, there are many examples. I would like to examine briefly efforts to commodify information in just two areas of law: copyright and privacy.

Copyright

The constitutional purpose of copyright law, you will recall, is to facilitate expression. However, recent changes in that law to expand the rights of copyright holders and reduce the rights of copyright users threaten to frustrate that purpose.

1. Duration

Nowhere is this clearer than in the length of copyright protection. The duration of copyright has grown from a 14-year term, which could be renewed by the creator once, in the first U.S. Copyright Act in 1790,³² to life of the author plus 70 years today. For anonymous or pseudonymous works, or works created by institutions, protection today lasts for 120 years after creation or 95 years after publication.³³

One might reasonably wonder whether 70 years of posthumous protection creates any additional incentive to create, while it defers for that much longer the moment when a work becomes part of the public domain. Lord Macaulay spoke to this issue in 1841 when Parliament was considering extending the term of British copyright protection:

Now, would the knowledge, that this copyright would exist in 1841, have been a source of gratification to [Dr.] Johnson? Would it have stimulated his exertions? Would it have once drawn him out of his bed before noon? Would it have once cheered him under a fit of the spleen? Would it have induced him to give us one more allegory, one more life of a poet, one more imitation of Juvenal? I firmly believe not. . . . Show me that the prospect of this boon roused him to any vigorous effort, or sustained his spirits under depressing circumstances, and I am quite willing to pay the price of such an object, heavy as that price is. But what I do complain of is that my circumstances are to be worse, and Johnson's fare none the better, that I am to give five pounds for what to him was not worth a farthing.³⁴

2. Subject Matter

Congress has also aggressively expanded the subject matter of copyright. The first Copyright Act applied only to maps, charts, and books. By the time it passed the 1909 Act, Congress had expanded the scope of copyright law to cover "all of the writings of an author," provided that they were published. In 1976, Congress eliminated the publication requirement. To qualify for protection today, a work must be "fixed"—that is, captured in some "tangible medium of expression" like paper, computer disk, or video tape—and "original"—meaning only "independently created by the author (as opposed to copied from other works)."³⁵ These requirements are deliberately broad and easy to satisfy.

Congress and the courts have also expanded copyright to protect virtually anything that can be expressed—even plots, characters, choreography, basketball plays, page numbers, the selection and arrangement of otherwise uncopyrightable facts, sculpture, esthetic shapes, architecture, and the "look and feel" of computer programs.

Through revisions in 1976 and 1988,³⁶ Congress also eliminated the requirement that owners of copyrighted works must register their works with the Copyright Office and affix a proper copyright notice to each copy. Today, protection begins as soon as expression is fixed: no intent to copyright, no notice of copyright, and no application to the government are necessary. This has expanded exponentially the number of works subject to copyright. Copyright law now protects every letter, memo, note, home video, answering machine message, e-mail, and doodle.

3. Rights

Congress has also recently created new rights for copyright holders in the Digital Millennium Copyright Act.³⁷ Since 1976, and substantially since 1909, copyright law has given a creator, or, in some circumstances, a creator's employer,³⁸ the exclusive rights to reproduce, adapt, distribute, publicly perform, and publicly display a copyrighted work, and to authorize anyone else to do these things.³⁹ With passage of the DMCA in 1998, Congress greatly expanded copyright holders' rights.

The DMCA prohibits the circumvention of technological measures taken by copyright owners to control access to their works.⁴⁰ It also prohibits "manufactur[ing], import[ing], offer[ing] to the public, provid[ing], or otherwise traffic[ing] in any technology, product, service, device, component, or part thereof" that is primarily designed to circumvent technological measures designed to control access to a work.⁴¹ These provisions apply even if the circumvention is necessary to obtain lawful access—access permitted by federal copyright law. So, for example, while a copyright holder may not use copyright law to prevent access to factual information, which by definition cannot be protected by copyright law, he or she may encrypt that information and then use copyright law to prosecute anyone who tries to circumvent the encryption. Moreover, by broadly prohibiting the manufacture and sale of devices that circumvent encryption, the new law effectively eliminates the availability of such devices even for lawful uses.

Similarly, the DMCA prohibits the removal or alteration of "copyright management information"—information conveyed with a copyrighted work that identifies the author or performer and the terms and conditions for the use of the work.⁴² Yet it is often impossible or impractical to include the copyright notice when parodying a song, quoting a book, or videotaping a television program for later viewing. While the Supreme Court has ruled that all three of these activities are legitimate uses of copyrighted work, under the defense of "fair use," the failure to include the complete original copyright notice could nevertheless

subject the user to statutory fines as great as \$25,000 per incident, injunctions, damages, costs, attorney's fees, and even criminal prosecution.⁴³

Finally, under the DMCA, providers of Internet access, like AOL or Earthlink or Indiana University, are liable for data they "store," if, after receiving notice of a copyright holder's "good faith belief" that infringement is occurring, the service provider does not "respond expeditiously to remove, or disable access to, the material that is claimed to be infringing."⁴⁴ Think what this means: to avoid liability under the DMCA, a service provider must remove the material stored on its servers by its customers before any adjudication that the material is infringing or that the infringement is not excused by any defense under the copyright law. The law thus creates a tremendous incentive to turn service providers into copyright censors, blocking access to material that may ultimately prove to be wholly lawful.

These concerns are not fanciful. During the last presidential race, the George W. Bush campaign sent a cease and desist letter to Zack Exley, the creator of gwobush.com, a parody of the official campaign Web site, threatening legal action for what the letter characterized as Exley's "graft" of "inappropriate" material onto the "words, look and feel of the Exploratory Committee's site." "There ought to be limits to freedom" the Bush campaign said in a statement about the case posted on its official Web site.⁴⁵ As we see with the expansion of copyright holders' rights, increasingly there are.

4. Defenses

In addition to the expansion in duration, subject matter, and rights reflected in copyright law, there has been a parallel reduction in the defenses provided by that law. The most important of these defenses is "fair use." Fair use expressly permits certain uses of copyrighted works that serve important public purposes and that do not harm the market for the original work. The 1976 Copyright Act sets out four factors for courts to consider when determining whether an otherwise infringing use is fair:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁴⁶

Courts often focus on the fourth factor. According to the Supreme Court, unauthorized uses of copyrighted works are unfair (1) if it is proved that the particular use is harmful to the market for the original work, or (2) if it is shown

by a preponderance of the evidence that “should [the use] become widespread, it would adversely affect the potential market for the copyrighted work.”⁴⁷

Historically, a use such as copying a page from an article or a frame from a motion picture would likely have been found to be fair, because it involved copying only a small portion of a larger work and there was no market for that portion alone. Today, however, such a use is far less likely to be found fair, because technologies like the Internet make possible markets for per-page or per-line licenses. As a result, almost any use, if widespread, could “adversely affect the potential market for the copyrighted work.”

The Second Circuit Court of Appeals demonstrated this in 1994 in *American Geophysical Union v. Texaco*.⁴⁸ The court faced the issue of whether a Texaco scientist’s unauthorized copying of eight articles from the *Journal of Catalysis* over four years constituted fair use. The court did not focus on the impact of the copying on the market for subscriptions to the complete journal or on sales of back issues and back volumes. Instead, the court stressed the copying’s likely impact on the publisher’s ability to negotiate licenses to photocopy individual articles. By redefining the market to include licenses for *portions* of whole journal issues, the court negated Texaco’s argument that such limited copying had no likely market impact:

Despite Texaco’s claims to the contrary, it is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier. This notion is not inherently troubling: it is sensible that a particular unauthorized use should be considered “more fair” when there is no ready market or means to pay for the use, while such an unauthorized use should be considered “less fair” when there is a ready market or means to pay for the use. . . . Whatever the situation may have been previously, before the development of a market for institutional users to obtain licenses to photocopy articles, it is now appropriate to consider the loss of licensing revenues in evaluating “the effect of the use upon the potential market for or value of” journal articles.⁴⁹

As computers create markets in smaller and smaller fragments of works—licensing their reproduction by the line or column inch—uses that were fair in print will likely cease to be so in the context of digital information.

Moreover, the fair use defense does not apply to the new actions created by the DMCA for circumventing technological protections, altering or removing copyright management information, or failing to remove information stored on a server after receiving a complaint of copyright infringement. As a result, even if fair use protects a use such as a quote from or parody of a copyrighted work, it

will not excuse decrypting the work to engage in the fair use or failing to include the complete copyright management information along with the quote or parody.

5. Contracts

The final development is the extent to which contract law is supplanting copyright law as a source of rights for protecting works, particularly in the digital environment. Database providers, such as Lexis and Westlaw, have long relied on contracts to govern access to, and control reuse of, material contained in their databases, even when that material includes noncopyrightable government documents and public domain material. Copyright holders license almost all software, subject to contract terms, rather than sell it outright. And this trend recently gained support with adoption of the Uniform Computer Information Transactions Act. That Act reflects a concerted effort to use mass market licenses, instead of copyright law, for all transfers of "computer information transactions"—not only software, but "electronically disseminated" news, opinions, pictures, and the like.⁵⁰

These licenses are used to protect rights that go far beyond those provided by copyright law. For example, they can restrict the use of facts or ideas. They can last indefinitely. They can be used to limit criticism or the development of new and competing materials. They seldom provide for any of the defenses included in copyright law—including fair use—and they often include penalties and conditions far more severe than those provided by copyright law. Contracts are proving to be an important means for controlling access to information.

Summary

Collectively, these changes in U.S. copyright law greatly expand the rights of copyright holders and provide them with the legal tools to prevent access to, or use of, the contents of copyrighted works altogether.

Let me offer a very practical example, drawn from my own experience, of how the expansion in copyright law and the use of contracts can be used effectively to create property rights in information itself and then be used to stifle the valuable information flows.

Indiana University hosts the *Thesaurus Musicarum Latinarum*, a five million-word full-text database developed over the past ten years by a consortium of U.S. universities, under the leadership of Thomas J. Mathiesen, David H. Jacobs Distinguished Professor of Music. The goal of the TML is to digitize the entire corpus of Latin music theory from the Middle Ages through the Renaissance. The TML is made available to scholars via the Internet, free of charge. The

database includes digital images of diagrams that appear within the treatises drawn from medieval manuscripts housed in libraries around the world.

Six years ago, the Bodleian Library in Oxford objected to the TML's use of several images from Bodley 842, a 14th-century musical manuscript in the Bodleian's collection. The Bodleian claimed that the picture violated the Library's copyright, not in the manuscript (which being 700 years old had long ago become part of the public domain), but in the *photographs* of the manuscript. We pointed out that the law in both the United Kingdom and the United States requires some modicum of originality; the caselaw therefore clearly established that there is no copyright protection available for photographs that merely exactly reproduce works that are too old to be subject to copyright law.⁵¹

The Bodleian was not finished, however. In the absence of a copyright interest, the Library asserted that the only way to obtain a copy of the image of the treatise was to order one from the Bodleian and that the Bodleian Library Photographic Services Order Form contains contract language, to which the user must agree. The form limits the use of any image to "research" purposes. When we challenged—on both factual and doctrinal grounds—this use of contract to assert control over the contents of a 14th-century manuscript, the Bodleian responded by rejecting a routine order for slides from Indiana University's Library with an e-mail stating that because of this dispute "the Bodleian cannot accept any institutional order from Indiana University for new photographic materials or for the renewal of old ones."

The dispute is a straightforward one. The Bodleian—like many libraries, businesses, and other organizations—sought to expand its property rights in public domain material to include not only the right to possess and control use of the actual document, but also the right to control use of the content and exact reproductions of the document. When copyright law, even as recently expanded, proved unavailing, the Bodleian turned to contract law in an effort to expand its monopoly. The argument was not about price or terms (although it easily could have been). In its earliest correspondence, the Bodleian wrote that its "rule is not to allow Bodleian images to be mounted on other sites" and that it has "no immediate plans" to digitize these images on its own site. The argument was about whether the Indiana University, the TML, or any other scholarly resource could have access at all.

When considering the 1909 Copyright Act, Congress wrote that: "The enactment of copyright legislation by Congress is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and the useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings."⁵² Almost a century later, we have moved far from that original purpose.

Copyright law today applies to every imaginable form of expression; its protection attaches immediately and automatically and lasts for generations. The rights that copyright law protects have expanded, while the defenses to infringement are contracting and, in the case of the new rights provided by the DMCA, have disappeared altogether. And, at least in new arenas for commerce and discourse such as the Internet, it appears that private contracts may replace copyright entirely. Legal scholars have described these developments as an "intellectual land-grab"⁵³ and a "creeping enclosure of the informational commons."⁵⁴ Unchecked they threaten the public's ability to access and use information.

Privacy

Another area in which information flows are being threatened by new laws and a new focus on property rights is that of information privacy.

The Privacy Avalanche

The past five years have witnessed a surge in legislation, regulation, and litigation designed to protect the privacy of personal information. In 1998 Congress adopted legislation restricting the collection and use of information from children online,⁵⁵ and the following year enacted the first comprehensive federal financial privacy legislation as part of the Gramm-Leach-Bliley Financial Services Modernization Act,⁵⁶ as well as the first federal law prohibiting access to historically open public records without individual "opt-in" consent.⁵⁷ Federal regulators have not only implemented these and other privacy laws, but have also adopted sweeping health privacy rules under the Health Insurance Portability and Accountability Act.⁵⁸ The Federal Trade Commission reversed its longstanding position and released two proposals for legislation concerning adult's online privacy.⁵⁹ And Congress and state legislatures have considered more than 600 privacy bills while state attorneys general have initiated aggressive privacy investigations and litigation.

The Transformation of Privacy Law

The result has been a transformation in not only the volume, but also the object, of privacy law. Historically, U.S. privacy law focused on two broad themes. The first was preventing intrusion by the *government*. The second theme was, when privacy laws did address private-sector behavior, preventing specific, identified *harms* to consumers.

The dominant trend in these recent enactments is to invest consumers with near absolute *control over information* in the marketplace—irrespective of whether the information is, or could be, used to cause harm. Public officials and privacy

advocates argue that "we must assure consumers that they have full *control* over their personal information."⁶⁰ Virtually all of the privacy bills pending before Congress reflect this goal: "To strengthen *control* by consumers" and "to provide greater individual *control*."⁶¹ William Safire summed up this movement towards turning information into property when he wrote in the *New York Times*: "Your bank account, your health record, your genetic code, your personal and shopping habits and sexual interests are your own business. That information has value. If anybody wants to pay for an intimate look inside your life, let them make you an offer and you'll think about it."⁶²

These new enactments do exactly that. Take the recently adopted health privacy rules. Under those rules, which take effect in April 2003, individuals are given the right to control virtually all uses of "health information" about them.⁶³ Or consider Congress' 1999 amendments to the Drivers Privacy Protection Act, which compelled states to restrict the disclosure of motor vehicle records unless individual motorists consented to the disclosure.⁶⁴

Rather than striking down laws like these that threaten access to, and communication of, information, the Supreme Court has endorsed them as legitimate economic regulation. In an unanimous opinion upholding the DPPA, the Court wrote that "the personal, identifying information that the DPPA regulates is a 'thing in interstate commerce,'" and referred to that information throughout its opinion simply as "an article in interstate commerce," like a truckload of coal or steel.⁶⁵ This stands in stark contrast to the considerable protection that the Court has interpreted the First Amendment as applying to expression.

Similarly, just three months earlier, the Court had upheld the constitutionality of a California statute that prohibited the release of arrestee addresses to anyone for the purpose of using them to sell a product or service.⁶⁶ The statute explicitly permitted such information to be used for "journalistic" purposes. Nevertheless, the Court rejected the argument that it was unconstitutional (as well as nonsensical) to seek to protect the privacy of arrestees by prohibiting attorneys and private investigators from sending letters offering their services, while permitting publication of arrestee names and addresses in the newspaper. The Court went even further, however, to write that "California could decide not to give out arrestee information at all without violating the First Amendment."⁶⁷

Granting individuals control over uses of information about them in the absence of evidence of harm—much less blocking access altogether—not only ignores the constitutional protection of open information flows, it also has very practical consequences. Many of those consequences relate to our use of information to monitor public officials and the activities of our government. For example:

- By systematically examining local government records, *San Francisco Examiner* reporter Candy Cooper discovered that police investigated rapes in upscale Berkeley far more readily than in the crime-infested neighborhoods of Oakland.
- The Associated Press used Social Security Numbers to match Mississippi Department of Correction and Department of Education records to discover eight school teachers who had failed to report that they had been convicted of crimes including drug dealing and sex offenses.
- The *St. Petersburg Times* searched public records to discover that a man running for city treasurer had not disclosed that he had filed for personal bankruptcy three times and corporate bankruptcy twice, and that the new director of a large arts organization that solicited donations had been charged with fraud in his home state.
- Tampa's News Channel 8 mapped the location of all drug arrests to uncover a narcotics ring across the street from an elementary school.

A recent study by Professor Brooke Barnett, when she was a Knight Fellow at Indiana University's School of Journalism, found that journalists routinely use records, including those restricted by the DPPA, not merely to check facts, but actually to identify the story in the first place. According to that study, 64 percent of all crime-related stories, 57 percent of all city or state stories, 56 percent of all investigative stories, and 47 percent of all political campaign stories rely on public records. Access to public record databases, Professor Barnett writes, is "a necessity for journalists to uncover wrongdoing and effectively cover crime, political stories and investigative pieces."⁶⁸

Allowing individuals to exercise control over information, in the absence of any specific threat of harm, also has consequences in our society and economy more broadly. For example, public and commercial records are used to locate missing family members, owners of lost or stolen property, organ and tissue donors, alumni and members of associations and religious groups, suspects and witnesses in criminal and civil matters, tax evaders, and parents who are delinquent in child support payments. Firestone and Ford Motor Company used those records to identify and obtain current addresses for people who needed to receive information on replacing defective tires.

Data are used extensively in the market. Ubiquitous credit reports, for example, mean that Americans are judged based on our own credit history and qualifications, not stereotypes based on where we live, how old we are, or the color of our skin. Those records have literally transformed the financial services sector of our country. Banks, credit card issuers, insurers and others make more services available to more people, on a more equitable basis, and at lower cost

than ever before. For example, because lenders today rely on accessible credit information collected from diverse sources over time, they provide more loans to a wider range of people than ever before. Between 1956 and 1998, the number of U.S. households with mortgages more than trebled. The very completeness of those credit records means that lenders will provide service to previously unserved populations. A 2000 World Bank study, for example, showed that restrictive privacy laws would eliminate 11 out of every 100 people who currently qualify for mortgages, credit cards, and other loans.⁶⁹

Accessible credit records increase the speed with which credit decisions are made. In 1997, 82 percent of automobile loan applicants received a decision within an hour; 48 percent of applicants received a decision within 30 minutes. Many retailers open new charge accounts for customers at the point of sale in less than two minutes. The greater accuracy, speed, and efficiency of the credit system, and the greater confidence of lenders, also drive down the cost of credit—by an estimated \$80 billion per year for mortgages alone.⁷⁰

These benefits derive from the fact that information is obtained routinely, over time, *without* the consumers having control over the information. Allowing the consumer to block the collection or use of unfavorable information would make the credit report and other public and commercial records useless.

Some benefits transcend either political or economic considerations. This is especially true in the context of health privacy, both because of the extent to which the development of new treatments and drugs depends on the widespread availability of information, and because of the important distinction between privacy of the body—the right to refuse treatment or to choose among medically appropriate treatments—and privacy of information *about* the body. Helena Gail Rubenstein has written that “Privacy, which is intertwined with the concept of control over what is disseminated about oneself, is an expression of autonomy. . . . [W]hile autonomy is an appropriate framework for evaluating questions concerning the treatment of one’s body, it is not the appropriate framework for evaluating rules to regulate the use of health data.”⁷¹ This is precisely because of the many other valuable uses that those data have.

Those who wish to condition the collection and use of health-related information on consent—without regard for the value of its other uses or its potential for causing harm—refuse to recognize “in exchange for the vast improvements in medical care, a correlative responsibility on the part of the individual, as a consumer of health care services, toward the community.” Rubenstein continues: “As individuals rely on their right to be let alone, they shift the burden for providing the data needed to advance medical and health policy information. Their individualist vision threatens the entire community”⁷²

The FBI's efforts to identify and bring to justice the terrorists who attacked the Pentagon and World Trade Center and to protect against future terrorist attacks, also demonstrate vividly the value of information collected in the marketplace and the need for such information in the future.

Professor Eugene Volokh has written: "The difficulty is that the right to information privacy—my right to control your communication of personally identifiable information about me—is a right to have the government stop you from speaking about me."⁷³ Expanding the realm of information over which we allow individuals to exercise control—without regard for harm—not only threatens the constitutional doctrine of the First Amendment, but poses practical and significant risks to our democracy and society as well.

Conclusion

It is ironic that these developments in copyright and privacy law reflect almost opposite objectives. Businesses have lobbied Congress and litigated aggressively to expand the monopoly granted them by copyright law and thereby to exact greater compensation from individuals who wish to access and use copyrighted works and the information they contain. Recent privacy laws, by contrast, reflect an effort to give individuals greater control of the information about them that businesses wish to collect and use. Both efforts, however, have the effect of creating property-like rights in information that threaten to choke the information flows on which our democracy and economy depend.

Unlike direct attacks on expression, which courts have almost uniformly repelled, efforts to create ownership and control of information are far more subtle and insidious. Motivated by changes in markets and technologies, and especially the growth in the information services economy, these efforts to commodify data, and thereby restrict their use, are rarely even seen as a threat to traditionally protected expression interests. So few constitutional objections have been raised, and courts have proved only occasionally sympathetic when they are.

Recognizing that threat does not necessarily mean that laws creating greater control over information are universally undesirable or should always be repudiated. Rather, it sets the stage for balancing laws that restrict information flows with the constitutional protection for those flows. Where the former are necessary to respond to sufficiently significant harms, the latter may have to give way. But we should reach that conclusion explicitly, carefully, and reluctantly.

I anticipate that, if explicitly balanced against the benefits of accessible information in our democracy and economy, many recent enactments that create property rights in information would fall. Some would fall because under the

additional scrutiny of constitutional analysis, they would be seen not to serve any beneficial interest at all. Others would fall because they would not be the least restrictive means of achieving an otherwise laudable objective. But most would fall because the damage to our democracy and economy of compromising our commitment to open information flows—even for a worthy objective—would simply be too great.

One hundred years ago the Michigan Supreme Court rejected an effort to expand that state's privacy laws. The words it used then seem equally applicable today:

We do not wish to be understood as belittling the complaint. We have no reason to doubt the feeling of annoyance alleged. Indeed, we sympathize with it, and marvel at the impertinence that does not respect it. We can only say that it is one of the ills that, under the law, cannot be redressed.⁷⁴

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Endnotes

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4. R.A.V., 505 U.S. 377; Texas v. Johnson, 491 U.S. 397 (1989); Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980).
5. Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 244 (1974); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
6. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
7. Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).
8. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).
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10. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).
11. Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).
12. Florida Star v. B.J.F., 491 U.S. 524 (1989); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).
13. Public Utilities Commission v. Pollack, 343 U.S. 451 (1952).
14. Erznosnik v. City of Jacksonville, 422 U.S. 205 (1975).
15. Cohen v. California, 403 U.S. 15 (1971).
16. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
17. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
18. United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).
19. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); First National Bank v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1 (1976).
20. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762-64 (1976) (footnote and citations omitted).
21. 121 S. Ct. 1753, 1765, 1765 n.21 (2001) (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940))).
22. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985).
23. Feist Publications, Inc. v. Rural Telephone Services Co., 499 U.S. 340, 344-45, 349 (1991) (quoting *Harper & Row*, 471 U.S. at 556).

24. *Id.* at 349 (quoting *Harper & Row*, 471 U.S. at 589 (Brennan, J., dissenting)) (citations omitted).

25. *Baker v. Selden*, 101 U.S. 99, 104 (1879).

26. *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971).

27. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

28. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

29. *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (quoting H. R. Rep. No. 1383, 73d Cong., 2d Sess., 11 (1934)).

30. *Id.* (quoting *Santa Fe Industries, Inc. v. Green*, 430 U. S. 462, 477-478 (1977), quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 186 (1963)).

31. Board of Governors of the Federal Reserve System, *Report to the Congress Concerning the Availability of Consumer Identifying Information and Financial Fraud 2* (1997).

32. Act of May 31, 1790, 1st Cong., 2d Sess., 1 Stat. 124 (1790).

33. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298 (1998) (codified at 17 U.S.C. §§ 301 et seq); William F. Patry, "The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors," 14 *Cardozo Arts & Entertainment Law Journal* 661 (1996).

34. 56 Parl. Deb. H.C. (3d Ser.) 341, 349-50 (1841) (statement of T. Macaulay).

35. *Feist Publications*, 499 U.S. at 345.

36. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified at 17 U.S.C. §§ 101 et seq).

37. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. §§ 101 et seq).

38. The right belonged initially to the creator unless the work was "made for hire." The statute defines a "work made for hire" as

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101.

39. *Id.* §§ 106, 602(a).

40. *Id.* § 1201(a)

41. *Id.*

42. *Id.* § 1202(c).
43. *Id.* § 1203(b).
44. *Id.* § 512(c).
45. Hannibal Travis, "Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment," 15 *Berkeley Technology Law Journal* 777, 858 (2000) and sources cited therein.
46. 17 U.S.C. § 107.
47. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984); *Harper & Row*, 471 U.S. at 566; *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).
48. 37 F.3d 881 (2d Cir. 1994).
49. *Id.* at 898-99 (citation omitted).
50. Travis, *supra* at 840, and sources cited therein.
51. *Bridgeman Art Library, Ltd. v. Corel Corporation*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).
52. H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909).
53. James Boyle, "A Politics of Intellectual Property: Environmentalism for the Net?," 47 *Duke Law Journal* 87, 94 (1997).
54. Peter Jazi & Martha Woodmansee, *The Construction of Authorship* 11 (1994).
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56. Gramm-Leach-Bliley Financial Services Modernization Act tit.V, 106 Pub. L. No. 102, 113 Stat. 1338 (1999) (codified at various sections of 15 U.S.C.).
57. Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 106-69, § 350, 113 Stat. 986, 1025-26 (1999).
58. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (2000) (HHS, final rule) (to be codified at 45 C.F.R. pt. 160, §§ 164.502, 164.506).
59. Federal Trade Commission, *Online Profiling: A Report to Congress (Part 2) -Recommendations* (July 2000); Federal Trade Commission, *Privacy Online: Fair Information Practices in the Electronic Marketplace-A Report to Congress* (2000).
60. Enactment of the Children's Online Privacy Protection Act, 106th Congress, 2d Session, 146 Cong. Rec. E616, May 2, 2000, statement of Jay Inslee (D-Wash.) (emphasis added).
61. S. 30, 107th Cong. § 2 (2001); H.R. 89, 107th Cong. § 2(b)(1) (2001); H.R. 347, 107th Cong. § 2(b)(1)(A) (2001) (emphasis added)
62. William Safire, "Nosy Parker Lives," *New York Times*, Sept. 23, 1999, at A29.

63. Standards for Privacy of Individually Identifiable Health Information, *supra*.
64. Department of Transportation and Related Agencies Appropriations Act, *supra*.
65. *Condon v. Reno*, 528 U.S. 141, 148 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 558-559 (1995)).
66. *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999).
67. *Id.* at 40.
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