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

ANDREA STEIN FUELLEMAN

I. INTRODUCTION

II. BACKGROUND

A. Behavioral Targeting
   1. What is Behavioral Targeting?
   2. The Data Collected for Behavioral Targeting Paints a Fairly Accurate Picture
   3. Regulation Policies for Behavioral Targeting
B. FTC’s Rule Making Authority
C. Right of Publicity
   1. What is the Right of Publicity?
   2. What is Protected Under this Right?
   3. How is the Right of Publicity Regulated?

III. ANALYSIS

A. The Elements of a Right of Publicity Claim
   1. Data Collected for Behavioral Targeting Sufficiently Establishes Users’ Identity
   2. The Information Collected for Behavioral Targeting is Used for a Commercial Purpose
   3. Information Is Collected Without User’s Express Consent
   4. Harm Results When One’s Identity Is Unknowingly Used for Behavioral Targeting
B. Counterarguments and Rebuttals in Recognizing Behavioral Targeting as Infringing the Right of Publicity
   1. Identifiability of the Data Collected for Behavioral Targeting
   2. When, if at all, Have Internet Users Consented to the Collection and Use of their Online Data?
   3. Can both Celebrities and Non-Celebrities Bring a Right of Publicity Action?
   4. How Can Harm Be Measured?
C. This Problem Is Not Adequately Addressed Under Existing Law

IV. PROPOSAL

A. A New Rule Should Be Enacted
B. Implementation and Enforcement
   1. Implementation Considerations
   2. Proposed Language for the New Rule
   3. The FTC is Best Suited to Enforce this Rule

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

ANDREA STEIN FUELLEMAN*

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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*Andrea Stein Fuelleman 2011. Andrea Stein Fuelleman is a 2012 Juris Doctor candidate at The John Marshall Law School in Chicago, Illinois. She received a B.S. in Journalism from Ohio University in 2005. She would like to thank her soon to be husband, Adam Fuelleman, and her parents for their unconditional love, support and patience. She would also like to thank her editors, Jessica Godell, Kelly Hejlik and Brandon Nemec for their extensive review, encouragement and contributions to this comment. Any mistakes in this article are my own.
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

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.
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. 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. 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. Using this information, the process then classifies users into specific behavioral profiles. These profiles are very valuable because they allow advertisers to cut through online clutter and speak directly to consumers.

The information collected for BT is generally categorized based on its ability to identify a specific individual. The data collected for BT is typically considered "anonymous" because it does not include readily identifiable information like names or addresses. 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. When data that can personally identify individuals ("PII") is misused, however, it raises consumer concerns.

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.

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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.
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.
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. 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.

A recent case involving Netflix is a prime example of information misuse. In that case, Netflix tried to plan a contest that involved the use of “anonymous” customer movie viewing data. 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. This example illustrates that users do not have to disclose their actual name or address in order to be identifiable. In fact, the collaboration of independent pieces of non-PII data can also lead to the same person.

3. Regulation Policies for Behavioral Targeting

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

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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).
28 Id.
30 See Letter from Maneesha Mithal to Reed Freeman, supra note 29.
32 McClurg, supra note 11, at 89–90.
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

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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.
46 Kaye, supra note 45.
Is Behavioral Targeting Violating the Right to Control Your Identity Online?

Participation by advertisers and third party advertising networks, however, is not mandatory. 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. Opponents agree that some government regulation of data collection is necessary to ensure the data collection does not run afoul of privacy laws.

**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. FTC rulemaking authority is either pursuant to the Magnuson-Moss Warranty Act (“Mag-Moss”), or more commonly, pursuant to Congressional mandate, which typically adopts the Administration Procedures Act (“APA”).

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. Mag-Moss procedures require multiple notices, opportunities for informal hearings, cross-examination and public comment prior to the submission of the final rule. To achieve these goals, the FTC’s self-regulatory approach is strengthened by legislative mandate.

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

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. When a federal statute addressing similar unfair issues already exists, the process is streamlined even further. 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.

The FTC can only promulgate a rule when consumer injury is present. 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. Addressing the first requirement, it is easy to recognize that the most obvious type of consumer injury is monetary. Although this is generally the case, financial loss is not necessarily required.

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. For instance, technologies and marketing techniques frequently change and laws can be revisited, reinterpreted or revised to address specific problems associated with technological growth.

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.

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53 Parnes & Jennings, supra note 33, at 995.
54 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 feed in the Funeral Rule, while discussing the FTC amendment procedures).
55 Parnes & Jennings, supra note 33, at 996; see, e.g., id. at 996 n.55 (noting recent FTC rules enacted pursuant to congressional mandate).
56 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).
57 Husemann, supra note 58.
59 Id. § 45(n).
61 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").
62 Parnes & Jennings, supra note 33, at 989, 996.
63 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).
64 See generally I.J. Schiffres, 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.76 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,
the right of publicity protects a person's likeness when an attribute is readily identifiable and its exploitation is non-incidental.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{80} Under this narrow approach, any commercial use of someone's identity that does not

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

\textsuperscript{75} Nimmer, \textit{supra} note 6, at 215–16; see also McGeeveran, \textit{supra} note 26, at 1150–51; \textbook{McCarthy}, \textit{supra} note 6, \S 4:16.

\textsuperscript{76} Carpenter, \textit{supra} note 72, at 11, 17.


\textsuperscript{78} See, \textit{e.g.}, \textit{White}, 971 F.2d at 1399 (protecting game show assistant's identifying attributes and mannerisms); \textit{Midler}, 549 F.2d at 463 (extending scope of “identity” to prohibit sound-alike from using singer's distinctive voice); \textit{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); \textit{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).

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

\textsuperscript{80} N.Y. CIV. LAW \S 50 (Consol. 2000).
squarely fit within one of the enumerated uses, like using one’s name, picture or portrait, is lawful.\textsuperscript{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.\textsuperscript{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.

\section*{III. Analysis}

Naturally, the privacy issues arising from data collection and BT practices generate a great deal of concern.\textsuperscript{83} Privacy advocates long to see federal regulation targeting this practice, while others favor the current self-regulation.\textsuperscript{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.

\subsection*{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.\textsuperscript{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.\textsuperscript{86} This first section discusses how the current BT practices satisfy each of these factors, thereby resulting in right of publicity infringement.

\footnotesize
\begin{itemize}
  \item \textsuperscript{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 Coyboy, was not a “picture” or “portrait” of a “living person”).
  \item \textsuperscript{82} Jonathon W. Penney, \textit{Privacy and the New Virtualism}, 10 YALE J.L. \& TECH. 194, 201 (2008).
  \item \textsuperscript{83} See, e.g., Gruenwald, \textit{supra} note 4 (discussing various consumer privacy concerns associated with BT practices).
  \item \textsuperscript{84} 2009 FTC SELF-REGULATORY PRINCIPLES, \textit{supra} note 4, at 18.
  \item \textsuperscript{85} Lapter, \textit{supra} note 6, at 272.
  \item \textsuperscript{86} Eastwood v. Superior Court of L.A. Cnty., 149 Cal. App. 3d 409, 417 (1983).\end{itemize}
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.\(^8\) 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.\(^8\) 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.\(^9\)

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.\(^9\) Behavioral advertising is a commercial use because advertisers pay a premium to target their message directly to potential customers.\(^9\) If the data had no value to the advertisers, they would have little incentive to pay to use it.\(^9\) Accordingly, by using internet users’ data in commercial manner, advertisers are recognizing that there is commercial value in one’s online behavioral data.\(^9\) While BT is arguably a service to the consumers, it is mainly driven by commercial profits.\(^9\)

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.\(^9\) Advertisers must obtain permission from an individual before using his image or

\(^8\) Id.
\(^9\) McClurg, supra note 11, at 125; see also Fenrich, supra note 31, at 951.
\(^9\) 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.
\(^9\) Chester Testimony, supra note 16, at 20–21.
\(^9\) McClurg, supra note 11, at 72 n.57.
\(^9\) Fenrich, supra note 31, at 951; Bartow, supra note 93, at 652.
\(^9\) Eastwood, 149 Cal. App. 3d at 417; see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. f.
Is Behavioral Targeting Violating the Right to Control Your Identity Online?

aspects of his identity for a commercial purpose. 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. 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. There are various theories of analyzing harm, both economic and personal. One is a labor theory which preserves “the right of the individual to reap the reward of his endeavors.” Others are rooted in the notions of individual autonomy and personal property rights. While harm analyses vary, the majority of jurisdictions that have a right of publicity statute protect all individuals, regardless of their fame. Conversely, a small number of jurisdictions require that the plaintiff’s identity must have an existing commercial value to recover under this IP right.

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. 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.

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

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98 See supra text accompanying note 77.
99 See supra note 77.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{108} Arguably, data such as clickstream data, IP addresses, and browser language, the information commonly used for BT, does not directly identify an individual.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{115}

\textsuperscript{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).

\textsuperscript{107} 2009 FTC SELF-REGULATORY PRINCIPLES, supra note 4, at 2.

\textsuperscript{108} Id. at 21.

\textsuperscript{109} Id. at 2.

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

\textsuperscript{111} McClurg, supra note 11, at 124–25; Penney, supra note 82, at 226.

\textsuperscript{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).

\textsuperscript{113} See Carpenter, supra note 72, at 4; Parnes & Jennings, supra note 33, at 997.

\textsuperscript{114} 2009 FTC SELF-REGULATORY PRINCIPLES, supra note 4, at 25.

\textsuperscript{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. 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.

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. Under some versions of the right of publicity, such as the law in New York, written consent for identity use is required. 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.

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. Similarly, consent to have pictures appear in one magazine does not imply consent for those pictures to appear in another. 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. The logic behind this view is that the right of publicity only protects property that has already...
been commercially exploited, thereby making it measureable, so anyone without a measureable property interest has no cause of action.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{130} Accordingly, many famous figures have sued under the right of publicity to vindicate an emotional or personal harm rather than an economic loss.\textsuperscript{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.\textsuperscript{132} In that case the court awarded the celebrity plaintiff more than two million dollars in

\textsuperscript{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.


\textsuperscript{127}Id. at 802.

\textsuperscript{128}Bartow, supra note 93, at 687.

\textsuperscript{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).

\textsuperscript{130}Dogan & Lemley, supra note 90, at 1209–11.


\textsuperscript{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 policy that will promote consumer trust,” transparency, and choice, “online marketing in the U.S. will be undermined by a lack of confidence.”144

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133 Id. at 1105.
134 Coats & Gossain, supra note 125, at 285.
135 Haemmerli, supra note 77, at 415–18.
136 McGeveran, supra note 26, at 1154.
137 Id.
139 FTC 2009 SELF-REGULATORY PRINCIPLES supra note 4, at 38.
140 Fenrich, supra note 31, at 965–70.
142 See Fenrich, supra note 31, at 963–69.
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

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145 Barclay, supra note 24, at 65.
146 McGeorge, 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://reedsmitupdate.com/ve/ZZ28sh85773190836158Q4 (explaining how Europe is already regulating and enforcing such regulation).
152 McClurg, supra note 11, at 129–33.
constitute sufficient consent in the right of publicity context.\textsuperscript{153} Therefore, the best way to ensure express affirmative consent is to require an opt-in.\textsuperscript{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.

\textit{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.

\textbf{1. Implementation Considerations}

Proposed House Bill 5777 ("Best Practices Act") should be used as a guideline for a new rule.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{158} The consent element, however, should be stringent, like that in New York, to ensure that consent is affirmative express consent, and not implied.\textsuperscript{159} These considerations will provide a feasible enforcement mechanism.

\textbf{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

\textsuperscript{153} See id. at 136–37.
\textsuperscript{154} See McGeveran, supra note 26, at 1158–59.
\textsuperscript{156} Id. §§ 2, 104, 401, 602.
\textsuperscript{157} See Industry, supra note 150.
\textsuperscript{158} See CAL. CIV. CODE § 3344.1(a)(1) (2009); 765 ILL. COMP. STAT. 1075/5 (2009); 33 FLA. STAT. § 540.08 (2010).
\textsuperscript{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.”\(^\text{160}\)

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.\(^\text{161}\)

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.\(^\text{162}\) 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.\(^\text{163}\) 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.\(^\text{164}\)

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.\(^\text{165}\) 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.\(^\text{166}\) 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.\(^\text{167}\) Therefore, this type of problem fits within the scope of the FTC.

\(^\text{160}\) See H.R. 5777 § 2.4(A)(vii).
\(^\text{161}\) Id. § 2.6.
\(^\text{162}\) See id. § 106.
\(^\text{163}\) E.g., Industry, supra note 150.
\(^\text{164}\) H.R. 5777 § 602.
\(^\text{166}\) Ford & Danforth, supra note 62.
\(^\text{167}\) 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.
