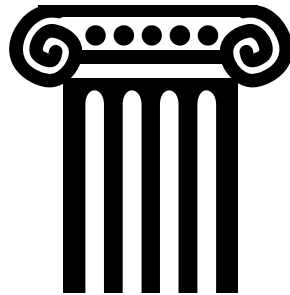


# University of Minnesota Law School

Legal Studies Research Paper Series  
Research Paper No. 09-04



## Disclosure, Endorsement, and Identity in Social Marketing

William McGeeveran

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## DISCLOSURE, ENDORSEMENT, AND IDENTITY IN SOCIAL MARKETING

William McGeveran\*

*Social marketing is among the newest advertising trends now emerging on the internet. Using online social networks such as Facebook or MySpace, marketers could send personalized promotional messages featuring an ordinary customer to that customer's friends. Because they reveal a customer's browsing and buying patterns, and because they feature implied endorsements, the messages raise significant concerns about disclosure of personal matters, information quality, and individuals' ability to control the commercial exploitation of their identity. Yet social marketing falls through the cracks between several different legal paradigms that might allow its regulation—spanning from privacy to trademark and unfair competition to consumer protection to the appropriation tort and rights of publicity. This Article examines potential concerns with social marketing and the various legal responses available. It demonstrates that none of the existing legal paradigms, which all evolved in response to particular problems, addresses the unique new challenges posed by social marketing. Even though policymakers ultimately may choose not to regulate social marketing at all, that decision cannot be made intelligently without first contemplating possible problems and solutions. The Article concludes by suggesting a legal response that draws from existing law and requires only small changes. In doing so, it provides an example for adapting existing law to new technology, and it argues that law should play a more active role in establishing best practices for emerging online trends.*

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\* Associate Professor, University of Minnesota Law School. I am grateful for helpful comments and assistance from Ann Bartow, Dan Burk, Mike Carroll, Jesse Cheng, Danielle Citron, Tom Cotter, Deven Desai, Christine Haight Farley, James Grimmelman, Eric Goldman, Steven Hetcher, Laura Heymann, Brian Holland, Mark Janis, Ruth Okediji, Frank Pasquale, Jessica Silbey, Lars Smith, and Diane Zimmerman. Versions of this Article were presented at the Reputation Economies in Cyberspace Symposium at Yale Law School; the Computers, Freedom, and Privacy 2008 Conference in New Haven; the Intellectual Property Roundtable on User-Generated Content, Social Networking, and Virtual Worlds at Vanderbilt University Law School; the Works in Progress in Intellectual Property Colloquium at Tulane University Law School; and the Intellectual Property Scholars Workshop at Drake University Law School. I received valuable research assistance from David Couillard and Jennifer Cross.

## TABLE OF CONTENTS

Introduction .....	1106
I. Background.....	1109
A. Online Word of Mouth .....	1109
B. Social Networks and Online Advertising.....	1113
C. Social Marketing and the Example of Facebook Ads.....	1116
II. Potential Concerns About Social Marketing .....	1122
A. Disclosure Concerns.....	1122
B. Information Quality Concerns .....	1127
C. Identity Control Concerns.....	1131
III. Paradigmatic Legal Responses .....	1134
A. Privacy Law .....	1135
B. Trademark and Unfair Competition Law.....	1144
C. “Persona Rights” Law.....	1149
D. Consumer Protection Law .....	1155
IV. Consent and Implications.....	1158
A. A Consent Paradigm? .....	1158
B. Potential Objections.....	1162
Conclusion .....	1165

## INTRODUCTION

Imagine that you wander into a bookstore. Out of curiosity, you thumb through the newest novel of an author you loathe, and then you purchase two other books, one as a gift and one for yourself. Now imagine that the moment you turn away from the sales counter, all your friends receive an e-mail message urging them to consider buying all three books because you, their friend, had looked at them. You may raise several objections all at once. First, many shoppers would find automatic disclosure to their friends of personal browsing and buying to be intrusive. Furthermore, the resulting message probably misleads its recipients because you do not actually want to read at least one, and perhaps two, of the listed books. Finally, you may consider this commercial exploitation of your personal identity objectionable. If the nascent practice of “social marketing”<sup>1</sup> catches on, however, something very similar may

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1. The term “social marketing” has been applied to marketing for charitable or socially beneficial causes, such as anti-smoking or other health promotion campaigns. See, e.g., Philip Kotler & Gerald Zaltman, *Social Marketing: An Approach to Planned Social Change*, 35 J. MARKETING, July 1971, at 3. For that reason, some have objected to the use of this nomenclature for marketing conducted through online social networks, as discussed in this Article. See, e.g., Spare Change, *Social Marketing vs. “Social Marketing” Smackdown*, <http://social-marketing.com/blog/2006/09/social-marketing-vs-social-marketing.html> (Sept. 6, 2006). Notwithstanding any regrettable confusion that might result, “social marketing” has become the common and convenient name to refer to the techniques discussed in this Article, and I use it here.

soon happen routinely on the internet, raising all of these possible concerns.

The popular online social networking platform Facebook launched such an initiative, Facebook Ads, in November 2007.<sup>2</sup> Web sites outside of Facebook could determine whether their visitors had Facebook accounts and, if so, disseminate information about those customers' internet browsing, purchases, or other activities throughout their Facebook social networks. Thus, someone who rented a particular movie at Blockbuster Video's web site could find that fact announced to all her friends through their Facebook "News Feeds."<sup>3</sup> Initially, the only notice she received was the brief appearance of a pop-up window that allowed her to cancel the message; if she took no action, the site quickly removed the window and sent the message.<sup>4</sup> Although Facebook's initial foray into social marketing was not successful,<sup>5</sup> several trends strongly indicate that the practice will return in some form, and Facebook is now experimenting with several different approaches.<sup>6</sup> Social network providers face a compelling need to raise revenue, while advertisers crave efficient targeting of referrals from their existing customers. The potential rewards for both parties seem certain to encourage development of new social marketing initiatives.

Interactive tools on the internet—including social networks and other utilities for sharing opinions about products and services—hold great promise for improved communication and enhanced consumer choice. Social marketing can play a positive role in that system. If poorly designed, however, such a program would fail to achieve these benefits or even, in some circumstances, destroy them.

Like celebrity endorsements or cross-branding agreements, social marketing is a form of reputational piggybacking. All three allow a marketer to benefit from an association with someone else's well-known identity. Unlike other arrangements, however, social marketing capita-

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2. As *The New York Times* explained it, "Yesterday, in a twist on word-of-mouth marketing, Facebook began selling ads that display people's profile photos next to commercial messages that are shown to their friends about items they purchased or registered an opinion about." Louise Story, *Facebook Is Marketing Your Brand Preferences (with Your Permission)*, N.Y. TIMES, Nov. 7, 2007, at C5. For more information about the functioning of social networking, see *infra* Part I.B. For more details about Facebook Ads in particular, see *infra* Part I.C.

3. "News Feed is a constantly updating list of stories about actions your friends have taken on Facebook." Facebook, Getting Started Guide, [http://www.facebook.com/help/new\\_user\\_guide.php?guide\\_section=explore\\_facebook](http://www.facebook.com/help/new_user_guide.php?guide_section=explore_facebook) (last visited May 26, 2009).

4. See Amy Morganstern, Comment, *In the Spotlight: Social Network Advertising and the Right of Publicity*, 12 INTELL. PROP. L. BULL. 181, 183–84 (2008); Posting of Benjamin Googins to CA Security Advisor Research Blog, <http://community.ca.com/blogs/securityadvisor/archive/2007/11/29/facebook-socialads-going-too-far.aspx> (Nov. 29, 2007, 14:59).

5. Ellen S. Bass, Comment, *A Right in Search of a Coherent Rationale—Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights*, 42 U.S.F. L. REV. 799, 800 n.5 (2008).

6. See Brad Stone, *Facebook Aims to Extend Its Reach Across the Web*, N.Y. TIMES, Dec. 2, 2008, at B3; Helen Leggatt, *Facebook Tests 3 New Social Ad Formats*, BIZREPORT, Aug. 22, 2008, [http://www.bizreport.com/2008/08/facebook\\_tests\\_3\\_new\\_social\\_ad\\_formats.html](http://www.bizreport.com/2008/08/facebook_tests_3_new_social_ad_formats.html).

lizes on individuals' reputations among their friends, not just in the public at large. In some forms, it does so without authentic consent. And unlike those other examples of reputational piggybacking, the law has yet to develop rules for social marketing.

Potential problems fall into several distinct types: disclosure, endorsement, and identity. First and most clearly, the individual disclosures made in social marketing messages could impinge on personal privacy. Second, some designs for social marketing could cause information quality problems that degrade not only the effectiveness or accuracy of a particular endorsement, but also the entire ecology of online peer recommendation. Finally, social marketing threatens to rob the individual of control over the commercial exploitation of identity and reputation.

At present, social marketing falls through the cracks between several different sources of possible legal regulation—spanning from privacy to trademark and unfair competition to the appropriation tort and rights of publicity to consumer protection regulation. New combinations of technology and business techniques transcend the old categories. A large class action lawsuit filed against Facebook Ads proves this point, because the complaint struggles, with limited success, to fit its claims into the pigeonholes of current law.<sup>7</sup> Constraints within each legal paradigm, though appropriate to the distinct situations from which its rules arise, prevent that law from influencing social marketing design. Modes of enforcement and measurement of damages render some related law largely toothless. And in any case, the existing paradigms were tailored to address only a subset of the concerns—disclosure *or* endorsement *or* identity—and not all three at once.

This Article considers what tools existing law might offer regulators and how these tools fall short, and begins thinking about a future legal approach to social marketing. To be absolutely clear, it examines potential legal responses to problems that may not require legal intervention in the end, depending on how social marketing develops. Though it might be premature to reach final decisions about legal treatment of social marketing, it is time to start evaluating the options. Ultimately, one might reach a normative conclusion that the law should leave social marketing to be regulated by other means—presumably market forces, online social norms, and the technological design of social networking platforms.<sup>8</sup> It is just too early to say for certain. This evaluation, however, requires at least a preliminary inquiry into the nature of possible legal regulation. In the course of that inquiry, we will discover some reasons to be cautious about the optimistic view that problems arising from social marketing will self-correct through other means. At a minimum, this Ar-

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7. See Complaint at 1, *Lane v. Facebook, Inc.*, No. C08 03845 (N.D. Cal. Aug. 12, 2008), available at <http://docs.justia.com/cases/federal/district-courts/california/candce/5:2008cv03845/206085/1/> [hereinafter *Lane* Complaint].

8. See LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE* 86–90, 235–39 (1999).

ticle argues, the law can play a role, even if only a modest one, in crafting and promoting best practices for social marketing. Those rules should center on ensuring the authentic consent of the people featured in social marketing messages.

The analysis unfolds in four Parts. Part I provides necessary background about word of mouth marketing, social networks, social marketing, and the particular example of Facebook Ads. Part II delves into potential disclosure, endorsement, and identity concerns arising from social marketing. Part III turns to existing legal paradigms in the United States that could apply to the problems discussed in Part II. Information privacy law focuses on the revelation of particularly sensitive information. Trademark and unfair competition law concentrates on the accuracy of marketing messages. “Persona rights” law, through the appropriation tort and right of publicity, recognizes an individual interest in controlling the exploitation of one’s own identity. Finally, consumer protection law ensures fair and competitive marketing. All these paradigmatic legal responses have something to say about social marketing, but none aligns fully with the emerging practice.

Part IV reduces the paradigms discussed in Part III to an essential shared component that is relevant to social marketing: consent. The different approaches unite in their implication that, at a minimum, advertisers should secure robust affirmative consent for all endorsements featured in their advertising messages. Part IV suggests some possible standards for judging consent and means of enforcing them. In doing so, it provides an example for adapting existing law to new technology, and it argues that law should play a proactive role in establishing best practices for emerging online trends.

## I. BACKGROUND

### A. *Online Word of Mouth*

“Word of mouth” describes peer-to-peer interactions in which an individual passes on opinions about a product to others.<sup>9</sup> The opinion could be positive or negative, specific or general. Traditionally, as the name suggests, the interactions were simple conversations. Professional marketers view word of mouth as “the most important source of influence in the purchase of household goods, and advice from other consumers about a service exerts a greater influence than all marketer-generated information combined.”<sup>10</sup>

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9. See generally Eric Goldman, *Online Word of Mouth and Its Implications for Trademark Law*, in *TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* 404, 404 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008); Nicholas Negroponte & Pattie Maes, *Electronic Word of Mouth*, *WIRED*, Oct. 1996, at 218.

10. Kineta H. Hung & Stella Yiyan Li, *The Influence of eWOM on Virtual Consumer Communities: Social Capital, Consumer Learning, and Behavioral Outcomes*, 47 *J. ADVERTISING RES.*, 485, 485

Marketers want to encourage positive word-of-mouth messages about their products for reasons of both quantity and quality. Partly, this importance reflects the vast number of interactions involved: one advertising researcher estimates that Americans participate in 3.5 billion word-of-mouth conversations daily and that 49 percent of those who hear word of mouth are “highly likely” to pass that information on to others.<sup>11</sup> Word of mouth also cuts through the clutter of advertising and catches a distractible consumer’s attention.<sup>12</sup> Most fundamentally, however, word of mouth influences consumers’ decisions because they believe it: a recommendation from a disinterested person similar to the consumer is likely to be “immediate, personal, credible, and relevant.”<sup>13</sup> As Facebook founder Mark Zuckerberg noted when rolling out Facebook Ads, an endorsement from an especially familiar source such as a family member, friend, or acquaintance with high credibility—the so-called trusted referral<sup>14</sup>—is pretty much the “Holy Grail” of marketing.<sup>15</sup>

Long before the internet, creative companies developed strategies to encourage positive word-of-mouth messages. The Tupperware party is a classic pre-internet example of selling products through peer connections.<sup>16</sup> Book publishers and record labels distribute copies of their offer-

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(2007); see also Ed Keller, *Unleashing the Power of Word of Mouth: Creating Brand Advocacy to Drive Growth*, 47 J. ADVERTISING RES., 448, 448 (2007) (“The evidence is becoming clear: word of mouth has now become the most important and effective communications channel.”); Word of Mouth Marketing Association, *An Introduction to Word of Mouth Marketing*, at <http://www.womma.org/womm101/> (last visited May 26, 2009) (“Word of mouth marketing empowers people to share their experiences. It’s harnessing the voice of the customer for the good of the brand.”).

11. See Keller, *supra* note 10, at 450–51.

12. Justin Kirby, *How to Manage and Measure the Word of Mouth Revolution*, MARKETINGPROFS, Feb. 28, 2006, <http://www.marketingprofs.com/6/kirby1.asp> (“Acute advertising clutter is making it increasingly difficult for traditional marketing campaigns to break through and capture people’s attention. To avoid the advertising cacophony, buyers turn to their friends for word of mouth recommendations.”).

13. Maria Flores Letelier et al., *Strategies for Viral Marketing*, in KELLOGG ON INTEGRATED MARKETING 90, 90 (Dawn Iacobucci & Bobby Calder eds., 2003); see also LOIS KELLY, *BEYOND BUZZ: THE NEXT GENERATION OF WORD-OF-MOUTH MARKETING* 14 (2007) (“Surveys say that people don’t trust companies and that the only way to win back that trust is through communicating in new ways.”); GEORGE SILVERMAN, *THE SECRETS OF WORD-OF-MOUTH MARKETING* 23–35 (2001) (discussing reasons for the high influence of word of mouth); Donnavieve Smith et al., *Online Peer and Editorial Recommendations, Trust, and Choice in Virtual Markets*, J. INTERACTIVE MARKETING, Summer 2005, at 15, 32 (reporting empirical study demonstrating that online consumers rely on independent recommendations more than they rely on sponsored ads).

14. See Caroline McCarthy, *Facebook Ads Makes a Flashy Debut in New York*, CNET NEWS, Nov. 6, 2007, [http://news.cnet.com/the-social/8301-13577\\_3-9811932-36.html](http://news.cnet.com/the-social/8301-13577_3-9811932-36.html) (referring to Facebook Ads as “rooted in viral trends and ‘trusted referrals’”).

15. See Posting of Dan Farber to Between the Lines, Facebook Beacon Update: No Activities Published Without User Proactively Consenting, <http://blogs.zdnet.com/BTL/?p=7188> (Nov. 29, 2007, 19:05) (reporting Zuckerberg’s remarks); see also Story, *supra* note 2 (“Nothing influences a person more than a recommendation from a trusted friend.” (quoting Zuckerberg)); Press Release, Facebook, Facebook Unveils Facebook Ads (Nov. 6, 2007), <http://www.facebook.com/press/releases.php?p=9176> (“Social actions are powerful because they act as trusted referrals and reinforce the fact that people influence people.” (quoting Zuckerberg)).

16. See Letelier et al., *supra* note 13, at 90. The telephone company MCI used similar personal connections in its successful promotion to give higher discounts for calls among “friends and family” who became MCI customers. Notably, however, AT&T responded with an extensive ad campaign

ings to literary and musical opinion leaders in the hope that these trusted sources enjoy them and discuss them with friends and colleagues, creating positive word of mouth.<sup>17</sup> Vendors offer customers incentives, such as discounts, for referring friends to them.<sup>18</sup> Publicity events or stunts that grab media attention indirectly stimulate conversation among consumers.<sup>19</sup> For example, children's bookstores held elaborate midnight release parties to unveil new Harry Potter books, a trend that has now spread to other titles.<sup>20</sup> Most recently, critics have focused on "buzz marketing," the practice of compensating individuals to insinuate positive word of mouth about a product into their everyday conversations.<sup>21</sup>

Prior to the advent of online communication, however, practical impediments prevented word of mouth from becoming a reliable and consistent aspect of marketing strategy.<sup>22</sup> It was too difficult to catalyze such endorsements or to control their message. There was little available means to identify potential endorsers or the audiences over which they might exert influence.<sup>23</sup> And, crucially for this analysis, all of these tactics required the marketer to persuade people to engage in their own personalized word-of-mouth interactions. The individual discussing a product chose the time, the audience, and the message. Really, then, these forms of word-of-mouth marketing resemble public relations more than advertising.

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attacking the program as an irritating invasion of privacy. See Jennifer L. Givens & James Kyle Lynch, *MCI Communications Corporation: Friends and Family*, in *NEW PRODUCT SUCCESS STORIES* 196, 201-05 (Robert J. Thomas ed., 1995).

17. See, e.g., Esther Margolis, *The Role of Promotion in the Book Publishing Process*, 33 *LIBR. TRENDS* 215, 217-21 (1984).

18. See, e.g., Virgin Mobile, Referral Rewards Program—Virgin Mobile Kickbacks, <http://www.virginmobileusa.com/promos/kickbacks.do> (last visited May 26, 2009) (explaining a program to reward mobile phone customers who refer their friends to the company with sixty free minutes). See generally SILVERMAN, *supra* note 13, at 188-90 (discussing "referral selling programs").

19. See Geoff Williams, *Top 10 Successful Marketing Stunts*, *ENTREPRENEUR*, July 20, 2006, <http://www.entrepreneur.com/marketing/marketingideas/article159484.html>. In a more outlandish example, Ford Motor Company reportedly gives Mustang cars to flight attendants to drive during layovers so that people see "glamorous" women driving the vehicle, internalize that image of the product, and talk about it. See Letelier et al., *supra* note 13, at 91.

20. See, e.g., Carol Memmott, 'Dawn' Breaks Publisher's First-Day Sales Record; 'Twilight' Finale Lands Amid Frenzy, *USA TODAY*, Aug. 4, 2008, at 1D, available at [http://www.usatoday.com/life/books/news/2008-08-03-breaking-dawn-sales\\_N.htm](http://www.usatoday.com/life/books/news/2008-08-03-breaking-dawn-sales_N.htm); see also LEONARD M. LODISH ET AL., *ENTREPRENEURIAL MARKETING* 171 (2001) (discussing lavish launch parties for release of new Microsoft Windows operating system).

21. See Jeanette Kennett & Steve Matthews, *What's the Buzz? Undercover Marketing and the Corruption of Friendship*, 25 *J. APPLIED PHIL.* 2, 3 (2008); see also, e.g., Jackie Crosby, *Bloggers Seeing Red over Target's Little Secret*, *STAR TRIB.*, Dec. 1, 2007, at 1A, available at <http://www.startribune.com/business/11987331.html> (describing an initiative by Target Corp. to sign up "Target Rounders" who received discounts, CDs, and other prizes for making positive comments about Target on Facebook and elsewhere while concealing their affiliation).

22. See ANDY SERNOVITZ, *WORD OF MOUTH MARKETING: HOW SMART COMPANIES GET PEOPLE TALKING* 5 (2006); Dee T. Allsop et al., *Word of Mouth Research: Principles and Applications*, 47 *J. ADVERTISING RES.*, 398, 410 (2007).

23. See Russell Abratt et al., *Role of the Market Maven in Retailing: A General Marketplace Influencer*, 10 *J. BUS. & PSYCHOL.* 31, 53-54 (1995) (discussing, prior to the popularization of the internet, difficulties in identifying those most likely to repeat positive word-of-mouth messages).



The internet revolutionized word of mouth. In particular, the exploding popularity of interactive, user-generated, and cooperative forms of online communication—a phenomenon sometimes referred to as “Web 2.0”—empowers individuals to shape the information environment.<sup>24</sup> The shift to this newer model involves changes in business and social attitudes as much as any technological improvements. Perhaps its maturation as a mainstream phenomenon came when *Time Magazine* named “You”—meaning the millions of contributors to digital resources such as Wikipedia, YouTube, and open source software—as its 2006 “person of the year.”<sup>25</sup>

Eric Goldman has chronicled the wide range and powerful commercial influence of “online word of mouth” enabled by these new communication tools.<sup>26</sup> The internet “amplifies” consumers’ opinions through multiple tools, including blogs and blog comments, reviews at vendor web sites such as Amazon, dedicated rating and review sites such as Angie’s List, and of course (as discussed further below) social networks.<sup>27</sup> Furthermore, when word of mouth occurs, online marketers can more easily monitor and measure peer-to-peer communication about their products.<sup>28</sup>

It is difficult to overstate the gigantic and widespread benefits of these developments. At its broadest, as Yochai Benkler describes in the introduction to his remarkable book about the impact of peer production, *The Wealth of Networks*, “We are in the midst of a technological, economic, and organizational transformation that allows us to renegotiate the terms of freedom, justice, and productivity in the information society.”<sup>29</sup> On a more specific level, the exchange of information and recommendations enabled by new technology allows for the so-called long tail effect: through our shared opinions we help one another find more obscure products that might have eluded our attention before (and which are also more readily available now as a result of e-commerce).<sup>30</sup> “Folksonomies”—taxonomies created socially through individuals tagging things and complex sorting algorithms grouping those tags—allow for a rich new understanding and organization of information.<sup>31</sup> Finally,

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24. See Tim O’Reilly, *What is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, O’REILLY MEDIA, Sept. 30, 2005, <http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html> (explaining the origins of the term “Web 2.0”).

25. Lev Grossman, *Time Person of the Year: You*, TIME, Dec. 25, 2006, at 38, available at <http://www.time.com/time/magazine/article/0,9171,1569514,00.html>.

26. See generally Goldman, *supra* note 9.

27. *Id.* at 411.

28. See SERNOVITZ, *supra* note 22, at 25–26, 167–77.

29. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 25 (2006).

30. CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 98–124 (2006).

31. See DAVID WEINBERGER, *EVERYTHING IS MISCELLANEOUS: THE POWER OF THE NEW DIGITAL DISORDER* 165–68 (2007).

markets function better when individual consumer purchasing decisions rely on improved information, as they do in an environment saturated with accessible and relevant peer opinions. When this Article describes the problems that social marketing might raise, it is essential to keep these benefits in view. This positive transformation must not become the proverbial baby tossed out with her bathwater.

At the same time, just as before the internet, marketers naturally seek to influence the content and distribution of word-of-mouth messages.<sup>32</sup> The growing amount and power of online word of mouth also increases the capacity of vendors to stimulate and sometimes manipulate that discussion. The now-established art of “viral marketing,” for example, promotes brands by associating them with content such as a video or web page that users voluntarily share with one another because it is interesting or humorous in some way; the content also transmits a carefully planned and integrated marketing message.<sup>33</sup> Some marketers, such as Reunion.com, use technology to scrape their users’ e-mail addresses and then send solicitations to those users’ friends that purport to come from the users themselves.<sup>34</sup> Alongside the great promise of online recommendation and word of mouth, more controversial tactics seek to harness it for narrower purposes and perhaps to taint its authenticity.

### B. Social Networks and Online Advertising

Social networks like MySpace and Facebook describe their services as communities that allow users to communicate more efficiently and share information, photos, and interests with their networks of friends, family, and coworkers.<sup>35</sup> Users create profiles that typically contain detailed personal information such as birthdates, religious and political affiliations, education and employment history, and lists of hobbies, interests, and tastes in music, books, and movies.<sup>36</sup> Users then link, by mutual

32. Goldman, *supra* note 9, at 414–29 (discussing marketers’ exercises of trademark rights to control online word of mouth).

33. See, e.g., The Subservient Chicken, <http://www.subservientchicken.com/> (last visited May 26, 2009) (novelty web site sponsored by Burger King to promote a new chicken sandwich where a person in a chicken costume obeys user commands). See generally Daniel Terdiman, *Marketers Feverish over Viral Ads*, WIRED, Mar. 22, 2005, <http://www.wired.com/techbiz/media/news/2005/03/66960> (describing examples of viral marketing). Like the other terms in this space, the definition of viral marketing is unsettled, and some uses of the term overlap with social marketing or word-of-mouth marketing.

34. See David Lazarus, *Too Much Contact at This Reunion*, L.A. TIMES, Apr. 16, 2008, at C1. Such e-mail tactics have been challenged under anti-spam law. See *Hoang v. Reunion.com, Inc.*, No. C-08-3518 MMC, 2008 WL 4542418 (N.D. Cal. Oct. 6, 2008), at \*1; Rules Implementing the CAN-SPAM Act of 2003, 16 C.F.R. § 316 (2008) (defining requirements under federal anti-spam law).

35. See, e.g., Facebook, Facebook Factsheet, <http://www.facebook.com/facebook#/press/info.php?factsheet> (last visited May 26, 2009) (describing the purposes and uses of Facebook); MySpace, About Us, <http://www.myspace.com/index.cfm?fuseaction=misc.aboutus> (last visited May 26, 2009) (describing the purposes and uses of MySpace).

36. See James Grimmelman, *Facebook and the Social Dynamics of Privacy*, 95 IOWA L. REV. (forthcoming 2009), manuscript at 9, available at <http://ssrn.com/abstract=1262822> (Sept. 3, 2008) (“A fully filled-out Facebook profile contains about 40 pieces of recognizably personal information . . .”).

consent, to the profiles of people they know, after which each friend can see the other's profile and can keep track of new postings. Privacy settings allow users to control the information that other users can see, although of course the provider of the social networking platform has access to all the information.<sup>37</sup>

The sheer size of social networking platforms suggests that they should become an important new venue for advertising. As of April 2009, Facebook claimed over 200 million active users worldwide.<sup>38</sup> MySpace still probably has the most users in the United States, with approximately 76 million.<sup>39</sup> These and other social networking sites consistently rank among the most popular web sites in the world.<sup>40</sup> Such eye-popping statistics have raised expectations about the potentially enormous profitability of social networking sites. Rupert Murdoch's News Corporation purchased MySpace for \$580 million in 2005.<sup>41</sup> Facebook is privately held and valuation estimates vary widely, but extrapolations from private investments in the company suggest that it is probably worth several billion dollars.<sup>42</sup>

Social networks have tried to capitalize on their access to a large quantity of user data to help advertisers target their messages (and thereby justify a higher rate).<sup>43</sup> Both MySpace and Facebook allow advertisers to identify specific demographic groups based on attributes such as

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37. See Facebook, Facebook Principles, Privacy Policy (Nov. 26, 2008), <http://www.facebook.com/policy.php>; MySpace, Privacy Policy (Feb. 28, 2008), <http://www.myspace.com/index.cfm?fuseaction=misc.privacy>.

38. Facebook, Statistics, <http://www.facebook.com/press/info.php?statistics> (last visited May 26, 2009). Facebook says over 100 million users log on "at least once each day." *Id.*

39. See Posting of Michael Arrington to TechCrunch, Social Networking: Will Facebook Overtake MySpace in the U.S. in 2009?, <http://www.techcrunch.com/2009/01/13/social-networking-will-facebook-overtake-myspace-in-the-us-in-2009/> (Jan. 13, 2009) (reporting that Facebook has 54.5 million unique U.S. visitors compared to nearly 76 million for MySpace but that Facebook is growing faster than MySpace in the United States).

40. According to the most recent statistics from the ranking service Alexa, Facebook and MySpace are the fourth and ninth most popular sites on the web, respectively. Two other social networking sites popular outside the United States, Hi5 and V Kontakte, also rank in the top thirty. Finally, other sites with social networking features are also high on the list, including YouTube, Blogger, eBay, and the Chinese instant messaging site Qq. See Alexa, Top Sites, <http://www.alexa.com/topsites> (last visited Apr. 17, 2009).

41. *News Corp in \$580m Internet Buy*, BBC NEWS, July 19, 2005, <http://news.bbc.co.uk/1/hi/business/4695495.stm>.

42. One recent estimate places Facebook's market value between \$1.3 billion and \$2.3 billion. Owen Thomas, *Facebook's New Value: \$1.3 Billion?*, VALLEYWAG, Dec. 15, 2008, <http://valleywag.gawker.com/5106128/facebooks-new-value-13-billion>. Needless to say, recent turmoil in the stock market complicates these estimates. Early in 2008, observers routinely cited a \$15 billion figure. See, e.g., Katrina Chan, *How Much Is Facebook Really Worth?*, MOTLEY FOOL, Feb. 14, 2008, <http://www.fool.com/investing/high-growth/2008/02/14/how-much-is-facebook-really-worth.aspx>; Posting of Adam Ostrow to Mashable, *The Facebook Valuation Debate: IPO Highly Unlikely Before 2010*, <http://mashable.com/2008/02/14/facebook-valuation-2/> (Feb. 14, 2008).

43. See Posting of Om Malik to GigaOM, *Why Facebook Connect Matters and Why It Will Win*, <http://gigaom.com/2008/07/23/facebook-connect/> (July 23, 2008, 22:19 PT) ("[Facebook] makes no bones about trying to build a platform that allows it to offer branded advertising in a manner akin to Google's AdSense.").

location, gender, age, political views, relationship status, or other keywords, and to aim advertisements at users who fit these profiles.<sup>44</sup> In doing so, they followed a familiar and successful blueprint for internet advertising.<sup>45</sup> Most advertising-driven sites have developed increasingly sophisticated mechanisms to target messages based on such individual characteristics. Google illustrates this progression. The company famously began selling paid search advertisements, which allowed for the placement of advertisements relevant to precisely the user's objective, based on the search query entered.<sup>46</sup> Then, in 2004, Google began targeting advertisements based on the content of messages sent through its Gmail service.<sup>47</sup> Most recently, Google has encouraged users of its many services to register for accounts that aggregate information about an individual's activities across all the company's platforms, including maps, searches, blogs, e-mail, word processing, and now even telephone service.<sup>48</sup>

So far, however, the extraordinary size of social networks and their access to users' personal information have not translated into revenue that justifies huge market valuations.<sup>49</sup> Display ads on MySpace, Facebook, and the social networking site Bebo sell for only thirteen cents for

44. See Caroline McCarthy, *MySpace Gets 'Hyper' with Targeted Ads*, CNET NEWS, Nov. 5, 2007, [http://news.cnet.com/8301-13577\\_3-9810771-36.html](http://news.cnet.com/8301-13577_3-9810771-36.html) (reporting MySpace's announcement of advertising program called "'HyperTargeting', which uses the information that members put in their profiles to serve up ads they might actually want to see"); Facebook, Facebook Advertising, <http://www.facebook.com/advertising/> (last visited May 26, 2009) (encouraging advertisers to "[r]each your exact audience and connect real customers to your business").

45. See NIR VULKAN, *THE ECONOMICS OF E-COMMERCE* 25 (2003).

46. JOHN BATTELLE, *THE SEARCH* 123-24 (2005).

47. *Id.* at 194.

48. See Miguel Helft, *Google's Free Phone Manager Could Threaten a Variety of Services*, N.Y. TIMES, Mar. 12, 2009, at B9, available at <http://www.nytimes.com/2009/03/12/technology/internet/12google.html>; Rex Crum, *No End in Sight for Microsoft-Google War*, MARKETWATCH, Oct. 15, 2008, [http://www.marketwatch.com/news/story/no-end-sight-microsoft-google-war/story.aspx?guid=%7BA5D6279D-40A9-4AEB-9835-C003D296A841%7D&dist=msr\\_2](http://www.marketwatch.com/news/story/no-end-sight-microsoft-google-war/story.aspx?guid=%7BA5D6279D-40A9-4AEB-9835-C003D296A841%7D&dist=msr_2) (describing Google's business efforts to become a centralized place to find information, so that "Google is able to collect more information directly from consumers and tailor its advertising efforts").

49. See Chan, *supra* note 42; Peter Kafka, *News Corp: Selling Ads for MySpace Is Hard Work!*, BUS. INSIDER, May 7, 2008, [http://www.alleyinsider.com/2008/5/news\\_corp\\_don\\_t\\_worry\\_about\\_revenue\\_myspace\\_is\\_doing\\_great](http://www.alleyinsider.com/2008/5/news_corp_don_t_worry_about_revenue_myspace_is_doing_great); Ostrow, *supra* note 42. Even Google, which entered an advertising partnership with MySpace in 2006, has been unable to solve the puzzle of extracting advertising revenue from social networks. See Posting of Michael Arrington to TechCrunch, *Fox Said to Be Exploring Termination of Google Advertising Deal*, <http://www.techcrunch.com/2008/02/25/fox-exploring-termination-of-google-advertising-deal/> (Feb. 25, 2008). Google founder Sergey Brin summed up the slow progress:

I don't think we have the killer best way to advertise and monetize the social networks yet. We're running lots of experiments. We had some significant improvements but as I said, some of the things we were working on in Q4 didn't really pan out and there were some disappointments there.

Google, 2007 Q4 Earnings Conference Call (Jan. 31, 2008), <http://investor.google.com/webcast.html> (follow respective Webcast hyperlink) (transcript available at <http://seekingalpha.com/article/62591-google-q4-2007-earnings-call-transcript>).

every thousand times the ad is served (CPM, or cost per thousand).<sup>50</sup> By comparison, big traditional media companies such as CBS and NBC charge CPM rates of between fifty and seventy-five *dollars* on affiliated sites.<sup>51</sup> Many observers believe that targeted advertising has worked poorly in social networking contexts because it diverges from a visitor's purpose of interacting with friends; in sharp contrast, Google presents ads precisely when someone is searching for a related item.<sup>52</sup>

Given the enormous market pressure to improve these revenue numbers, it seems inevitable that social network sites will turn to social marketing as a means to improve the effectiveness of the advertising they carry. The arrival of an economic recession might slow down what previously appeared to be an imminent shift, because advertisers may conserve their budgets and take fewer risks.<sup>53</sup> Yet the potential of social marketing and the weak performance of other efforts to monetize social networking surely point in the same direction. Put another way: if your revenue-starved business possessed advertisers' "Holy Grail," wouldn't you give them a sip? The next section discusses social marketing and Facebook's initial foray into the field.

### C. Social Marketing and the Example of Facebook Ads

Because the concept is still new, this Article broadly defines the term "social marketing" as any technique that sends information about an ordinary individual's interaction with a product to that person's friends and acquaintances in order to stimulate demand for that product. Social marketing relies on the existing relationship between customers and their friends as a conduit for an advertising message.

To oversimplify somewhat,<sup>54</sup> there can be two basic structures for social marketing, depicted by the diagrams below.<sup>55</sup> Under the first structure—which was the only kind realistically possible before the rise of new

50. Kevin Kelleher, *MySpace and Friends Need to Make Money. And Fast.*, WIRED, Mar. 24, 2008, [http://www.wired.com/techbiz/it/magazine/16-04/bz\\_socialnetworks](http://www.wired.com/techbiz/it/magazine/16-04/bz_socialnetworks) ("[O]ne social networking metric is distinctly underwhelming: the one with a dollar sign."). One exception is the social networking site LinkedIn, which can charge much higher CPM rates in part because it is aimed at professionals. *Id.*

51. *Id.*

52. See, e.g., Bill Houghton, *Social Networks' Failed Advertising Strategy*, SEMINAL, Apr. 15, 2008, <http://www.theseminal.com/2008/04/15/social-networks-failed-advertising-strategy/>; Kafka, *supra* note 49; Scott Karp, *Why Traditional Advertising Formats Fail on the Web*, PUBLISHING 2.0, May 24, 2008, <http://publishing2.com/2008/05/24/why-traditional-advertising-formats-fail-on-the-web/>.

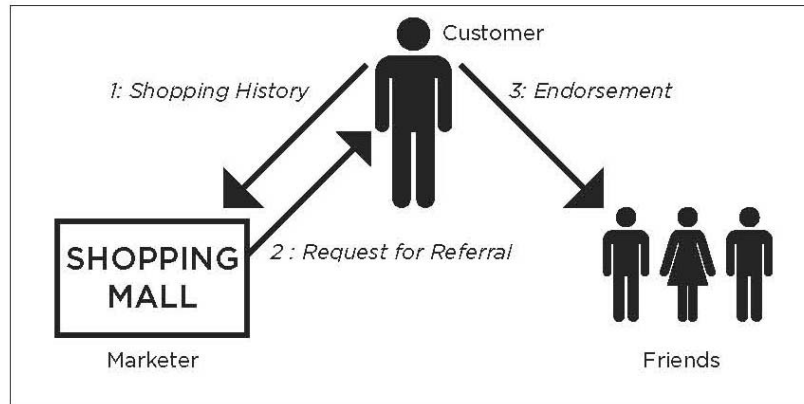
53. See Emily Steel, *Marketers Cut Back on Digital Media; Budgets for Videogames, Cellphones, Other New Formats Fall Victim to Downturn*, WALL ST. J., Oct. 15, 2008, at B6 ("Financial woes likely will derail the growth of a slew of advertising technologies that until recently were being hailed as the next big thing."). But see Story, *supra* note 2 (reporting, in 2007, that "[e]xecutives from consumer brand companies attending the [Facebook Ads launch] announcement said they viewed ads on social networking sites as a priority in their ad spending").

54. For somewhat more complex variations on these structures, see *infra* notes 276–79 and accompanying text.

55. Many thanks to Mike Minehart for assistance with these diagrams.

social networking technology—a vendor suggested or encouraged the customer to tell friends about a product. This is what happens, for example, when marketers offer discounts or other incentives for referring friends to the business.

FIGURE 1  
SOCIAL MARKETING VIA SUGGESTION

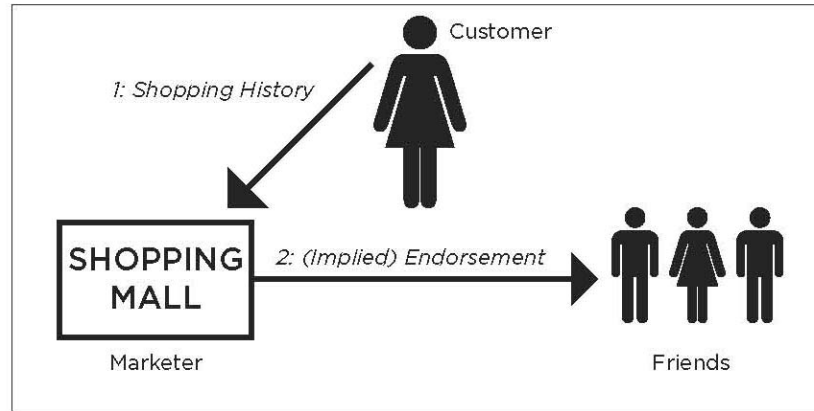


This structure exists online as well. Most new online interaction tools such as social networks or microblogging rely on purely voluntary communication. Before transmitting personal information such as a status update on Facebook or a tweet on Twitter, a user must compose the text and then push the button to send it. Users choose the content and timing of these communications. Much social marketing falls into the same category, as depicted in Figure 1. If a vendor encourages customers to post positive reviews or to feature new purchases in a social networking profile, then users divulge information intentionally. Figure 1 also represents the flow of information in viral marketing, because the customer, not the marketer, chooses to forward communication to friends.

Some see this structure as a shortcoming. One prominent analyst called it “distorted” because “[e]ndorsements are now passed from trusted customers to prospects, not directly from the brands themselves.”<sup>56</sup> In a Web 2.0 environment, however, marketers can overcome this “distortion.” If they can identify the customer’s friends without assistance from the customer, then they can send a message to those friends directly. Marketers can then tell the friends about the customer’s interactions with the product such as browsing and buying. Figure 2 depicts this information flow.

56. Laura Petrecca & Jon Swartz, *Marketers to Capitalize on Facebook Connections*, USA TODAY, Nov. 7, 2007, at 3B (quoting Jeremiah Owyang, an analyst at Forrester Research).

FIGURE 2  
AUTOMATED DIRECT SOCIAL MARKETING



Social marketing structured as shown in Figure 2 “cuts out the middleman”—although the middleman here happens to be the subject of the personal information and the one supposedly providing an endorsement of the product. Marketers using this method can overcome reluctance or inertia on the part of customers to forward word-of-mouth messages. They gain control over the precise content and appearance of the message. Marketers can also provide a link within the message to entice recipients into trying their wares. And they can track the results with precision.

Social marketing appeals to marketers for a range of reasons. Marketers can improve the targeting of a message to consumers likely to buy a product (because friends are more likely to have similar tastes). They can attract the recipient’s attention more effectively (because messages from friends may stand out amid marketing clutter). They can overcome the problem that ads are unrelated to a user’s purpose in visiting a social networking site (because the messages embed advertising within that social interaction). Perhaps most important, social marketing increases the persuasiveness of the message (because piggybacking on the credibility of the recipient’s friend turns the message into a trusted referral or something close to one; it implicitly functions as an endorsement of the product).

The best concrete example of social marketing so far has been the initiative by Facebook, particularly its Beacon feature.<sup>57</sup> This Article

57. Facebook has changed the terminology it uses to refer to its social marketing and advertising programs several times, which can cause confusion. This Article adheres to the original language,

uses Facebook Ads as an example, even though techniques will evolve in the future and this specific program does not fully delimit the boundaries of social marketing.

The company unveiled Facebook Ads in November 2007 with two components.<sup>58</sup> One of them, Social Ads, allowed businesses to create pages within Facebook, much as an individual would. When a user interacts with an advertiser's page, such as "becoming a fan" of a particular band, publication, politician, or product, a story is transmitted to that user's Facebook friends alerting them and inviting them to "become a fan" as well.<sup>59</sup> Because it involved only activities within the Facebook environment, the Social Ads initiative was not very controversial. The only purpose of "becoming a fan" within Facebook is to add that designation to your profile, so it represents an intentional public endorsement. Social Ads thus fall within Figure 1.

Beacon was different. It sent messages within Facebook about a user's actions on sites *outside of Facebook*. So, to take Facebook's own example of how the program worked: Meaghan, an average Facebook user, might rate a movie at the website of Blockbuster Video.<sup>60</sup> The Blockbuster site would then send a query to Facebook's servers and find out whether Meaghan was logged into Facebook.<sup>61</sup> If so, a small pop-up window would appear on the bottom right of Meaghan's screen notifying her that Blockbuster would send a message to the News Feeds of her Facebook friends.<sup>62</sup> The corner of the pop-up window included a place to click "No Thanks." This notification was unobtrusive and disappeared quickly, however, and many users did not realize the disclosure was made until after the fact.<sup>63</sup> Unless the user opted out, Blockbuster sent a promotional message to the News Feeds of all Meaghan's Facebook friends with a statement such as, "Meaghan gave a 4-star rating to the movie *Top Gun*," alongside the photo from Meaghan's Facebook profile, a Blockbuster advertising message, and a hyperlink that would allow the recipient to rent *Top Gun* from Blockbuster.<sup>64</sup>

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which referred to "Facebook Ads" as the overarching social marketing initiative and to "Beacon" and "Social Ads" as its two components.

58. Press Release, *supra* note 15.

59. *Id.*

60. See Story, *supra* note 2 (using Blockbuster example); Googins, *supra* note 4 (same).

61. For an excellent blog post explaining Beacon's code and how it operated, see Posting of Jay Goldman to Radiant Core, *Deconstructing Facebook Beacon JavaScript*, <http://www.radiantcore.com/blog/archives/23/11/2007/deconstructingfacebookbeaconjavascript> (Nov. 23, 2007, 17:00). I am also grateful to Jesse Cheng for his assistance in understanding the mechanics of Beacon.

62. *Id.*

63. See Morganstern, *supra* note 4, at 183–84; Christopher Caldwell, *Intimate Shopping*, N.Y. TIMES, Dec. 23, 2007, (Magazine), at 13. When a user returned to the Facebook page, that site would notify the user that "Blockbuster.com is sending a story to your profile," but this message did not include another opportunity to opt out. See Posting of Charlene Li to Forrester Research Groundswell Blog, <http://blogs.forrester.com/groundswell/2007/11/close-encounter.html> (Nov. 21, 2007, 14:46) (showing a screenshot).

64. A screenshot illustrating this sample message is on file with author.



When Facebook launched Beacon, it claimed partnerships with sixty advertisers including not only Blockbuster but also CBS, Chase, Coca-Cola, Microsoft, Sony Pictures Television, and Verizon Wireless.<sup>65</sup> The press release announcing the program highlighted advertising partners' enthusiasm for Beacon and its ability to add a level of "trust" to advertisements.<sup>66</sup> Beacon allows advertisers to harness word of mouth and "turn a user's preferences into an endorsement with commercial value."<sup>67</sup> Zuckerberg, the notoriously hyperbolic founder of Facebook, called this system "a completely new way of advertising online" and declared: "For the last hundred years media has been pushed out to people, but now marketers are going to be a part of the conversation."<sup>68</sup>

Users felt less enthusiastic about Beacon. They complained that the system often revealed personal information to a user's friends without the user's knowledge or consent.<sup>69</sup> The political organization MoveOn.org created a Facebook group called "Facebook: Stop Invading My Privacy."<sup>70</sup> More than 30,000 members joined in the first week,<sup>71</sup> and eventually the group's page reported that it had around 80,000 members.<sup>72</sup> As the controversy grew, some of the original Beacon partners put a hold on their participation, though they did not back out completely.<sup>73</sup>

A month later, Facebook responded to the backlash by apologizing and reconfiguring Beacon.<sup>74</sup> In the new version, rather than sending messages to Facebook automatically, a window appears on the screen asking permission to "tell your friends in Facebook" about an action tak-

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65. See Press Release, *supra* note 15.

66. Press Release, Facebook, Leading Websites Offer Facebook Beacon for Social Distribution (Nov. 6, 2007), <http://www.facebook.com/press/releases.php?p=9166> ("In a marketplace where trust and reputation are crucial to success, giving sellers the ability to easily alert their network of friends—the people who already know and trust them—to an item for sale has the potential to be a powerful tool.").

67. Ellen Nakashima, *Feeling Betrayed, Facebook Users Force Site to Honor Their Privacy*, WASH. POST, Nov. 30, 2007, at A1.

68. Press Release, *supra* note 15.

69. See, e.g., Caldwell, *supra* note 63; Ellen Lee, *Facebook Apologizes for New Ad System*, S.F. CHRONICLE, Dec. 6, 2007, at C1; Nakashima, *supra* note 67; Louise Story & Brad Stone, *Facebook Retreats on Online Tracking*, N.Y. TIMES, Nov. 30, 2007, at C1; Jessica Guynn, *Saving Face over Facebook Faux Pas*, L.A. TIMES, Dec. 6, 2007, <http://articles.latimes.com/2007/dec/06/business/fi-facebook6>.

70. Facebook, Petition: Facebook, Stop Invading My Privacy!, <http://www.facebook.com/group.php?gid=5930262681> (last visited May 26, 2009) [hereinafter MoveOn Petition]; Jessica Guynn, *Latest Target of MoveOn: Facebook*, L.A. TIMES, Nov. 21, 2007, <http://articles.latimes.com/2007/nov/21/business/fi-facebook21>.

71. Steven Levy, *Do Real Friends Share Ads?*, NEWSWEEK, Dec. 10, 2007, at 30.

72. MoveOn Petition, *supra* note 70.

73. Lee, *supra* note 69; Guynn, *supra* note 69; Posting of Louise Story to New York Times Bits Blog, *Coke Is Holding Off on Sipping Facebook's Beacon*, <http://bits.blogs.nytimes.com/2007/11/30/coke-is-holding-off-on-sipping-facebooks-beacon/> (Nov. 30, 2007, 15:53).

74. Posting of Mark Zuckerberg to The Facebook Blog, <http://blog.facebook.com/blog.php?post=7584397130> (Dec. 5, 2007, 9:00). Just a week earlier, Facebook executives had defended Facebook Ads and insisted that they would not offer a blanket opt-out to users. Story & Stone, *supra* note 69.

en on a partner site. Without that authorization, the site does not send any social marketing message. In other words, the company changed the program's structure from the one depicted in Figure 2 to that in Figure 1—a more old-fashioned model where a marketer suggests that a customer transmit word of mouth to friends, but the decision to initiate that message remains with the individual and not the marketer. Facebook also overhauled the site's privacy settings so that users could opt out of Social Ads and Beacon altogether.

Despite the failure of Facebook Ads to raise revenue, intensive discussion continues within the industry about the promise of social marketing.<sup>75</sup> Facebook itself is preparing to “reboot” the concept of social marketing with a new feature, which it began rolling out in December 2008, called Facebook Connect.<sup>76</sup> The feature allows users to log in at other sites using their Facebook identity and to transport their social network with them to the external site. MySpace, Google, and other major players are developing similar identity management initiatives that will compete in this space, giving birth to the next generation of social marketing.<sup>77</sup> This evolution underscores the fact that Facebook Ads were only an early and somewhat crude attempt to engage in social marketing.<sup>78</sup> The analysis in the remainder of this Article anticipates the eventual emergence of new social marketing endeavors as nearly inevitable and considers the shape of an appropriate legal response.

75. See, e.g., Posting of Justin Smith to Inside Facebook, Facebook's New Social Video Ad Unit is an Engagement Magnet, <http://www.insidefacebook.com/2008/08/14/facebooks-new-social-video-ad-unit-is-an-engagement-magnet/> (Aug. 14, 2008); Posting of Meghan Keane to Wired Epicenter, Facebook's New Social Ads Turn Your Friends into Marketers, <http://blog.wired.com/business/2008/08/your-facebook-n.html> (Aug. 20, 2008, 16:38); Posting of Will M to All Facebook, Facebook's Tim Kendall on the Future of Monetization, <http://www.allfacebook.com/2008/08/facebooks-tim-kendall-on-future-of-monetization/> (Aug. 20, 2008, 10:52).

76. See Stone, *supra* note 6; Posting of Mark Zuckerberg to Facebook Blog, *Facebook Across the Web*, <http://blog.facebook.com/blog.php?post=41735647130> (Dec. 4, 2008, 14:18); see also Leggatt, *supra* note 6 (discussing Facebook's other more recent social marketing efforts); Posting of Dave Morin to Facebook Developer, *Announcing Facebook Connect*, <http://developers.facebook.com/news.php?blog=1&story=108> (May 9, 2008 12:32) (previewing the soft launch of Facebook Connect).

77. MySpace Developer Platform, Category: MySpaceID, <http://wiki.developer.myspace.com/index.php?title=Category:MySpaceID> (last visited May 26, 2009); Google Code, Open Social, <http://code.google.com/apis/opensocial/> (last visited May 26, 2009); see Stone, *supra* note 6; *MySpace Embraces Data Portability, Partners with Yahoo, Ebay, and Twitter*, TECHCRUNCH, May 8, 2008, <http://www.techcrunch.com/2008/05/08/myspace-embraces-data-portability-partners-with-yahoo-ebay-and-twitter/>.

78. The well-known technology blogger Om Malik characterized Facebook Connect as “like Facebook Beacon—minus the marketing sleaziness.” Posting of Om Malik to GigaOM, Social Web's Big Question: Federate or Aggregate?, <http://gigaom.com/2008/11/30/social-webs-big-question-federate-or-aggregate/> (Nov. 20, 2008, 22:08 PT).

## II. POTENTIAL CONCERNS ABOUT SOCIAL MARKETING

### A. *Disclosure Concerns*

Probably the most evident concern raised by social marketing is the potential threat of unauthorized and undesired disclosures of particular pieces of personal information. Social marketing depends on a flow of information from the customer featured in an endorsement message to that customer's friends. The ads function only by revealing that the endorser bought a certain shirt, browsed on a certain page, or signed up to receive news about a certain musician. But some people might not want information about their browsing and shopping shared automatically with a large number of others, and particularly with their friends.

The controversy surrounding the introduction of Facebook Ads focused almost entirely on such disclosure concerns. Both Facebook and opponents of Beacon framed the pertinent issues as "privacy."<sup>79</sup> Media coverage also highlighted unwanted disclosures of personal information.<sup>80</sup> Similarly, legal claims against Beacon have all taken this approach thus far. Two class action lawsuits filed in the United States center on the program's allegedly unlawful disclosure of personal information, based on a variety of theories grounded in data privacy law.<sup>81</sup> A regulatory complaint against Facebook in Canada likewise focuses on the site's collection and disclosure of personal information, purportedly in violation of that nation's stringent data protection law.<sup>82</sup>

Many users found it "creepy" that Facebook transmitted information in the News Feed without asking for specific permission first.<sup>83</sup> But just because a disclosure was unintended does not necessarily make it problematic, much less a cognizable legal injury. Unpacking exactly what led to feelings of "creepiness" about Beacon helps define more clearly what serious disclosure concerns might arise from social marketing, as opposed to mere discomfort or uncertainty. I see four distinct (though overlapping) concerns about disclosure.

First, some categories of information enjoy special sensitivity across the board. As we shall see, most privacy law, and especially U.S. law, recognizes far stronger rights against disclosures within defined classes of

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79. Press Release, *supra* note 15; MoveOn Petition, *supra* note 70.

80. See sources cited *supra* note 69.

81. *Lane* Complaint, *supra* note 7, at 1; Amended Complaint, *Harris v. Blockbuster, Inc.*, No. 2:08-cv-00155-DF (E.D. Tex. June 3, 2008) [hereinafter *Harris* Complaint] (suing Blockbuster only).

82. See Complaint of Phillippa Lawson et al. to Can. Privacy Comm'n (May 30, 2008), [http://www.cippic.ca/uploads/CIPPICFacebookComplaint\\_29May08.pdf](http://www.cippic.ca/uploads/CIPPICFacebookComplaint_29May08.pdf) [hereinafter *Lawson* Complaint].

83. See, e.g., Googins, *supra* note 4; IdeaLog, Facebook Super Creeped Me out Tonight, <http://www.idealogs.com/2008/07/facebook-super.html> (July 16, 2008, 1:18); Posting of Adam Ostrow to Mashable, Report: Facebook Might Make Beacon Less Creepy, <http://mashable.com/2007/11/29/facebook-beacon/> (Nov. 29, 2007); Posting of David Weinberger to Huffington Post, Facebook's Privacy Default, [http://www.huffingtonpost.com/david-weinberger/facebook-privacy-default\\_b\\_72687.html](http://www.huffingtonpost.com/david-weinberger/facebook-privacy-default_b_72687.html) (Nov. 14, 2007, 17:48 EST) ("I find myself creeped out by this system . . .").

particularly intimate topics.<sup>84</sup> These presumptively private topics include medical, sexual, financial, or political matters. In principle, future social marketing initiatives could transmit a user's implied endorsement of anti-diarrhea medicine, condoms, emergency mortgage counseling, or an anarchist group. Though such disclosures might seem the most obviously and seriously troubling, in reality, they are extremely unlikely. No Beacon partner sites focused on such sensitive topics. Moreover, this sales technique appears ill-suited to extremely personal information. Companies that collect extra-sensitive data tread very carefully to avoid alarming customers, regardless of whether they are legally required to do so.<sup>85</sup>

A second and related concern is that social marketing might impinge on what Neil Richards has called "intellectual privacy."<sup>86</sup> Automatically publicizing a user's choice of books, music, films, or web sites (and especially those a user has merely browsed) would constrain the capacity to explore ideas freely.<sup>87</sup> Introducing its anti-Beacon petition, MoveOn.org invoked the specter of disclosures that could invade one's thought processes: "When you buy a book or movie online—or make a political contribution—do you want that information automatically shared with the world on Facebook? Most people would call that a huge invasion of privacy."<sup>88</sup> In contrast to the inherently personal topics noted above, some original Beacon partner sites related to the development of ideas or self-expression, including those affiliated with Blockbuster, CBS, Fandango, and *The New York Times*.<sup>89</sup> This concern regarding intellectual privacy appears more realistic than the concern for extremely intimate information.

Third, in some circumstances users may not want to reveal certain pieces of personal information to particular acquaintances. Messages broadcast to all friends undermine fine-grained individual choices. For

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84. See Joel R. Reidenberg, *Setting Standards for Fair Information Practice in the U.S. Private Sector*, 80 IOWA L. REV. 497, 515 (1995).

85. As an extreme example, consider the privacy policy for Bedpost, a site where users can track information about their sexual encounters:

We understand that this is potentially the most personal of data-sets you will ever keep outside of financial records. The records you save here will never be viewed by us nor will it ever be sold or provided to a third party. This information is permanently delete-able by you, should you deem it necessary.

See Bedpost, Privacy Policy, <http://bedposted.com/> (last visited May 26, 2009); see also, e.g., Google Health, Google Health Privacy Policy, <http://www.google.com/intl/en-US/health/privacy.html> (last visited May 26, 2009) (describing similar rules for sharing and deleting medical information).

86. Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 387 (2008) (discussing First Amendment implications of "intellectual privacy—the protection of records of our intellectual activities").

87. Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management in Cyberspace"*, 28 CONN. L. REV. 981, 1003–19 (1996); Richards, *supra* note 86, at 434–37.

88. MoveOn.org, Facebook Must Respect Privacy, <http://www.civic.moveon.org/facebookprivacy/> (last visited May 26, 2009). As to privacy of political contributions, see generally William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1 (2003).

89. See Press Release, *supra* note 66 (listing Beacon partner sites).

example, some of the best-publicized negative response to Beacon arose from ruined surprise gifts; because the program was rolled out in November, many users were doing their Christmas shopping, and Facebook Ads revealed the purchase of presents to their intended recipients.<sup>90</sup> More generally, someone who wears sweater sets by day and combat boots by night may prefer these two aspects of her identity to remain separate. What if she only uses a social network professionally but social marketing techniques send messages related to her nightlife? Or college students and other young people may fail to recognize how many people beyond their peers can see their profile on a site like Facebook.<sup>91</sup> Even information about seemingly mundane purchases such as clothing can breach these separations. As one commenter objected on the MoveOn protest page, “I don’t know about everyone else, but I’m not looking forward to the day where I have to constantly be on alert as to if what I’m doing online is being shared with all my family, friends, and co-workers.”<sup>92</sup> This version of the disclosure concern also appears justified. And although overly broad disclosures will cause no more than inconvenience or discomfort in many situations, they could result in significant privacy harms.

Finally, beyond these specific examples of especially sensitive topics, “intellectual” content, and unwanted disclosures to particular individuals, the very possibility of unintentional disclosure can cause more pervasive problems. Jerry Kang compared earlier forms of online tracking to being followed through the mall by a private detective taking notes.<sup>93</sup> When Facebook first unveiled Beacon, David Weinberger offered a similar metaphor of a couple talking quietly as they walked down the street, only to discover recordings of their conversation posted on the internet.<sup>94</sup> In both instances, semipublic communication is removed from its original context and placed in a much more widely available setting. In other words, regardless of the particular nature of the information transferred, the pre-reform Beacon violated implicit social norms about

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90. See, e.g., Caldwell, *supra* note 63, at 13; Nakashima, *supra* note 67; Tom Regan, *Facebook Faces Up to Privacy Concerns—Again*, CHRISTIAN SCI. MONITOR, Dec. 12, 2007, at 16; Story & Stone, *supra* note 69; Guynn, *supra* note 69.

91. See Grimmelmman, *supra* note 36, manuscript at 20–22.

92. Posting of Ansley to Facebook, Facebook, Stop Invading My Privacy!, This Group is Awesome! Good Call, MoveOn.org, <http://www.facebook.com/topic.php?uid=5930262681&topic=3630> (Nov. 22, 2007, 23:31).

93. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1198–99 (1998); see also Caldwell, *supra* note 63, at 13 (“We used to live in a world where if someone secretly followed you from store to store, recording your purchases, it would be considered impolite and even weird. Today, such an option can be redefined [by Facebook Beacon] as ‘default’ behavior.”).

94. Posting of David Weinberger to Huffington Post, *supra* note 83 (“The couple would feel violated not only because their ‘information’—their conversation—was published but because they had the expectation that even though their sound waves were physically available to anyone walking on the street who cared to listen, norms prevent us from doing so. . . . Our expectation is that our transactions at one site are neither to be made known to other sites nor made known to our friends.”).

disclosure and aggregation of personal information.<sup>95</sup> By flouting those norms, Beacon contributes to a pervasive sense of surveillance and its attendant discomfort and constraint.<sup>96</sup> As sociologists have long understood, we rely on the presumptive privacy of certain activities, both online and off, to give us “down time” from living on display.<sup>97</sup> Users who are unsure whether activities will be reported to their friends can be expected to act differently, leading to some of the same pernicious self-censorship effects of monitoring that make intellectual privacy important.<sup>98</sup>

One standard response to all of these concerns stresses that only an endorser’s chosen friends receive the disclosures from social marketing.<sup>99</sup> According to its defenders, social marketing inherently limits the audience to one defined by and known to the endorsers, eliminating or at least reducing drastically the privacy impact of disclosures. This argument is backwards, however. Far from reducing privacy concerns, existing relationships between the endorser and the recipients of social marketing heighten the privacy salience of disclosures in the ads.

We should and do recognize some infringement of privacy interests arising from disclosures made to complete strangers.<sup>100</sup> But both law and social conventions recognize a higher—not a lower—degree of privacy in communications with friends and family members.<sup>101</sup> As Charles Fried has explained, unwanted disclosures to friends interfere with selective revelation, the process of increasing intimacy gradually by disclosing pieces of personal information over time.<sup>102</sup>

Furthermore, as noted above, not all “friends” are created equal, online or in real life. Any individual’s social life actually consists of interlocking groups with different norms, roles, and relationships that re-

95. See Grimmelmann, *supra* note 36, manuscript at 24–25; Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004).

96. See OSCAR GANDY, *THE PANOPTIC SORT* (1993); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1647–67 (1999).

97. See, e.g., ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); ALAN WESTIN, *PRIVACY AND FREEDOM* 23–51 (1967).

98. See Richards, *supra* note 86, at 425 (“Intellectual privacy thus permits us to experiment with ideas in relative seclusion without having to disclose them before we have developed them, considered them, and decided whether to adopt them as our own.”); Schwartz, *supra* note 96, at 1647 (summarizing ways that concern created by pervasive internet monitoring will constrain democratic deliberation, self-governance, and related values).

99. See *Privacy Implications of Online Advertising: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 110th Cong. 3–5 (2008) [hereinafter Kelly Testimony] (testimony of Chris Kelly, Chief Privacy Officer, Facebook) [http://commerce.senate.gov/public/\\_files/ChrisKellyFacebookOnlinePrivacyTestimony.pdf](http://commerce.senate.gov/public/_files/ChrisKellyFacebookOnlinePrivacyTestimony.pdf) (“Social Ads are only presented to confirmed friends as opposed to the world at large . . .”); Anick Jesdanun & Rachel Metz, *Facebook Users Raise Privacy Complaints over New Tracking*, USA TODAY, Nov. 22, 2007, [http://www.usatoday.com/tech/news/internetprivacy/2007-11-22-facebook-tracking\\_N.htm](http://www.usatoday.com/tech/news/internetprivacy/2007-11-22-facebook-tracking_N.htm) (“Information is shared with a small selection of a user’s trusted network of friends, not publicly on the Web or with all Facebook users.”).

100. See Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245, 245, 249–50 (2008).

101. See *id.* at 251.

102. See Charles Fried, *Privacy*, 77 YALE L.J. 475, 489–90 (1968).

sult in different levels of intimacy and disclosure as well as different expectations of discretion or privacy.<sup>103</sup> As any user of social networking sites would testify, it can be awkward to reject a request to become friends. Thus, social networks of supposed “friends” are also populated by relatives, professional colleagues, neighbors, former classmates or co-workers, and many casual acquaintances.<sup>104</sup> All the people in these undifferentiated groups have not formed identical relationships in real space. Yet most online social networking sites have been built for all-or-nothing sharing. Facebook and MySpace have features that allow users to segment their friends into different lists for different purposes,<sup>105</sup> but it is not clear if these subnetworks would interact with social marketing. After all, marketers want to reach every potential customer whom the endorsement can influence, not just a portion of them.

Another reply to disclosure concerns suggests that users of social networks, especially younger users, simply have particularly relaxed preferences about information privacy.<sup>106</sup> Those who do not like sharing personal information, the argument runs, should just abstain from online social networking. Even if it were true at one time, the caricature of social network users as a young exhibitionist fringe no longer reflects reality. First, the number of users involved places online social networks firmly in the mainstream: one-third of adult internet users and two-thirds of online teenagers have profiles on social networking sites.<sup>107</sup> Because adults account for a much larger proportion of the population, they actually compose the majority of social network users.<sup>108</sup> In addition, empirical research demonstrates that the majority of both older and younger users consciously protect their privacy in their use of social networks.<sup>109</sup> Finally, as social media functionality spreads rapidly to oth-

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103. See Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 948–59 (2005).

104. See Posting of Ansley to Facebook, *supra* note 92; Posting of Amanda Lenhart to Pew-Internet, Facebook Connect and a Failure to Understand Online Identity Management, <http://www.pewinternet.org/PPF/p/1525/pipcomments.asp> (Dec. 2, 2008 11:31) (“In the offline world, we don’t present ourselves in the same way to all people in our lives—we show different sides of ourselves to our mothers, our friends, our employers.”).

105. See Posting of Justin Smith to Inside Facebook, Facebook Friend Lists Let You Manage Your “Friends” More Effectively, <http://www.insidefacebook.com/2007/12/19/facebook-friend-lists-let-you-manage-your-friends-more-effectively/> (Dec. 17, 2007); MySpace.com, Frequently Asked Questions, <http://faq.myspace.com/> (search “Privacy” them follow “1. Control Privacy on MySpace profile 2.0” hyperlink) (last visited May 26, 2009).

106. As *The New York Times* quoted one observer, “Isn’t this community getting a little hypocritical?,” said Chad Stoller, director of emerging platforms at Organic, a digital advertising agency. “Now, all of a sudden, they don’t want to share something?” Story & Stone, *supra* note 69.

107. Memorandum from Amanda Lenhart, Senior Research Specialist, Pew Internet & American Life Project, Adults and Social Network Websites, at 1 (Jan. 14, 2009), [http://www.pewinternet.org/~media/Files/Reports/2009/PIP\\_Adult\\_social\\_networking\\_data\\_memo\\_FINAL.pdf](http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Adult_social_networking_data_memo_FINAL.pdf).

108. *Id.*

109. See *id.* at 9–11 (reporting that the majority of adult users of online social networks restrict access to their profiles and content and take other privacy-protective measures); Memorandum from Amanda Lenhart & Mary Madden, Senior Research Specialists Pew Internet & American Life Project, Social Networking Websites and Teens, at 5 (Jan. 3, 2007), <http://www.pewinternet.org/>

er parts of the web, rather than remaining segregated at particular sites dedicated to social networking, the entire internet will soon become more hospitable to social marketing techniques.

Now that online social networking has become ubiquitous, especially among younger cohorts, it simply is not a realistic alternative to opt out altogether.<sup>110</sup> Doing so would be like a teenager of a previous generation eschewing the telephone. Moreover, opting out of online social networking can abdicate the ability to shape one's own reputation—after all, friends and acquaintances will still discuss the abstainer and tag him or her in photos.<sup>111</sup> For good or ill, platforms like MySpace and Facebook are a crucial forum for everyone (and especially those under thirty-five) to talk, organize social outings, play games, and hang the virtual posters that define oneself in the world—in short, to live.<sup>112</sup> They must have a reasonable degree of confidence in their privacy when they do so.

### B. Information Quality Concerns

Social marketing messages are a form of consumer endorsement as the Federal Trade Commission defines the term.<sup>113</sup> The virtues of peer recommendations depend very much on their high perceived reliability and independence.<sup>114</sup> Social marketing advertisements may not always share in this level of dependability and could convey exaggerated, misleading, or even completely false information or endorsements. Such claims could deceive a recipient into taking actions or making purchases that might not otherwise have occurred, thus distorting choices with bad information. Worse, over time either inaccurate or overly frequent social marketing would seriously undermine the effectiveness of online word of mouth altogether.<sup>115</sup> These concerns can be grouped together as worries about the information quality of social marketing.

The baseline of a true endorsement should be defined as an *accurate* and *voluntary* declaration of support. Accuracy is crucial, obviously, but

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~media/Files/Reports/2007/PIP\_SNS\_Data\_Memo\_Jan\_2007.pdf.pdf (reporting similar data about teenagers).

110. See JOHN PALFREY & URS GASSER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* 36 (2008).

111. See Clive Thompson, *I'm So Totally, Digitally Close to You*, N.Y. TIMES, Sept. 7, 2008, (Magazine), at 42, available at <http://www.nytimes.com/2008/09/07/magazine/07awareness-t.html>.

112. See Grimmelmann, *supra* note 36, manuscript at 11–17 (identifying social construction of identity, relationship, and community as key motivations for participation in online social networks).

113. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0(b)(2008) (“[A]n *endorsement* means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser.”).

114. See Goldman, *supra* note 9, at 410; KELLY, *supra* note 13, at 14; Smith et al., *supra* note 13, at 32.

115. See Goldman, *supra* note 9, at 429.



can be difficult to measure. Simplified social marketing messages may convert a mixed and nuanced view of a product into an apparent black-and-white positive opinion. Voluntariness ensures that an endorsement is freely given. One might like a product perfectly well but still not enough to recommend it to others. Even if the supposed endorsements embodied in social marketing messages fall far short of this level of enthusiasm, however, advertisers naturally want to portray them as spontaneous declarations of support.

In principle, and depending on the design of a particular social marketing system, users could trigger positive messages even if their opinions of an underlying product are neutral or negative. If social marketing became widespread, then messages could be sent when a user merely visited a web site, browsed merchandise, tried out a diversion such as a poll or quiz, or entered a contest. Without much trouble one can imagine social marketing developing to the point where eager advertisers parlay routine online actions such as these into automated social marketing messages that imply endorsement. Such endorsements, neither accurate nor voluntary, would pollute the overall information environment.

A misleading implication might not require any direct falsehoods. Rather, the message “Joe answered the quiz at Acme.com, why don’t you try?” seeks to drive traffic to Acme’s web site by suggesting the thought, “my friend Joe took the time to take this quiz, so maybe I should too.” The message does this even if Joe thought the quiz was rotten after he finished it, or hates the actual products sold at Acme’s site, or never paid attention to the fact that Acme sponsored the quiz. Indeed, Facebook’s own promotional materials show how the video rental site Blockbuster used Facebook Ads to transmit messages to a user’s friends when a user *rated* movies on the company’s web site or Facebook page.<sup>116</sup> Blockbuster essentially inserted a user’s name and image into an advertisement for the company and sent it to the user’s friends, even though that user may never have *rented* a movie from Blockbuster at all. Before reform of Beacon, this occurred without explicit permission from the user.

Similarly, a user may have been browsing or buying for a particular purpose that does not indicate any genuine personal recommendation. People frequently consider or make purchases that do not match their true preferences. Knowing that your most fashionable friend bought a certain shirt or your most well-read friend bought a certain book could serve as a strong recommendation for those items—unless the shirt actually was for an “ugly nerd” Halloween costume, the book was assigned class reading, or either one was a gift intended to match the recipient’s poor taste rather than the purchaser’s good taste. The “ruined Christmas

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116. See *supra* notes 60–64 and accompanying text.

presents” theme to much anti-Beacon commentary<sup>117</sup> demonstrates the likelihood of this last example.

Passive or automatic transmission of social marketing messages (that is, shifting from the model portrayed in Figure 1 to that in Figure 2) further intensifies this possible distortion. Even if the endorser likes the advertiser’s products just fine, she might not have gone out of her way to say so. An in-person recommendation to a friend, or even a general review written on a blog, requires the endorser’s thought and volition. Recipients of these trusted referrals rely on them in part precisely because of their voluntariness. Routinized social marketing messages, however, require no such effort or choice, which diminishes their value from heart-felt true endorsements to mechanized impersonal advertisement.

It is easy to understand the cumulative damage that would be caused by many inaccurate (or less than fully accurate) social marketing messages. For a comparison, consider how advertisements for movies sometimes include favorable quotes, notoriously excerpting the only faint praise in an otherwise negative review.<sup>118</sup> The practice became sufficiently well-known to damage the efficacy of all such critic blurbs, even the entirely accurate ones.<sup>119</sup> If social marketing messages become unreliable in this way, then it may prevent the promise of an online culture of recommendation from coming to fruition.

These dangers intensify because removing the speed bump of an individual’s decision to tell friends about a product surely would increase the number of such messages. Apart from any inaccuracy, if in-boxes become cluttered with supposed endorsements from people we know, presumably the effectiveness will plummet. The result could be the “spamification” of social marketing. Consumer attention to social marketing is a finite resource shared by all marketers; if they lack incentives or restrictions that prevent them from depleting that shared resource, the resulting overuse by at least some of them could cause a situation resembling a tragedy of the commons.<sup>120</sup>

Apparent social marketing endorsements that do not fully reflect a person’s views also harm the supposed endorser by diluting his or her reputation and influence, both quantitatively (too many recommendations make each one less valuable) and qualitatively (recommendations the person would not have otherwise made can be unwise and may dis-

117. See *supra* note 90 and accompanying text.

118. See, e.g., Adam Conner-Simons, *Don’t Quote Me, But...*, GELF MAG., Sept. 21, 2007, [http://www.gelfmagazine.com/archives/dont\\_quote\\_me\\_but.php](http://www.gelfmagazine.com/archives/dont_quote_me_but.php).

119. *Id.* (“Many critics question whether blurbing even contributes to films’ success.”).

120. See Deven R. Desai, *Property, Persona, and Preservation*, 81 TEMPLE L. REV. (forthcoming 2009), manuscript at 17–22, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1101648](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101648) (discussing “attention economics” and viewing consumer attention as a scarce resource); Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135, 166–71 (2007) (discussing how information overload creates externalities similar to pollution).

courage the recipient from relying on that person's opinion in the future). Many motivations inspire individuals to engage in word-of-mouth interactions, including desires to feel smart, to be helpful, to express themselves, or to affiliate themselves with groups that share their opinions.<sup>121</sup> Some individuals apparently serve as particularly strong "influencers" within their social circle.<sup>122</sup> These influencers—from fashion-forward clothes horses to early-adopter computer geeks—gain satisfaction from starting trends or being the first among their acquaintances to try new products. Recipients of all this word of mouth benefit as well, by gaining reliable sources for information and opinions about products: we all have knowledgeable friends whom we ask about purchasing decisions within their field of expertise. No matter how enthusiastically he or she engages in word of mouth, however, each person has a limited fund of social capital to send information or make recommendations to friends.<sup>123</sup> Whatever a person's level of influence, a large number of endorsements that are not fully voluntary will squander that influence.<sup>124</sup>

The greatest danger of poor information quality arises in the aggregate. An individual social marketing message that misstates or overstates the supposed endorser's level of support may only mislead its recipient into making an ill-advised individual purchasing decision. Cumulatively, however, too many inaccurate endorsements—or even too many social marketing messages overall—will condition recipients to ignore all of them, good and bad. Bad information could generate enough "noise" to drown out any accurate "signal" transmitted by social marketing.<sup>125</sup> This spamification of social marketing would undermine the benefits of online

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121. See SERNOVITZ, *supra* note 22, at 15–18.

122. See Abratt et al., *supra* note 23, at 32–34 (reviewing marketing literature concerning "market mavens"); Nicholas Casey & Bruce Orwall, *Running Underground: To Sharpen Nike's Edge, CEO Taps 'Influencers'; House Built by Athletes Hires a Tattoo Artist; Mr. Parker and the Twins*, WALL ST. J., Oct. 24, 2007, at A1 (describing efforts by Nike to appeal to 'influencers' as a means of maintaining the brand's edge). But see Matthew Creamer, *What's Plaguing Viral Marketing*, ADVERTISING AGE, July 16, 2007, at 1 (reporting on skeptics who believe influencers have more limited impact than sometimes suggested).

123. The 2008 redesign of Facebook recognized this fact more generally by restoring the ability for users to request less information about particular friends in the News Feed. Posting of Nick O'Neill on AllFacebook, Facebook Furthers Attack on FriendFeed, Adds Comments to News Feed, <http://www.allfacebook.com/2008/07/facebook-furthers-attack-on-friendfeed-adds-comments-to-news-feed/> (July 31, 2008, 9:41).

124. Celebrities, of course, must also avoid overexposure that dilutes the influence of their reputation in endorsements. See *Lugosi v. Universal Pictures*, 603 P.2d 425, 438 (Cal. 1979) ("[W]hile a judicious involvement in commercial promotions may have been perceived as an important ingredient in one's career, uncontrolled exposure may be dysfunctional.").

125. See XV OXFORD ENGLISH DICTIONARY 453, 454 (2d ed. 1989) (defining "signal-to-noise ratio" as "the ratio of the strength of a desired signal to that of unwanted noise interference, usu[ally] expressed in decibels; also *transf.* to non-electrical systems"); Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. CHI. LEGAL F. 377, 382–83 (using "signal to noise" synonymously with "ratios of wheat to chaff").

word of mouth and possibly destroy systems already in existence that help users navigate the ocean of information available online.<sup>126</sup>

### C. Identity Control Concerns

The final potential concern about social marketing is much more abstract and theoretical than the first two. Those other concerns arise because the content of social marketing messages contributes to some other consequential harm. Concerns about disclosure relate to the personal details that a customer's friends might discover through social marketing and some of the injuries the customer might suffer as a result of that knowledge, such as embarrassment or awkwardness. Information quality concerns derive largely from the possibility that the substance of a message might mislead or confuse consumers, or the danger that social marketing will contribute to information overload.

Identity control concerns, in contrast, do not depend on other second-order harms. Many commentators consider the exploitation of an individual's reputation or persona for commercial purposes to be objectionable in itself. Regardless of whether the information conveyed in the message is sensitive or misleading, nonconsensual reputational piggybacking may intrude on autonomy. Moreover, observers often object in particularly strong terms when personal identity is unwittingly entangled in commercial marketing. In this view, such uses interfere with a legally protectable interest in "demarkating a space beyond the reach of market forces."<sup>127</sup>

The identity control concern dates back at least to the classic article by Samuel Warren and Louis Brandeis that first articulated a common law right to privacy.<sup>128</sup> Their argument has often been cited to justify rules against particular embarrassing disclosures (as well as intrusive means of gathering information). At root, however, Warren and Brandeis had a much broader conception of the "right 'to be let alone.'"<sup>129</sup> They referred repeatedly to unauthorized publication of a photograph as an affront to the dignity of the individual, even if no other private details

126. Cf. SERNOVITZ, *supra* note 22, at 31–33 (comparing the danger that deceptive online word-of-mouth practices might create consumer distrust to a similar phenomenon in spam).

127. Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371, 373 (2003); see also Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM.-VLA J.L. & ARTS 123, 127 (1996) (noting desirability of legal protection for "those who do not want to hawk products, or to be seen as associated with or endorsing a particular manufacturer"); Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 676 (1991) ("[W]e must inquire whether we wish the law to create a social structure in which our very names and images have become alienable commodities.").

128. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

129. *Id.* at 195 (citing Thomas P. Cooley, COOLEY ON TORTS 29 (2d ed. 1888)).

accompany the image.<sup>130</sup> Courts and treatise writers may file disclosure and identity control concerns together under the “privacy” label because of their “family resemblance.”<sup>131</sup> But identity control differs from disclosure because identity could be implicated regardless of any specific information that might accompany a social marketing message.

Different courts and commentators offer different (though overlapping) accounts of the reasons for concern over identity control.<sup>132</sup> At times this diversity borders on incoherence: as Stacey Dogan and Mark Lemley suggest, “[A] review of the cases and the literature reveals that no one seems to be able to explain exactly why individuals should have this right.”<sup>133</sup>

Many have argued from various perspectives that an individual should be entitled to control the use of his or her own “persona” because it is an extension of the self.<sup>134</sup> Warren and Brandeis hinted at this idea in general terms.<sup>135</sup> Information associated with online personae such as social network profiles now shapes individual identity and reputation profoundly.<sup>136</sup> This may lead to dignitary harms from social marketing that interfere with the integrity of those online personae.<sup>137</sup> Some, particularly earlier in the tort’s development, also viewed an individual’s persona as the fruits of individual effort and relied on a form of Lockean labor

130. See *id.* at 195–96, 211, 213–14; see also Leon Green, *The Right of Privacy*, 27 ILL. L. REV. 237, 244–46 (1932) (describing early cases that “definitely” establish liability for nonconsensual “commercial, trade, or business use” of a plaintiff’s photograph).

131. See Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1097–99 (2002) (using Wittgenstein’s concept of “family resemblances” to identify commonalities among many diverse interests usually classified as “privacy”).

132. Many scholars have examined rationales comprehensively, a task beyond the scope of this Article. Indeed, the brief summary offered here ignores some important theoretical distinctions. My only purpose is to identify a separate set of privacy-like concerns about social marketing, beyond disclosure of personal information. For an overview of these debates about persona rights, see generally 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* §§ 2.1–2.9 (2d ed. 2009). For some good examples of thorough critical treatment from a variety of perspectives, see, for example, Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1180–90 (2006); Lee Goldman, *Elvis Is Alive, But He Shouldn’t Be: The Right of Publicity Revisited*, 1992 BYU L. REV. 597, 603–13; Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199 (1986); Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1 (1997); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2005).

133. Dogan & Lemley, *supra* note 132, at 1163.

134. See, e.g., Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964) (defining right of “inviolate personality”); Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 417–21 (1999) (arguing based on Kantian philosophy); McKenna, *supra* note 132, at 279–90 (defining right to “autonomous self-definition”).

135. See Warren & Brandeis, *supra* note 128, at 195–96.

136. See Beth Simone Noveck, *Trademark Law and the Social Construction of Trust: Creating the Legal Framework for Online Identity*, 83 WASH. U. L.Q. 1733, 1737–38 (2005).

137. See McKenna, *supra* note 132, at 286–88 (comparing a false implication of endorsement to compelled speech and arguing that such implications rob individuals of the right to express themselves on their own terms).

theory to justify protection as a natural right.<sup>138</sup> Perhaps this impact leads, or should lead, to a right of control over some aspects of public identity.<sup>139</sup>

Probably the most dramatic expression of such objections based on natural rights or personal liberty came in the early case of *Pavesich v. New England Life Insurance Company*,<sup>140</sup> involving the unauthorized use of the plaintiff's photograph in an advertisement for insurance alongside an invented quote about his supposed purchase of an insurance policy.<sup>141</sup>

The knowledge that one's features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master . . .<sup>142</sup>

Setting aside the overheated rhetoric, bad social marketing practices could raise the very same concerns. A message that appears to convey an individual's commercial endorsement, even if it does not mislead recipients, could interfere with this natural right to autonomy in the exploitation of identity.

In another vein, some commentators adhere to more economically oriented rationales. Some of them argue that, as in copyright, the law should protect individuals' incentives for the creation and maintenance of a coherent identity that embodies their reputation.<sup>143</sup> Others straightforwardly suggest that the commercialization of individual identi-

138. See, e.g., Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954) (arguing for right of publicity because an individual who develops an identity with pecuniary value deserves protection for an investment that required "considerable time, effort, skill, and even money"); see also Dogan & Lemley, *supra* note 132, at 1181–84 (criticizing Lockean "moral rights" rationale); McKenna, *supra* note 132, at 250–58 (same); cf. Post, *supra* note 127, at 658–62 (arguing that Warren and Brandeis began the evolution of justification away from a pure Lockean "labor" theory toward a broader "personality" theory).

139. See, e.g., Haemmerli, *supra* note 134, at 417–21 (arguing based on Kantian philosophy).

140. 50 S.E. 68 (Ga. 1905). Another famous case of the era rejected a similar claim, see *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447–48 (N.Y. 1902), but was overturned promptly by state legislation. See N.Y. CIV. RIGHTS LAW § 51 (McKinney 1992).

141. *Pavesich*, 50 S.E. at 68–69 ("Under the plaintiff's picture the following appeared: 'In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day my family is protected and I am drawing an annual dividend on my paid-up policies.' . . . He never made any such statement, and has not, and never has had, a policy of life insurance with the defendant company.").

142. *Id.* at 80.

143. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576–77 (1977) (suggesting that the right of publicity protected incentives in a similar fashion to copyright and patent law); see also Dogan & Lemley, *supra* note 132, at 1186–90 (criticizing incentive rationale); McKenna, *supra* note 132, at 258–63 (same).

ty proves its value and therefore conclude that the person behind the persona should be compensated for its use. As another early twentieth century court put it, "If there is value in [identity], sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?"<sup>144</sup> Either of these rationales might apply to social marketing, which piggybacks on the customer's reputation among his or her friends to sell products. Wresting control of the persona from an individual for commercial purposes might be seen as something akin to unjust enrichment.<sup>145</sup>

Broadly speaking, these two types of arguments, rooted in natural rights or in economic efficiency, map on to two distinct, though overlapping, claims for non-trademark persona rights: a tort claim of appropriation that emphasizes protection of dignitary interests and a right of publicity rooted in economic justifications.<sup>146</sup>

It is not clear that mere appearance in a social marketing message necessarily unleashes this sort of metaphysical identity crisis. Nor is it clear that recognizing this injury adds much to the law. To the extent that unwanted exposure of the self causes injury, much would seem to be covered by the disclosure concern discussed above. And a message that was unwanted to the point that its implication of endorsement becomes inaccurate falls within the information quality concern, also discussed above. Nevertheless, some individuals prefer to separate themselves from the commercial realm, distinct from their desire to keep information private or to prevent messages that distort their tastes. As a descriptive matter, the law certainly takes seriously the autonomy interests of individuals in controlling the commercial use of identity. As we shall see, claims arising from these inchoate interests are among the strongest responses to all the concerns about social marketing.

### III. PARADIGMATIC LEGAL RESPONSES

The types of concerns identified in Part II are hardly unique to social marketing. The law already addresses the disclosure of personal data, the accuracy and quantity of marketplace information, and the integrity of personal identity in many contexts.

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144. *Munden v. Harris*, 134 S.W. 1076, 1078 (Mo. Ct. App. 1911); *see also Roberson*, 64 N.E. at 450 (N.Y. 1902) (Gray, J., dissenting) ("[I]f her face or her portraiture has a value, the value is hers exclusively, until the use be granted away to the public.").

145. *See Caldwell*, *supra* note 63, at 14 ("[Y]our shopping choices and preferences have value. Who owns those choices? Common sense says that you do. If a company wants to use you to advertise its products, it can pay you, just as Nike pays Tiger Woods."); *Desai*, *supra* note 120, manuscript at 22–25; *see also ANNE WELLS BRANSCOMB, WHO OWNS INFORMATION?: FROM PRIVACY TO PUBLIC ACCESS* 174–86 (1994) (casting interest in control of personal information as ownership interest); Ann Bartow, *Our Data, Ourselves: Privacy, Propertization, and Gender*, 34 U.S.F. L. REV. 633, 687–90 (2000) (proposing property rights in personal data based on similar observations).

146. *See infra* Part III.C.

Social marketing presents a novel combination of these concerns, however. The existing legal remedies evolved in response to particular harms; their boundaries blur and their internal limitations strain when they are tested by unforeseen technology and related business techniques. Legal decisionmakers facing potential problems created by changed technology should first try to adapt existing legal approaches to the new situation. This Part reviews existing law and finds that, though each legal paradigm offers some insight into the ways law might handle social marketing, none responds to the full range of concerns about disclosure, endorsement, and identity.

#### A. Privacy Law

Just as the initial negative reaction to Facebook Ads centered on the disclosure of personal information and its privacy impact, the most natural and immediate legal response hinged on rules about handling personal information.<sup>147</sup> Numerous privacy laws ban or restrict the dissemination of particular personal information. These are a subset of information privacy law and are distinct from privacy laws with other purposes (such as preventing trespass into personal space, eavesdropping, or spreading falsehoods).<sup>148</sup> Because of its direct focus on disclosure of data, the laws in the “personal information” paradigm discussed here also differ from measures aimed more broadly at preserving the integrity of identity, discussed separately below.<sup>149</sup> The type of privacy law considered in this Section simply regulates the handling of personal information by those who are not the subject of that information.<sup>150</sup>

The most significant problem with these limits on disclosure derives from their circumscribed scope. Absent special considerations, there is no legal presumption of control over personal information (at least in the United States<sup>151</sup>). Under the common law, if A tells B a secret, B does not have a legal duty to keep the secret unless B has a particular relationship with A, or the information is so intimate or inherently private that it would be outrageous for B to divulge it.<sup>152</sup> The third-party doctrine in

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147. The legal actions taken against Facebook Ads—two class action suits in the United States and a regulatory complaint in Canada—were grounded in disclosure concerns and relied largely on privacy law claims. See *supra* notes 81–82 and accompanying text.

148. See Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 525–52 (2006). In this Article I draw a sharper distinction than Solove does between legal rules about the disclosure of truthful factual information and rules about *misleading* information, such as defamation or false light. See *id.* at 545–52.

149. For discussion of the persona rights paradigm, see *infra* Part III.C.

150. See Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1054–57 (2000) (drawing similar distinctions).

151. For more about the very different approach to disclosure of personal information in other countries, see *infra* notes 193–204 and accompanying text.

152. See Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 126, 151 (2007).



constitutional criminal procedure flows from the same reasoning; typically there is no “reasonable expectation of privacy” for information that a criminal defendant has conveyed to a third party, whether an institution like a bank or a personal friend.<sup>153</sup> Constitutional and statutory law place a few additional restrictions on the collection and processing of information by the government.<sup>154</sup> Commercial vendors who glean personal information from customers’ shopping habits face even fewer legal constraints—indeed the multibillion-dollar database marketing industry depends on the constant exchange and accumulation of just such detailed personal information.<sup>155</sup>

Across the board, then, the default assumption in American law is that personal information loses privacy protection as soon as one party confides it in another.<sup>156</sup> Put another way, the law divides the world into public and private spheres, and usually removes restrictions on information once it enters the public sphere. Retailers and marketers, whether they exist in “bricks and mortar” facilities or online, fall on the public side of this dividing line. The same reasoning could also be expressed in terms of waiver or consent: by confiding in another party, a person relinquishes legal entitlement to privacy of that information, absent special circumstances.

Against this general background, social marketing appears unlikely to violate most U.S. privacy laws. Users convey information to vendors through their browsing and shopping patterns, and the vendors typically enjoy freedom to dispose of that information however they like. They may study it for general research purposes, use it to target or modify their sales pitches to that user or others that appear to have similar tastes, share it with other businesses directly or through data brokers—and now, reveal it to users’ friends as part of a social marketing strategy.

Of course, this general or default background does not represent the entirety of American privacy law. Narrower rules aimed at particular problems depart from this default. Most of these exceptions apply only to defined sets of highly sensitive disclosures, however. None of them does much to address concerns about social marketing.

The earliest expression of the personal information paradigm came through common law, principally the tort for public disclosure of private

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153. See, e.g., *United States v. Miller*, 425 U.S. 435 (1976) (bank); *United States v. White*, 401 U.S. 745 (1971) (informant).

154. See, e.g., Privacy Act of 1974, 5 U.S.C. § 552a (2006) (limiting access to and use of personal data in government databases); *Reno v. Condon*, 528 U.S. 141 (2000) (upholding constitutionality of limits on state governments’ use of personal data collected by departments of motor vehicles); *Whalen v. Roe*, 429 U.S. 589 (1977) (recognizing possible constitutional basis for restricting government data collection).

155. See DAVID H. HOLTZMAN, *PRIVACY LOST: HOW TECHNOLOGY IS ENDANGERING YOUR PRIVACY* 187–209 (2006); ROBERT O’HARROW, JR., *NO PLACE TO HIDE* 34–73 (2005); DANIEL J. SOLOVE, *THE DIGITAL PERSON* 15–21 (2004).

156. See, e.g., Kang, *supra* note 93; Richards & Solove, *supra* note 152; Schwartz, *supra* note 96; Volokh, *supra* note 150.

facts.<sup>157</sup> Setting the pattern for later law, however, its scope is limited to especially sensitive information. In the words of the *Restatement (Second) of Torts*, liability under this theory attaches only “if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”<sup>158</sup> This limitation would immunize much of the ordinary information disclosed through social marketing, as the *Restatement* comments make clear:

The rule stated in this Section gives protection only against unreasonable publicity, of a kind highly offensive to the ordinary reasonable man. . . . [The reasonable person] must expect the more or less casual observation of his neighbors as to what he does, and that his comings and goings and his ordinary daily activities, will be described in the press as a matter of casual interest to others. The ordinary reasonable man does not take offense at a report in a newspaper that he has returned from a visit, gone camping in the woods or given a party at his house for his friends. . . . It is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises.<sup>159</sup>

Most individual social marketing disclosures would fail the basic requirements that they be “highly offensive,” “unreasonable,” or “seriously aggrieving.” Among the four disclosure concerns discussed above, this tort responds best to fear of inherently sensitive disclosures, but that type of disclosure is the least likely to arise in social marketing.<sup>160</sup> While the cumulative effect of frequent disclosures to friends about one’s ordinary shopping and browsing eventually might become intrusive, each disclosure is judged on its own under this tort theory; no single revelation would be likely to strike a jury as “outrageous.”<sup>161</sup> The focus of the disclosure tort on inherently sensitive information bypasses most social marketing.

Even if it cleared this initial hurdle, a claim that social marketing violated this tort would face other challenges as well. First Amendment and “newsworthiness” limitations have led to scholarly skepticism of whether the disclosure tort has any remaining vitality at all.<sup>162</sup> In addi-

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157. See RESTATEMENT (SECOND) OF TORTS § 652D (1977); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 392–98 (1960).

158. RESTATEMENT (SECOND) OF TORTS § 652D.

159. *Id.* § 652D cmt. c.

160. See *supra* notes 84–85 and accompanying text. It might be possible to reconceptualize the disclosure tort to better reflect the dynamics of social networks. See Grimmelmann, *supra* note 36, manuscript at 44–45. See generally Strahilevitz, *supra* note 103. This would represent a dramatic departure, however, so for current purposes I put this intriguing possibility aside.

161. See Richards & Solove, *supra* note 152, at 175.

162. See, e.g., Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1101 (1999) (arguing that the tort exists “more ‘in the books’ than in practice”); Volokh, *supra* note 150, at 1122–24 (summing up “significant doctrinal problems” with the tort); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 293, 362–65 (1983) (summing up argument that the tort is a “failure”).

tion, some courts view the tort as a prohibition only on unlimited publication, such as in a newspaper, and thus might conclude that a message sent to a defined network of friends does not qualify as “publicity.”<sup>163</sup>

More recently, statutes have added special privacy rules to the underlying lack of duty in U.S. law, but these also confine themselves to particular situations. “Sectoral” federal statutes focus narrowly on the handling of certain kinds of data, and often they apply only to certain types of actors.<sup>164</sup> For example, the Federal Department of Health and Human Services (HHS) issued complex privacy rules under the Health Insurance Portability and Accountability Act (HIPAA) that apply only to treatment of “individually identifiable health information”<sup>165</sup> by certain “covered entities” within the health care and insurance industries.<sup>166</sup> The law has no direct effect on mishandling of health information by people or entities outside the purview of the HHS or on collection of medical information unrelated to delivery of and payment for health care.<sup>167</sup> Similarly, the Gramm-Leach-Bliley Act deals only with personal financial information.<sup>168</sup> The Fair Credit Reporting Act generally regulates only personal information used to help determine a consumer’s eligibility for credit or employment.<sup>169</sup>

Most social marketing would be unlikely to fall within the specific situations covered by sectoral laws. Again, as with the public disclosure tort, these statutory protections single out areas of especially intimate personal information.<sup>170</sup> Social marketers typically know better than to alienate customers by disclosing their physical, financial, sexual, or political affairs.

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163. See Robert C. Ozer, *P.C. v. Borquez*, 940 P.2d 371, 378 (Colo. 1997) (requiring disclosure to “the general public or to a large number of persons”); RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977) (stating that the “publicity” element requires communication “to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge”). The decisions on this requirement are a mixed bag. Compare *Bauer v. Ford Motor Credit Co.*, 140 F. Supp. 2d 1019, 1023–24 (D. Minn. 2001) (disclosure to four friends and employer did not constitute publicity), and *Shattuck-Owen v. Snowbird Corp.*, 16 P.3d 555, 559 (Utah 2000) (disclosure to ten people involved in sexual assault investigation did not constitute publicity), with *McSurely v. McClellan*, 753 F.2d 88, 112–13 (D.C. Cir. 1985) (upholding jury verdict under Kentucky law finding liability for disclosure to U.S. Senate investigator), *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 902–03 (Ill. App. Ct. 1990) (disclosure to fellow employees did constitute publicity), and *Beaumont v. Brown*, 257 N.W.2d 522, 531 (Mich. 1977) (allowing liability for disclosure to “a particular public, whose knowledge of the private facts would be embarrassing to the plaintiff”).

164. See Reidenberg, *supra* note 84, at 507–09; see also SOLOVE, *supra* note 155, at 67–72 (describing different sectoral statutes).

165. 45 C.F.R. § 160.103 (2007).

166. *Id.* § 160.102.

167. See Scope of Criminal Enforcement Under 42 U.S.C. § 1320d-6, Op. Off. Legal Counsel (June 1, 2005), available at [http://www.usdoj.gov/olc/hipaa\\_final.htm](http://www.usdoj.gov/olc/hipaa_final.htm).

168. Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801–6809 (2006); see Edward J. Janger & Paul M. Schwartz, *The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules*, 86 MINN. L. REV. 1219, 1224–30 (2002).

169. 15 U.S.C. § 1681b(b).

170. See *supra* notes 84–85 and accompanying text.

Furthermore, the entities that might engage in social marketing often are not the ones covered by the statutes. For example, numerous health-related web sites, including those run by pharmaceutical companies and many sites with peer support groups, have no connection to “covered entities” under the HIPAA regulations.<sup>171</sup> One can imagine that such sites might try social marketing techniques to promote their services and attract new users.<sup>172</sup> If they did so, even in a manner that exposed sensitive personal health information, HIPAA would have no impact. These sorts of commercial consumer-oriented sites are more likely than covered entities such as doctors and insurers to try social marketing in the first place.

There is at least one notable exception where a topic of social marketing messages was also covered by one of the sectoral U.S. privacy statutes. The two U.S. lawsuits filed in response to Facebook Ads both rely (in whole or in part) on a relatively obscure and narrow statute of this kind, the Video Privacy Protection Act (VPPA).<sup>173</sup> Congress passed the law in direct response to an article in an alternative weekly newspaper disclosing the video rental history of Judge Robert Bork’s family during his contentious Supreme Court confirmation hearings.<sup>174</sup> The VPPA imposes liability for any “video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider.”<sup>175</sup> Unlike most sectoral laws, the VPPA protects intellectual privacy rather than inherently sensitive topics such as health or finances. It also intersects with a type of content (movie choices) much better suited to social marketing (indeed, the very example Facebook used when launching Beacon).

Both lawsuits claim that, at least under the original form of the Beacon program, some film-oriented sites sent social marketing messages to the Facebook friends of users noting when they rented movies or reserved them in a rental queue.<sup>176</sup> On its face, this charge appears to be valid.<sup>177</sup> The early structure of Beacon probably did not satisfy the VPPA’s requirement for “informed, written consent of the consumer

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171. See ANGELA CHOY ET AL., EXPOSED ONLINE: WHY THE NEW FEDERAL HEALTH PRIVACY REGULATION DOESN’T OFFER MUCH PROTECTION TO INTERNET USERS 16–21 (November 2001), [http://www.pewinternet.org/~media/Files/Reports/2001/PIP\\_HIPP\\_HealthPriv\\_report.pdf.pdf](http://www.pewinternet.org/~media/Files/Reports/2001/PIP_HIPP_HealthPriv_report.pdf.pdf).

172. See Stephanie Clifford, *Online Age Quiz is a Window for Drug Makers*, N.Y. TIMES, Mar. 26, 2009, at A1 (describing how sponsors of the online health quiz RealAge sell the information collected about millions of users to pharmaceutical companies to enable targeted marketing).

173. 18 U.S.C. § 2710 (2006).

174. See 134 CONG. REC. 31,839–40 (1988); SOLOVE, *supra* note 155, at 69.

175. 18 U.S.C. § 2710(b)(1). The VPPA provides a private right of action and a statutory damages minimum of \$2500. *Id.* § 2710(c).

176. Lane Complaint, *supra* note 7, at 42–49, (naming the sites Blockbuster.com, Fandango.com, Overstock.com, and Gamefly.com, and also suing Facebook for allegedly aiding and abetting those violations); Harris Complaint, *supra* note 81, at 1, (suing Blockbuster only).

177. See Posting of James Grimmelmann to The Laboratorium, *Facebook and the VPPA: Uh-Oh*, [http://www.laboratorium.net/archive/2007/12/10/facebook\\_and\\_the\\_vppa\\_uhoh](http://www.laboratorium.net/archive/2007/12/10/facebook_and_the_vppa_uhoh) (Dec. 10, 2007, 1:14).

given at the time the disclosure is sought.”<sup>178</sup> Nor did it fit the statute’s exemption for direct marketing.<sup>179</sup> In contrast, the revised Beacon program probably satisfies the VPPA because users themselves opt to disclose information about their movie choices.<sup>180</sup>

These VPPA claims serve as exceptions that prove the rule, however. In general, it is unlikely that social marketing would disclose the special types of information regulated by the alphabet soup of federal statutes. True, litigation has arisen about online tracking and data mining related to sensitive topics such as health, so it is not out of the question that a purveyor of such products might turn to some form of social marketing in the future.<sup>181</sup> Normally, however, social marketing messages are built around the quotidian purchasing and internet surfing of one’s friends. Specialized statutes rarely extend to this kind of information. Only a historical accident led Congress to regulate video rentals. No comparable federal statute forbids disclosures that compromise intellectual privacy in other ways, for example records of individual book purchases,<sup>182</sup> magazine subscriptions,<sup>183</sup> or general web surfing.<sup>184</sup> Richards argues that social norms and the culture of institutions like libraries and universities might have made such laws unnecessary in the past, but innovations such as social marketing could call this premise into question in the future.<sup>185</sup>

178. 18 U.S.C. § 2710(b)(2)(B).

179. This exception allows disclosure of customers’ names, addresses, and general genres of movie preferences provided that customers can opt out of such information sharing and “the disclosure does not identify the title, description, or subject matter of any video tapes or other audio visual material; however, the subject matter of such materials may be disclosed if the disclosure is for the exclusive use of marketing goods and services directly to the consumer.” *Id.* § 2710(b)(2)(D). Thus, the VPPA does allow the most common form of direct behavioral targeting, through gathering dossier information to support advertising aimed at the subject of the data. Nonconsensual social marketing, however, reveals actual titles and does so in order to market goods and service not directly to consumers but to their friends. It falls outside this exemption. For more general discussion of the differences between behavioral targeting and social marketing, see *infra* notes 272–76 and accompanying text.

180. The *Lane* suit is confined to the period before Beacon’s alteration. See *Lane* Complaint, *supra* note 7, at 3. The *Harris* suit, in contrast, alleges that Blockbuster continued to violate the VPPA even after the reform of Beacon, because although user permission was then required before sending messages to friends, the site allegedly provided *Facebook* with protected information. See *Harris* Complaint, *supra* note 81. Based on an analysis of the code supporting Beacon, this does not appear to be the case; at most, Blockbuster’s servers checked with Facebook’s servers to connect a user to a Facebook account and ask permission to send a social marketing message, but do not appear to transmit any information protected by the VPPA at that stage. See Posting of Jay Goldman to Radiant Core, *supra* note 61. Again, my thanks to Jesse Cheng for his technical assistance.

181. See, e.g., *In re Pharmatrak*, 329 F.3d 9, 15–16 (1st Cir. 2003); cf. Clifford, *supra* note 172.

182. But see *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002) (finding limited privacy protection for book purchases in state constitution). Most states do have some form of privacy statute covering library borrowing records, although their terms vary widely. See Am. Library Ass’n, State Privacy Laws Regarding Library Records, <http://www.ala.org/ala/aboutala/offices/oif/ifgroups/stateifchairs/stateifcinaction/stateprivacy.cfm> (last visited May 26, 2009).

183. See *Shibley v. Time, Inc.*, 341 N.E.2d 337 (Ohio Ct. App. 1975) (dismissing suit against magazine publisher for selling subscriber lists to direct marketers).

184. See Kang, *supra* note 93, at 1227, 1230–32. But see *infra* note 272 and accompanying text (describing modest FTC rulemaking concerning the regulation of behavioral advertising).

185. Richards, *supra* note 86, at 419–21.

One of the Beacon lawsuits also adds claims based on the Electronic Communications Privacy Act (ECPA).<sup>186</sup> This statute is related only loosely to disclosure—although the ECPA does prohibit further dissemination of information that is gathered through improper methods,<sup>187</sup> most of the statute regulates the manner of *collecting* information.<sup>188</sup> This ECPA claim against social marketing appears weak in any event. Consistent with the default position of American law, the ECPA permits one party to a communication to disclose its contents without the other party's consent—and here, one of those two parties is the marketing web site.<sup>189</sup>

In sum, U.S. law concerning disclosure of personal information offers almost no response to the possible dangers of social marketing. It concentrates on privacy in inherently sensitive matters, but these topics are unlikely to become the subject of social marketing. These laws protect intellectual privacy only in rare instances, such as the VPPA. They offer no general response at all to uneasiness about decontextualized disclosures or general surveillance.

Aside from its poor treatment of disclosure concerns, this paradigm offers even less of a response to the other concerns outlined in Part II. Information quality concerns such as misleading implied endorsements or spamification do not derive from the personal nature of the information at all. Likewise, a social marketing message can compromise an individual's control over his or her identity without disclosing any sensitive personal information. As we have seen, although disclosure is the most evident problem with bad social marketing practices, it is not the only one.

Finally, the personal information paradigm presents significant structural and doctrinal problems in the United States. The emotional or psychic harms caused by disclosures in social marketing are difficult to quantify and, in any case, are likely small. Injured parties who file lawsuits to enforce their rights under privacy law often encounter great difficulty proving damages.<sup>190</sup> Only a few privacy laws offer statutory damag-

186. See *Lane* Complaint, *supra* note 7, at 40–42 (citing 18 U.S.C. §§ 2510–2522 (2006)).

187. 18 U.S.C. § 2511(1)(c); see *Bartnicki v. Vopper*, 532 U.S. 514, 520–21 (2001).

188. See 18 U.S.C. § 2511(1)(a), (b); see also *supra* note 148 and accompanying text. In his attempt to develop a new taxonomy of information privacy law, for instance, Daniel Solove classifies “surveillance” and “intrusion” separately from a cluster of privacy interests related to “information dissemination.” Solove, *supra* note 148, at 478, 491–99, 552–57.

189. See 18 U.S.C. § 2511(2)(d); *Chance v. Avenue A, Inc.*, 165 F. Supp. 2d 1153, 1162 (W.D. Wash. 2001). Twelve states do require consent of all parties under their state versions of the ECPA. See The Reporters Committee for Freedom of the Press, *Can We Tape?: A Practical Guide to Taping Phone Calls and In-Person Conversations in the 50 States and D.C.* <http://www.rcfp.org/taping/index.html> (last visited May 26, 2009) (listing California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington).

190. See, e.g., *Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018, 1020–21 (D. Minn. 2006) (rejecting breach of contract and negligence claims arising from theft of plaintiff's personal data because fear of possible identity theft was too speculative); *In re JetBlue Airways Corp. Privacy Litig.* 379 F. Supp. 2d 299, 326–27 (E.D.N.Y. 2005) (rejecting breach of contract claim for violation of priva-

es or other such automatic compensation for injuries.<sup>191</sup> Without the prospect of significant damages, private attorneys have no incentive to bring such cases. Furthermore, in many social marketing situations class actions would also present certification problems because of possible factual differences in the understanding and attitudes of different class members.<sup>192</sup>

Many of these problems are particular to the United States. Though the default position of U.S. privacy law generally excludes social marketing, most other industrialized countries generally observe the opposite default. “Data protection” statutes and regulations in these nations start from the assumption that companies cannot collect or use personal data.<sup>193</sup> The pathbreaking European Union directive on data protection requires that automatically processed personal information not be disclosed without consent unless one of several particular exceptions applies.<sup>194</sup> All processing and use of personal data within the EU must be compatible with the directive’s transparency, legitimacy, and proportionality standards. Similar regimes now have been enacted in other countries, including Canada and Japan.<sup>195</sup> A social marketing program along the lines of the reformed Beacon as depicted in Figure 1 might satisfy these requirements. A program similar to the original form of Beacon as depicted in Figure 2 could be unlawful in countries adhering to data protection regimes like the EU directive. Though these different regimes would not apply to Americans, they could prevent social marketing messages about citizens of the countries that adopt them.

The transnational nature of online information creates loopholes in these more protective regimes, however. In principle, personal data collected within the EU may only be processed outside the EU if the other country “ensure[s] that the rights and obligations” with respect to personal data “are respected.”<sup>196</sup> Although baseline U.S. law does not satisfy this standard, the relevant governments have negotiated a “safe harbor” agreement to allow transfers of personal information from the EU. Under the safe harbor, U.S. companies may certify their acceptance of a set of privacy principles that is significantly weaker than the EU’s require-

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cy policy because of failure to prove damages); *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1356–57 (Ill. App. Ct. 1995) (rejecting claim under Illinois Consumer Fraud Act about disclosure of credit history for failure to prove damages).

191. The VPPA is one such exception. 18 U.S.C. § 2710(c)(2) (providing for liquidated damages of \$2,500, punitive damages, and attorneys’ fees).

192. See FED. R. CIV. P. 23(a)(2).

193. See Joel R. Reidenberg, *E-Commerce and Trans-Atlantic Privacy*, 38 HOUS. L. REV. 717, 731–33 (2001).

194. Council Directive 95/46, On the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, 34, 38–39 [hereinafter EU Directive].

195. See Personal Information Protection and Electronic Documents Act, R.S.C., ch. P-8.6 (2000) (Can.); Act on the Protection of Personal Information, Law No. 57 of 2003 (Japan).

196. EU Directive, *supra* note 194, at art. 20.

ments, although somewhat stronger than the American default position.<sup>197</sup> These self-certifying companies are then immunized from liability under EU law; such enforcement as exists is handled entirely through United States institutions, chiefly the Department of Commerce.<sup>198</sup> Facebook has self-certified its adherence to the safe harbor requirements.<sup>199</sup> Although MySpace has not done so,<sup>200</sup> the site's privacy policy disclaims all liability under the EU Directive.<sup>201</sup>

Canadian privacy law takes a more aggressive stand on its applicability to companies in other countries that process data about Canadians. A recent court decision found that Canada's federal privacy commissioner must investigate complaints in such situations.<sup>202</sup> Last year a group of students in an internet law clinic at the University of Ottawa filed a formal regulatory complaint arguing that a wide variety of Facebook's practices, including Facebook Ads, violated Canadian data protection law.<sup>203</sup> As required by law, the commissioner is now investigating Facebook in response.<sup>204</sup>

Whatever its potential in other countries, legal restrictions on disclosure of personal information in the United States would have little effect on social marketing practices. Privacy law here addresses disclosure only in certain narrow and unlikely situations and does nothing about other concerns. Even though these laws have been the first and most natural response to social marketing, they are oriented toward quite different situations.

197. U.S. Dep't of Commerce, Safe Harbor Privacy Principles (July 21, 2000), [http://www.export.gov/safeharbor/eu/eg\\_main\\_018475.asp](http://www.export.gov/safeharbor/eu/eg_main_018475.asp); see Reidenberg, *supra* note 193, at 744–46 (noting that the Safe Harbor requirements are weaker than European privacy law but stronger than U.S. privacy law).

198. See Reidenberg, *supra* note 193, at 745; U.S. Dep't of Commerce, Safe Harbor Overview, [http://www.export.gov/safeharbor/SH\\_Overview.asp](http://www.export.gov/safeharbor/SH_Overview.asp) (last visited May 26, 2009).

199. See Facebook, Facebook Principles EU Safe Harbor Participation (Nov. 26, 2008), <http://www.facebook.com/policy.php>.

200. See U.S. Dep't of Commerce, Safe Harbor List, <http://web.ita.doc.gov/safeharbor/SHList.nsf> (last visited May 26, 2009).

201. MySpace, Privacy Policy (Feb. 28, 2008), <http://www.myspace.com/index.cfm?fuseaction=misc.privacy> ("When a Member who is located in the European Union chooses to post Profile Information that will be publicly disclosed, that Member is responsible for ensuring that such information conforms to all local data protection laws. MySpace is not responsible under the EU local data protection laws for Member-posted information.").

202. *Lawson v. Accusearch Inc.*, [2007] F.C.R. 314 (Can.).

203. *Lawson Complaint*, *supra* note 82. The complaint alleges that Facebook provides too little notice about the disclosure of information through its social marketing programs and that the manner in which it secures consent for disclosures is inadequate. *Id.* at 14–17. Facebook's chief privacy officer replied in a statement that the complaint misinterpreted Canadian data protection law and contained "serious factual errors—most notably its neglect of the fact that almost all Facebook data is willingly shared by users." Tamsyn Burgmann, *Federal Privacy Commissioner Launches Facebook Probe*, GLOBE AND MAIL, May 30, 2008, <http://www.theglobeandmail.com/servlet/story/RTGAM.20080530.wgfacebookprobe0530/BNStory/Technology/>.

204. See Burgmann, *supra* note 203.



*B. Trademark and Unfair Competition Law*

A second legal paradigm focuses not on the personal nature of information contained in a social marketing message, but on the accuracy of its implied customer endorsement. As discussed in Part II.B, an endorsement must be both accurate and voluntary to avoid distorting the customer's connection with and opinion of the product. Advertising that leaves a misleading or confusing impression of endorsement or affiliation is subject to liability under the law of trademarks and unfair competition. If we analogize personal identity to a trademark, aspects of trademark law match concerns about misleading social marketing endorsements very well.

Federal trademark law forbids uses of a trademark that falsely suggest "affiliation, connection, or association" between the trademark holder and another party, or falsely suggest the trademark holder's "sponsorship" or "approval" of the other party.<sup>205</sup> This allegation traditionally arises in a wide variety of familiar situations: for example, stores or repair shops display the trademarks of the products they sell or fix,<sup>206</sup> manufacturers of finished products show the trademarks of ingredients or component parts,<sup>207</sup> and events or groups show the marks of their sponsors, "official" or otherwise.<sup>208</sup> In addition, individual celebrities have established trademark rights in their own images and exercise those rights to prevent uses that mislead consumers into thinking the celebrity endorses a product.<sup>209</sup> Bad social marketing practices similarly risk presenting a misleading impression of an endorsement that does not exist.

More generally, trademark law concerns itself with messages that associate two different identities in the mind of a recipient, similar to the reputational piggybacking effect of social marketing. A trademarked brand has an identity just as surely as does an individual.<sup>210</sup> The reputation of this identity influences consumer purchasing decisions. Meanwhile, marketers zealously use their power over endorsements and associations to protect the integrity of trademarked brands and to ensure that those brands do not become overexposed or associated with qualities

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205. 15 U.S.C. § 1125(a)(1)(A) (2006).

206. See, e.g., *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 489–90 (5th Cir. 2004); *Volkswagenwerk Aktiengesellschaft v. Church*, 411 F.2d 350, 351 (9th Cir. 1969).

207. See, e.g., *Prestonettes, Inc. v. Coty*, 264 U.S. 359 (1924); *Bumble Bee Seafoods, L.L.C. v. UFS Indus., Inc.*, 71 U.S.P.Q.2d (BNA) 1684 (S.D.N.Y. July 20, 2004).

208. See, e.g., *Fed'n Internationale de Football Ass'n v. Nike, Inc.*, 285 F. Supp. 2d 64 (D.D.C. 2003); cf. *MGM-Pathe Commc'ns Co. v. Pink Panther Patrol*, 774 F. Supp. 869 (S.D.N.Y. 1991) (finding that the name "Pink Panther Patrol" of a gay rights organization infringed on the Pink Panther trademark by suggesting sponsorship of the movie character).

209. See, e.g., *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 833–36 (S.D.N.Y. 1990); see also *infra* Part III.C (discussing publicity rights and other "persona rights").

210. Consumers need not understand the ownership of a company or the exact provenance of a product if they recognize the brand identity. See *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F.2d 464, 466 (2d Cir. 1955); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9, cmt. c (1995).

that undermine their carefully crafted image. A regime like trademark law thus could avoid distortion of consumer choices through misleading social marketing messages and also prevent squandering the power of individuals' identities through overuse—some of the very same information quality concerns raised by poorly designed social marketing.

There are several problems with exporting this trademark model directly to social marketing, however. For historical reasons, trademark law extends only to identities of brands (or, increasingly, of celebrities) that already have been exploited commercially. Furthermore, trademark law imposes conditions that might not translate well to the social marketing context, especially its focus only on provably misleading or confusing associations. Finally, the economic focus of trademark rules ignores other concerns discussed in Part II, particularly the disclosure of personal information.

A threshold problem with applying a trademark model to social marketing is the traditional commercially rooted definition of a trademark. Beginning with its common law origins in unfair competition law, trademark protection has attached when a vendor first used the trademark to sell products.<sup>211</sup> In the alternative, the Lanham Act now allows optional federal registration of trademarks, but that protection also lapses absent commercial use of the mark.<sup>212</sup> Either way, trademarks exist precisely because consumers already perceive them as signifiers of some commercial meaning.<sup>213</sup> This definition emerged in part because a standard rationale for trademark rights relies principally on its protection of consumers rather than the trademark holder.<sup>214</sup> Brand names, logos, distinctive packaging, slogans, and product features allow would-be purchasers to locate the items they seek consistently and efficiently.<sup>215</sup>

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211. See, e.g., *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (“At common law the exclusive right to [a trademark] grows out of its use, and not its mere adoption.”); *Sengoku Works Ltd. v. RMC Int’l, Ltd.*, 96 F.3d 1217, 1219 (9th Cir. 1996) (“It is axiomatic in trademark law that the standard test of ownership is priority of use. To acquire ownership of a trademark it is not enough to have invented the mark first or even to have registered it first; the party claiming ownership must have been the first to actually use the mark in the sale of goods or services.”).

212. See 15 U.S.C. § 1119 (2006) (allowing courts to cancel registration of trademarks that are abandoned or otherwise lack the requirements for protection); *id.* § 1127 (defining “abandonment”).

213. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 13 (defining the distinctiveness requirement for trademark protection).

214. But see Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1849–73 (2007) (arguing that goals of producer protection were woven into trademark law from its inception).

215. See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995); Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2104–08 (2004); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 268–70 (1987); William McGeveran, *Four Free Speech Goals for Trademark Law*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1205, 1207–12 (2008). Secondarily, trademark rights also preserve incentives for producers to maintain the quality of their product, since they, not some imposter, will reap the rewards of repeat patronage when buyers like their products. Even this is usually explained as a benefit for consumers rather than producers because it rewards investment in high-quality goods. See *Qualitex*, 514 U.S. at 164.

Although the dawning era of social marketing shows that endorsements from ordinary individuals have (some) value, only a famous person can leverage personal identity into a recognized marketplace identifier. This requirement of widespread public identification of a mark is more than a mere condition that could be dispensed with in social marketing contexts; it represents the fundamental character of a trademark. The law exists to protect that preexisting public and commercial understanding. Conversely, privacy and certain persona rights insulate individual identity from commercial exploitation. The *raison d'être* of trademark law is the evil to be avoided by privacy and persona rights law.

Even individuals' names merit protection under standard trademark doctrine with proof of secondary meaning—that is, an existing association in the public mind between the name and the sale of particular products or services.<sup>216</sup> Modern trademark law largely repudiates the nineteenth century rule that gave second-comers the right to use their own name in business; rather, such use infringes if the use causes confusion to consumers.<sup>217</sup> Thus, a person named McDonald probably cannot open an eponymous restaurant. Overall, trademark law protects only identities already familiar to the public—brands and celebrities—but seldom ordinary private individuals.

The analogy to trademarks also breaks down because trademark law requires proof that consumers are likely to be confused by an allegedly misleading or false endorsement. The test for judging the likelihood of confusion, and precedents applying that test, have grown up in a particular factual setting different from that of social marketing. The doctrine already presents some awkward interpretive difficulties when transported from the context of merchandise to celebrities. These problems would only intensify if applied to ordinary customers as if their identities were trademarks. For example, instead of the public at large, the potentially confused segment of the population is composed entirely of friends of the aggrieved party. Litigants in false endorsement cases often proffer survey evidence demonstrating that consumers did (or did not) understand the use of the trademark in question to convey affiliation or sponsorship, but competent evidence of that sort would be difficult to gather in a social networking scenario. Similarly, standard factors for judging confusion, such as “relatedness of the goods” or “marketing channels used,” become nearly useless in social marketing situations. Again, the different factual background of social marketing presents new challenges. The lack of any history of commercial exploitation of an ordinary customer's identity makes trademark law inapposite.

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216. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 14. The rule quite sensibly seeks to protect “the opportunity for similarly-named persons to exploit their name in business.” *Id.* § 14 cmt. e.

217. See 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 13:8 (4th ed. 2008).

Another complication arises from the murky doctrine of fair use in trademark law.<sup>218</sup> When a mark is used merely to identify a product or its maker, that use often should be found noninfringing to avoid unduly constraining communication. A true statement of fact about a person in social marketing—such as “Joe ate at the restaurant” or “Joe took the quiz”—thus presents a difficult issue. Cases involving truthful statements about celebrity identities split on this question, often depending on particular facts.<sup>219</sup> Social marketing would almost always present just such tricky cases.

As a final example of the poor fit between trademark law and social marketing, the form of relief in trademark cases adapts poorly to social marketing. Most trademark holders who litigate seek injunctive relief as their primary goal, because they believe continuing infringement causes concrete, ongoing harm to their business. Courts are often wary of awarding damages in garden-variety infringement cases.<sup>220</sup> As we saw with privacy law, a typical individual whose identity has been used in a social marketing message would find it very difficult to prove damages in an isolated case.<sup>221</sup> Attorney fee awards are rare and limited to “exceptional” cases.<sup>222</sup> Thus, even if the many other difficulties were eliminated, lawyers would have no incentive to pursue trademark-based social marketing cases. Trademark law, because it protects only marks used for business purposes, understandably protects only those motivated by business-related damages. This structure works tolerably well for its intended beneficiaries but would not do a good job if repurposed for social marketing.

Claims for unfair competition or false advertising could avoid some—but not all—of these pitfalls of trademark law. A claim under section 43(a) of the Lanham Act or equivalent state laws is more flexible than a trademark claim because it only needs to demonstrate some misrepresentation in commercial advertising or promotion.<sup>223</sup> Professor Ellen Goodman recently conducted a comprehensive review of the application of false advertising law to new peer-to-peer marketing techniques.<sup>224</sup> Goodman persuasively argued that promotional messages that draw on user-generated elements remain fully subject to false advertising law if a

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218. Elsewhere I have criticized this doctrine and suggested improvements. See William McGeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 51–54 (2008).

219. Compare, e.g., *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1154–55 (9th Cir. 2002), with *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 412–13 (9th Cir. 1996).

220. See 2 MCCARTHY, *supra* note 217, § 30:58 (“Monetary liability in trademark cases without fault or knowingly performing illegal acts seems to give most judges considerable pause. However, evidence of actual confusion of some customers or evidence of actual losses suffered by plaintiff will often supply the missing element even where defendant ignorantly blundered into an infringing act. Such actual confusion or damage is notoriously difficult to prove, let alone quantify.”)

221. See *supra* note 190 and accompanying text.

222. See 15 U.S.C. § 1117(a) (2006).

223. See *Id.* § 1125(a)(1)(B).

224. Ellen P. Goodman, *Peer Promotions and False Advertising Law*, 58 S.C. L. REV. 683 (2007).

marketer adopts or disseminates them.<sup>225</sup> Even though she did not discuss social marketing (further testament to how quickly these advertising trends are developing), Goodman's analysis clearly applies to the technique. Social marketing involves a promotional message that is created and transmitted by the advertiser, who takes legal responsibility for its truthfulness.

Again, however, the factual context of false advertising law differs so much from social marketing that problems arise. First, a person featured in a social marketing message may lack standing to challenge it under false advertising law. In general, courts do not allow consumers to sue for false advertising under Section 43(a) because their injury is not the commercial type for which the Lanham Act was intended.<sup>226</sup> Unlike consumers, celebrities who allege that advertising has falsely implied their endorsement often have standing to sue—but usually courts reach this conclusion based on celebrities' long-standing and significant business interest in marketing their image.<sup>227</sup> While not free from doubt, it seems likely that an ordinary person whose identity has been used in a misleading way for social marketing would resemble a consumer more than a celebrity who suffers commercial harms.<sup>228</sup> Second, the nature of falsehood required for liability would present difficulties. Social marketing messages transmit truthful information but may invite a false inference of endorsement. Such misleading implications, as opposed to directly false statements, are much more difficult to prove.<sup>229</sup> Third and perhaps most significant, even if standing and proof problems could be overcome, a would-be plaintiff in a false advertising case still faces the same familiar problem with the inefficiency of individual suits that we have already seen in privacy and trademark law. The design of unfair competition and false advertising law offers the most effective redress to commercial competitors, not to ordinary individuals featured in promotional messages.

Finally, even at its most effective, trademark and unfair competition law both address only the information quality issues outlined in Part II.B.

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225. *Id.* at 703. In contrast, Goodman concluded that a "pure peer" promotion without any involvement by the brand owner is noncommercial speech and unregulated by false advertising law. *Id.* at 700.

226. See generally Richard A. De Sevo, *Consumer Standing Under Section 43(a): An Issue Whose Time Has Passed*, 88 TRADEMARK REP. 1 (1998) (reviewing and analyzing court decisions on consumer standing under the Lanham Act).

227. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1107–10 (9th Cir. 1992) (concluding after lengthy analysis that the singer's "standing was sufficiently established by the likelihood that the wrongful use of his professional trademark, his unique voice, would injure him commercially"); *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 625–26 (S.D.N.Y. 1985) (making a comparison to trademarks and finding that "[a] celebrity has a similar commercial investment in the 'drawing power' of his or her name and face in endorsing products and in marketing a career").

228. See *Kournikova v. Gen. Media Comms. Inc.*, 64 U.S.P.Q.2d (BNA) 1614, 1619 (C.D. Cal. 2002).

229. See generally Rebecca Tushnet, *It Depends on What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227 (2007).

Trademark-like rights may prevent misleading implications of endorsement. Indirectly, they also could avoid overexposure of individual endorsers. But disclosure concerns discussed in Part II.A would remain unresolved. Likewise, although trademark rights do allow firms to exercise a fair amount of control over the identities of their brands, at least in principle the law confers that control for instrumental purposes, as a means to respond to information quality concerns, rather than for the distinct dignitary reasons identified in Part II.C.

Overall, it is tempting to see the well-developed body of law surrounding trademarks and false advertising as an ideal way to tackle information quality problems presented by social marketing. The highly developed state of that law actually creates problems, however, because it is tailored for other situations and matches poorly with many aspects of social marketing.

### C. “*Persona Rights*” Law

The next area of law to consider blends aspects of the previous two to create a hybrid of privacy and intellectual property law. I will call this overall approach the “persona rights” paradigm.<sup>230</sup> As noted above,<sup>231</sup> identity control concerns are grounded in two understandings of the interests at stake, one focused more on offense to dignitary interests and the other on a right to compensation for commercial value. These interpretations have led to two related but distinct legal claims: the tort of appropriation and the right of publicity, respectively.

As Robert Post mildly states, “The process of distinguishing publicity from privacy rights was protracted and confused. . . .”<sup>232</sup> Judges and scholars have puzzled at length over the contours of the two claims and their relationship to one another. On the whole, social marketing avoids these more familiar controversies about persona rights, but instead encounters new problems with the paradigm. There is some dispute about the nature of the interest protected by each doctrine, but social marketing straddles the divide between them. Earlier cases, following in the footsteps of Warren and Brandeis, saw nonconsensual uses of persona as infringements on individuals’ dignitary interests.<sup>233</sup> William Prosser eventually crystallized a tort of appropriation from these cases.<sup>234</sup> As reporter for the *Restatement (Second) of Torts*, Prosser then enshrined his defini-

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230. See Haemmerli, *supra* note 134, at 479–80 (“The term ‘persona’ has long been used to describe the facet of personality that is presented to the outside world. It is a useful and desirable term because it evokes human personality and, in turn, human freedom.”).

231. See discussion *supra* Part II.C.

232. Post, *supra* note 127, at 667.

233. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); see 1 MCCARTHY, *supra* note 132, § 1.18 (“Most of the courts accepting the *Pavesich* view emphasized that the right was personal and not proprietary.”).

234. Prosser, *supra* note 157, at 401–07.

tion of this tort as occurring when someone “appropriates to his own use or benefit the name and likeness of another.”<sup>235</sup> Several states also have statutes that create equivalent liability.<sup>236</sup> Prosser himself emphasized the unauthorized taking of property instead of the affront to dignity.<sup>237</sup> In general, however, courts applying the *Restatement’s* appropriation framework still tend to look for dignitary harms.<sup>238</sup> Courts usually do not require plaintiffs in such cases to show that their identity had any commercial value.<sup>239</sup>

Meanwhile, explicit rights of publicity emerged in the middle of the twentieth century to cover monetary harms that might arise from commercial use of identity, generally of celebrities. In a 1954 law review article justifying and fleshing out the proposed new right, the respected intellectual property scholar Melville Nimmer argued that the dignity-based rationale was “not adequate to meet the demands of the second half of the twentieth century, particularly with respect to the advertising, motion picture, television, and radio industries.”<sup>240</sup> Judge Jerome Frank had opined a year earlier, in a groundbreaking decision among the first to recognize a publicity rights claim explicitly, that “prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements.”<sup>241</sup>

While this difference between dignity and monetary harm drives much of the discussion about persona rights, and might prove significant in many cases, it would have little effect on a claim of injury from social marketing. Publicity rights were developed with celebrities in mind, but ordinary persons usually can recover if the use of their image deprived them of financial benefits.<sup>242</sup> Likewise, famous people sometimes can

235. RESTATEMENT (SECOND) OF TORTS § 652C (1977).

236. See, e.g., N.Y. CIV. RIGHTS LAW § 51 (McKinney 1992); CAL. CIV. CODE § 3344–3344.6 (West 1997).

237. See Prosser, *supra* note 157, at 406–07 (“The interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff’s name and likeness as an aspect of his identity.”).

238. See, e.g., *Jim Henson Prods., Inc. v. John T. Brady & Assocs.*, 867 F. Supp. 175, 188–89 (S.D.N.Y. 1994) (“The privacy-based action is designed for individuals who have not placed themselves in the public eye. It shields such people from the embarrassment of having their faces plastered on billboards and cereal boxes without their permission. The interests protected are dignity and peace of mind, and damages are measured in terms of emotional distress.”); 1 MCCARTHY, *supra* note 132, §§ 5:63–5:67. But see *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983) (conflating Prosser’s appropriation tort with publicity rights and requiring commercial harm for recovery under appropriation).

239. See, e.g., *Joe Dickerson & Assocs. v. Dittmar*, 34 P.3d 995, 1002 (Colo. 2001) (“A plaintiff whose identity had no commercial value might still experience mental anguish based on an unauthorized use of her name and likeness.”). But cf. *Jackson v. Playboy Enter., Inc.*, 574 F. Supp. 10, 13 (S.D. Ohio 1983) (“[I]n order to state a cause of action for invasion of privacy by appropriation, the complaint must allege that plaintiff’s name or likeness has some intrinsic value, which was taken by defendant for its own benefit, commercial or otherwise.”).

240. Nimmer, *supra* note 138, at 203.

241. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

242. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995) (“[T]he identity of even an unknown person may possess commercial value.”).

show that certain uses of their image caused emotional harm and thus win an appropriation-like claim.<sup>243</sup> In principle, depending on the facts, social marketing might violate either branch of persona rights. The appropriation tort, with its orientation toward ordinary citizens, may be the more natural fit. But in the highly interactive online environment of Web 2.0, there is at least some monetary value to trusted referrals. Some social marketing cases might qualify for both claims simultaneously.<sup>244</sup>

Another difference between the doctrines is the status of publicity rights as a form of property, which generally makes them transferable, alienable, devisable, and descendible.<sup>245</sup> These features of publicity rights garner a great deal of scholarly attention.<sup>246</sup> Here, too, however, the ability to convey publicity rights to others is secondary to the analysis of whether *some* form of persona rights might provide a good response to poorly designed social marketing.

Finally, typical social marketing scenarios evade another thorny issue over the boundary of “identity.”<sup>247</sup> Courts have struggled to decide what features of a person must be appropriated for liability under the persona rights paradigm. Results vary by state. Under New York law, for example, only advertising uses of a “name, portrait, picture, or voice” are actionable.<sup>248</sup> Other states are more lenient and have found liability for imitation of costumes, catchphrases, and poses.<sup>249</sup> Social marketing, such as Facebook Ads, would satisfy a more stringent interpretation of identity like that of New York; social marketing goes beyond merely evoking a person’s identity<sup>250</sup> and typically uses individuals’ names and often their photos.

Having avoided all these difficulties, persona rights would appear quite promising as a basis for potential regulation of social marketing. Certainly, the facts at issue in cases of bad social marketing practices appear much closer to this type of claim than to theories under antidiscl-

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243. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1103 (9th Cir. 1992) (citing *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 880–81 (S.D.N.Y. 1973)); see also Kwall, *supra* note 132, at 35–38 (discussing celebrities’ emotional and dignitary interests in their public identities).

244. See 1 MCCARTHY, *supra* note 132, § 5:63.

245. See 2 MCCARTHY, *supra* note 132, §§ 9:17–9:40, 10:6–10:14 (collecting cases).

246. See, e.g., Peter L. Felcher & Edward L. Rubin, Comment, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125 (1980); Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322 (2002); Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 207–28 (1983); David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ARTS & ENT. L.J. 71 (2005).

247. See Sheldon W. Halpern, Essay, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 859–66 (1995).

248. N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 2009); see *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 451–54, (S.D.N.Y. 2008) (wrestling with the definition of identity under the New York statute).

249. See, e.g., *Wendt v. Host Int’l, Inc.*, 125 F.3d 806 (9th Cir. 1997); *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992); *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

250. Cf. Stacey L. Dogan, *An Exclusive Right to Evoke*, 44 B.C. L. REV. 291 (2003).



sure privacy law or trademark law. Just as in the old *Pavesich* case,<sup>251</sup> a marketer has used, for its own promotional purposes, a customer's name and image. Unlike the other paradigms, it would not matter whether the information in a social marketing message were especially personal, nor whether the message conveyed a misleading or false endorsement. To be sure, sensitive private information or deceptive advertising would likely influence the outcome of a case by presenting more compelling facts. But a persona rights approach also covers cases that lack these features and nevertheless raise the concerns listed in Part II.

In light of these observations, right after the introduction of Facebook Ads, Professor Daniel Solove and I both suggested on our legal blogs that the program (as then structured) probably violated appropriation torts and statutes.<sup>252</sup> Yet no one sued on this basis. The principal class action complaint over Facebook Ads omits any such theory from its eight varied counts.<sup>253</sup> There are legitimate arguments that such a claim ultimately might not prevail, but the failure even to bring the claims (particularly in comparison to seemingly weaker bases for recovery that were plead, such as the ECPA<sup>254</sup>) suggests something more might be afoot.

There are a few fairly technical reasons to omit such a claim. One commentator notes that Facebook's terms of service require application of Delaware law, which has minimal history with the persona rights paradigm and no statutory protection (although some courts would refuse to enforce this choice of law provision).<sup>255</sup> Variations within a social marketing program conceivably might prevent certification of a common question class action, although this too seems attenuated.<sup>256</sup> Some partner sites might implement the same social marketing program slightly differently, but serious factual distinctions among plaintiffs should be small in a suit against a single social marketing program. Likewise, states' divergent approaches to the persona rights paradigm might undermine common questions of law, although plaintiffs would argue—and many courts would conclude—that the benefits of aggregation overcome

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251. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

252. Posting of William McGeveran to Info/Law, Facebook Inserting Users into Ads, <http://blogs.law.harvard.edu/infolaw/2007/11/08/facebook-social-ads/> (Nov. 8, 2007); Posting of Daniel J. Solove to Concurring Opinions, The New Facebook Ads—Starring You: Another Privacy Debate?, [http://www.concurringopinions.com/archives/2007/11/the\\_new\\_faceboo.html](http://www.concurringopinions.com/archives/2007/11/the_new_faceboo.html) (Nov. 8, 2007 11:27).

253. See *Lane* Complaint, *supra* note 7, at 40–57.

254. See *supra* notes 186–89 and accompanying text (critiquing the ECPA claim in the *Lane* complaint).

255. Morganstern, *supra* note 4, at 192–95 (analyzing the impact of Facebook's terms of service on potential privacy lawsuits and noting that, although the choice of forum clause favors California and the choice of law clause favors Delaware, it is not clear whether California precedents would dictate enforcement of the choice of law clause); see Facebook, Terms of Use, Sept. 23, 2008, <http://www.facebook.com/terms.php>.

256. See, e.g., FED. R. CIV. P. 23(a)(2) (requiring common questions of law or fact for certification of class action); FED. R. CIV. P. 23(b)(3) (allowing class actions where such common questions predominate over other issues and aggregation allows superior efficiency).

these typically minor legal differences.<sup>257</sup> These technicalities of applicable law and class certification could explain the omission of a persona rights claim from the Facebook class actions, but they do not themselves undermine the possible utility of the entire paradigm as a model for handling social marketing. Two other issues present broader problems.

First, in most reported cases, there is no dispute over whether a plaintiff authorized the use of his or her persona. Occasional cases involve misunderstandings, such as a defendant obtaining a photograph, and mistakenly believing the plaintiff has consented to its commercial use;<sup>258</sup> while this error might mitigate damages, it does not usually eliminate liability. Because the existence and nature of consent seldom arise in persona rights disputes, however, the case law has not developed clear standards to determine what qualifies as consent.

Social networks cloud the issue of consent. Facebook's chief privacy officer argued publicly that Facebook Ads did not violate persona rights because users had already agreed to the transmission of social marketing messages through their participation in the site.<sup>259</sup> This cramped understanding of consent appears incorrect under current law. Recall that the original structure of Beacon allowed web sites to initiate social marketing messages provided a customer did not affirmatively object. When a customer took an action at a Beacon partner site that would be the subject of a social marketing message, a pop-up window appeared briefly and invited customers to decline to send such a message to their friends' Facebook News Feeds. A lack of response meant the site could send the message. Apparently Facebook and its partners judged that the failure to opt out constituted the consent necessary to avoid liability for appropriation. Under at least some versions of the persona rights paradigm it would appear that such implied consent would be inadequate. The New York statute, for example, demands prior *written* consent before using a "name, portrait, picture or voice . . . for advertising purposes or for the purposes of trade."<sup>260</sup> But the undeveloped law of consent in persona rights cases and the unclear nature of consent in social networks both complicate the analysis greatly.

Second, proving damages presents difficulty, just as in other legal paradigms.<sup>261</sup> Because persona rights are enforced entirely by private civil actions, claims must result in damage awards measuring harm to indi-

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257. For discussion of this complex issue, see generally *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995); Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1076–78 (2005); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 581–88 (1996).

258. See 1 MCCARTHY, *supra* note 132, §§ 3:34–3:35.

259. Posting by Saul Hansell to N.Y. Times Bits Blog, *Are Facebook's Social Ads Illegal?*, <http://bits.blogs.nytimes.com/2007/11/08/are-facebooks-social-ads-illegal/> (Nov. 8, 2007 17:28) (reporting that Facebook Chief Privacy Officer Chris Kelly "said the advertisements are simply a 'representation' of the action users have taken: choosing to link themselves to a product").

260. N.Y. CIV. RIGHTS L. § 51 (McKinney Supp. 2009).

261. See *supra* notes 190–201, 220–22 and accompanying text.

viduals. Celebrities usually can demonstrate the earning power of their personae and the reduction in value caused by unauthorized commercial use; damages awards in publicity rights cases can reach hundreds of thousands of dollars.<sup>262</sup> A few states that define persona rights by statute, including California, also provide small minimum damages for violations.<sup>263</sup> For ordinary individuals whose identities are misused through bad social marketing practices, however, proof is difficult and legal standards are unpredictable. As in any tort case assessing mental distress, courts are often hesitant to allow significant damages without evidence that severe consequences resulted such as physical problems or loss of employment. As to the standards, Professor McCarthy cites numerous cases attempting to assess the appropriate damages for indignity and mental distress and finds them “all over the map.”<sup>264</sup>

Perhaps the difficulty in measuring or proving direct dignitary harm arises because these identity control damages are not very serious in most individual cases. The injury is abstract. An individual and isolated loss of identity control, in one social marketing message at a time, rarely hurts customers enough to justify a lawsuit. Compounded through the entire society, however, a pervasive loss of identity control could be troubling. In addition to these identity concerns, we have explored possible problems associated with unwarranted disclosure and misleading endorsements. These larger concerns cannot be addressed by enforcing persona rights in individual lawsuits based on the minimal harm to identity control caused in each instance.

Overall, however, the persona rights rationale transcends the narrower focus of other paradigms on protecting information privacy or preventing misleading advertising. Privacy law demands consent only when information is sensitive, and trademark or unfair competition law require consent only if endorsements cause confusion. Persona rights, by contrast, exist regardless of these circumstances. Furthermore, they derive their force from individual preferences rather than from overly general legal characterizations about the nature of the information exchanged (sensitive or not; misleading or not).

The exercise of persona rights would allow a customer to withhold permission from any or all social marketing, thereby preventing unwanted disclosures, ensuring the accuracy of implied endorsements, and controlling the quantity of messages to avoid spamification. This outcome is slightly odd, because persona rights are oriented toward the identity control concern, which I have argued is the least serious concern

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262. See, e.g., *Midler v. Young & Rubicam Inc.*, 22 U.S.P.Q. 2d (BNA) 1478 (9th Cir. 1991) (\$400,000 for Bette Midler's singing voice).

263. See CAL. CIV. CODE. § 3344(a) (West 1997) (providing minimum statutory damages of \$750); IND. CODE ANN. § 32-36-1-10(1)(A) (LexisNexis 2002) (\$1000); NEV. REV. STAT. ANN. § 597.810(b)(1) (LexisNexis 2004) (\$750); TEX. PROP. CODE ANN. § 26.013(a)(1) (Vernon 2000) (\$2,500). In comparison, the VPPA's statutory damages figure is \$2500. 18 U.S.C. § 2710(c) (2006).

264. 2 MCCARTHY, *supra* note 132, § 11:29.

at stake in social marketing. Because they impose few conditions, however, appropriation and publicity rights actually offer the greatest scope for addressing all the possible concerns about social marketing, provided the problems of consent and proof of damages can be solved.

#### *D. Consumer Protection Law*

The final area of law is different from the others because it operates primarily through regulatory action rather than lawsuits. Given the problems under all the other paradigms with the efficacy of private suits, this may be a significant advantage. Admittedly, some would argue that federal agencies charged with enforcing HIPAA and financial privacy statutes have taken a lenient approach to violations thus far.<sup>265</sup> A regulatory approach nevertheless may offer the best means to respond to concerns about social marketing and also draw on the insights of the other paradigms.

The Federal Trade Commission (FTC) and state attorneys general sometimes intervene to protect information privacy as a form of consumer protection. The FTC calls privacy “a central element of the FTC’s consumer protection mission.”<sup>266</sup> A number of scholars have also examined the possibility of increased privacy regulation under the authority of consumer-based law such as the FTC Act or states’ comparable “little FTC Acts.”<sup>267</sup>

In the past, the FTC’s focus in enforcing privacy has fallen rather far from social marketing. For some years the agency has investigated companies that violate their own self-declared privacy policies. More recently, the Commission promulgated regulations concerning secure handling of especially sensitive personal financial information<sup>268</sup> and brought enforcement actions for serious data security breaches.<sup>269</sup> These problems, though potentially serious, are quite distinct from social marketing—and, in fact, would draw limited resources away from any action to regulate social marketing.

Recently, the FTC has engaged in rulemaking that moves closer to the realm of social marketing. In late 2008, the agency unveiled a pro-

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265. See Janger & Schwartz, *supra* note 168 (criticizing Gramm-Leach-Bliley enforcement); OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., NATIONWIDE REVIEW OF THE CTR. FOR MEDICARE & MEDICAID SERVS. HEALTH INS. PORTABILITY AND ACCOUNTABILITY ACT OF 1996 OVERSIGHT (October 2008), <http://www.oig.hhs.gov/oas/reports/region4/40705064.pdf> (criticizing HIPAA enforcement).

266. Fed. Trade Comm’n, Privacy Initiatives, <http://www.ftc.gov/privacy/> (last visited May 26, 2009).

267. See, e.g., Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041 (2000); Reidenberg, *supra* note 84; Jeff Sovern, *Protecting Privacy with Deceptive Trade Practices Legislation*, 69 FORDHAM L. REV. 1305 (2001).

268. See Standards for Safeguarding Customer Information, 16 C.F.R. § 314.1 (2008).

269. The FTC web site lists a number of data security cases the agency has pursued in recent years. Fed. Trade Comm’n, Privacy Initiatives, Enforcement, [http://www.ftc.gov/privacy/privacyinitiatives/promises\\_enf.html](http://www.ftc.gov/privacy/privacyinitiatives/promises_enf.html) (last visited May 26, 2009).

posed rule that would revise its guidelines concerning the use of endorsements—including consumer testimonials—in advertising.<sup>270</sup> Exercising its authority to define terms under the CAN-SPAM Act, the FTC has also developed guidance about marketers' use of e-mail, including "refer a friend" promotions.<sup>271</sup> Finally, this year the agency issued a staff report proposing principles to guide industry self-regulation of behavioral targeting techniques.<sup>272</sup> Using behavioral targeting methods, online advertisers mine the information they have gathered about individuals to build a profile of the customers and then target particularized advertisements based upon that profile.<sup>273</sup> The agency's willingness to proceed in these more analogous areas might suggest openness to addressing concerns that may arise from social marketing.

Problems with social marketing go well beyond those presented by other endorsements or by behavioral targeting. The proposed restrictions on consumer endorsements primarily would require that advertisements featuring testimonials from customers whose results were unusual must include substantiated information about more typical results.<sup>274</sup> This and other features of the rule aim to improve the information quality of such advertisements, but they do not purport to reach social marketing.

Companies engaged in behavioral targeting distribute personal information about their customers only to one another, whereas social marketing discloses similar information about an individual's habits directly to his or her friends. As I argued above, these disclosures within a social network actually represent greater harm.<sup>275</sup> Furthermore, different parties benefit in the two structures. Marketers accurately point out that behavioral targeting tailors the advertisements people receive based upon their own past preferences; this customization and convenience can benefit customers by informing them of products that might interest them and reducing irrelevant advertising messages.<sup>276</sup> Social marketing,

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270. See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. 72,374 (Nov. 28, 2008) (to be codified at 16 C.F.R. pt. 255).

271. See Federal Trade Commission, Definitions and Implementation Under the CAN-SPAM Act, 73 Fed. Reg. 29,654 (May 21, 2008) (to be codified at 16 C.F.R. pt. 316).

272. See Fed. Trade Comm'n, FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising (Feb. 2009), <http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf>.

273. See Stephanie Clifford, *Many See Privacy on Web as Big Issue, Survey Says*, N.Y. TIMES, Mar. 16, 2009, at B5 (reporting survey that found only 28 percent of people were comfortable with behavioral targeting); IAB Behavioral Targeting: Secret Weapon in Display Ad's Arsenal, [http://www.iab.net/insights\\_research/iab\\_research/1675/368205](http://www.iab.net/insights_research/iab_research/1675/368205) (July 2008) (projecting an increase in industry spending on behavioral advertising).

274. See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 73 Fed. Reg. at 72,378–79; Association of National Advertisers, Press Release, FTC Announces Potential Changes to Endorsement & Testimonial Guidelines (Dec. 3, 2008), <http://www.ana.net/advocacy/content/1529>.

275. See *supra* Part II.A.

276. Posting of Paul Barsch to Marketing Profs Daily Fix, Behavioral Targeting—Where's the Fine Line?, [http://www.mpdailyfix.com/2008/08/behavioral\\_targeting\\_wheres\\_th.html](http://www.mpdailyfix.com/2008/08/behavioral_targeting_wheres_th.html) (Aug. 13, 2008);

however, helps the marketer sell products to the customer's friends and perhaps helps those friends find products of interest. It does not provide any comparable benefit to the customer whose personal information provides these advantages to others. In fact, unless the endorsement is voluntary and the customer derives some satisfaction from advising friends about good products, it is difficult to perceive any gain for the customer at all.

The substantive justification for regulatory action can be found in the authority of the FTC and state regulators to enjoin deceptive or unfair trade practices.<sup>277</sup> Jeff Sovern has argued persuasively that this power could be used to stop intrusive data collection practices.<sup>278</sup> Social marketing presents an even clearer case, because the messages themselves may be misleading. In addition, regulators could rely on the significant body of law discussed in this Article that could reach social marketing, if not for certain details that frustrate its effectiveness. So, assume for example that some social marketing techniques (such as the original Beacon) are unlawful under the appropriation tort or similar state statutes, but the mode of enforcement through private causes of action effectively insulates marketers from liability. The FTC could draw on this underlying law to justify and guide its regulation.

Consumer protection regulators should also consider intervention because of structural factors that would make regulatory intervention superior to case-by-case resolution in courts. First, as we have seen repeatedly, problems of proof and damages would make individual suits over social marketing extremely difficult under any available law, whether privacy, trademark, or persona rights. Harms would be distributed widely across many individual instances, each resulting in small damages, so injured individuals would have minimal incentive to sue. A lawsuit aggregating such claims would be unwieldy. Second, judges lack the expertise and fact-finding power that an agency can use to evaluate complex and quickly changing technology and associated business practices.<sup>279</sup> Finally, a regulator such as the FTC can engage in a cooperative process with social networking providers, marketers, and privacy advocacy groups to develop an approach that accommodates competing interests to the degree possible. The resulting standards would become a set of best practices, and regulators would serve as norm entrepreneurs to encourage businesses and users alike to internalize those best practices as expectations for all social marketing.<sup>280</sup>

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see also Posting of Andy Chen to ClickZ, The Three Dimensions of Behavioral Targeting, <http://www.clickz.com/showPage.html?page=3401511> (Sept. 1, 2004).

277. See 15 U.S.C. § 45(a)(1) (2006).

278. See Sovern, *supra* note 267, at 1326–39.

279. See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

280. See Hetcher, *supra* note 267, at 2046–52.

## IV. CONSENT AND IMPLICATIONS

This final Part of the Article draws on the analysis of existing legal paradigms and particularly their effectiveness at addressing potential concerns about social marketing. Section A suggests a hybrid form of legal intervention that ought to be considered as a response if lawmakers choose to regulate social marketing. Section B considers possible objections to the proposal. Taken together, these analyses also serve as an example of an approach to regulating technology that maintains flexibility while addressing potential problems before they become entrenched.

A. *A Consent Paradigm?*

If the law responds to social marketing, then it should adapt the most promising elements of existing paradigms and address the full range of concerns discussed in Part II. As Part III demonstrated, despite some overlap, inherent aspects of traditional U.S. data privacy and trademark law render them generally unsuitable for application to social marketing. A theory grounded in persona rights may offer the best substantive rationale for a legal response, whereas consumer protection law presents structural advantages over models that depend on private lawsuits for enforcement.

Under the rationale of persona rights, commercial use of an individual's identity in social marketing would require that person's affirmative consent—as an opt-in, not an opt-out. That general standard is a close cousin, or maybe sibling, of the appropriation tort and the right of publicity. When marketers include a person's photo in advertising or use celebrity endorsements, they must receive affirmative consent, not merely acquiescence. But this consent-based standard echoes the other existing legal paradigms as well. In privacy law, individuals waive some rights by consenting (explicitly or implicitly) to particular disclosures of their information.<sup>281</sup> Similarly, licensing mechanisms allow trademark holders to authorize use of their brand identity by another party for its own commercial purposes.<sup>282</sup> Both of these consent-based exceptions give the individual or company greater control over the presentation of identity to the outside world.

Not only does a requirement of affirmative consent draw from all the paradigms, it also addresses all three types of concerns comprehensively. Genuine consent eliminates most of the problems with disclosure, because it ensures that an individual revealed personal information intentionally. Genuine consent would eliminate unfairness or deception

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281. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) (“[T]here is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye.”). *But cf.* *Nader v. Gen. Motors Corp.*, 255 N.E. 2d 765, 771 (N.Y. 1970) (distinguishing between casual observation and “overzealous” surveillance in applying this rule).

282. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 33 (1995).

that might run afoul of consumer protection law and would enhance rather than undermine information quality. Instead of misleading recipients, social marketing endorsements made with a customer's full approval provide useful recommendations. At the same time, the need to obtain consent would prevent social marketing messages based on customers' weak preferences, thus limiting their overall number and avoiding spamification. Voluntary messages even can provide useful feedback to marketers about their customers' enthusiasm for various offerings. Finally, of course, to the extent that control over individual identity is a goal in itself, demanding genuine consent for commercial uses would achieve it.

What qualifies as "genuine" consent? Turning this broad standard into a workable rule may present some challenges, but they should not be insuperable. Regulatory agencies like the FTC, viewing the entire information ecosystem and all the different forms of social marketing, are better equipped to navigate those obstacles than would be a court examining one fact-bound case. The FTC (or a state regulator) could adopt a prophylactic rule presuming that social marketing messages without opt-in consent are deceptive or unfair marketing practices. Perhaps the presumption would be rebuttable under certain facts. Such a rule certainly would push social marketing to develop in accordance with these best practices. Although this requirement can be justified solely on the basis of preventing misleading advertisement, the rule actually would encompass all three types of concerns: disclosure, endorsement, and identity.

The two forms taken by Facebook Ads provide excellent examples of the principle in action. Recall Figures 1 and 2 from the beginning of this Article.<sup>283</sup>

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283. See *supra* Part I.C.



FIGURE 1  
SOCIAL MARKETING VIA SUGGESTION

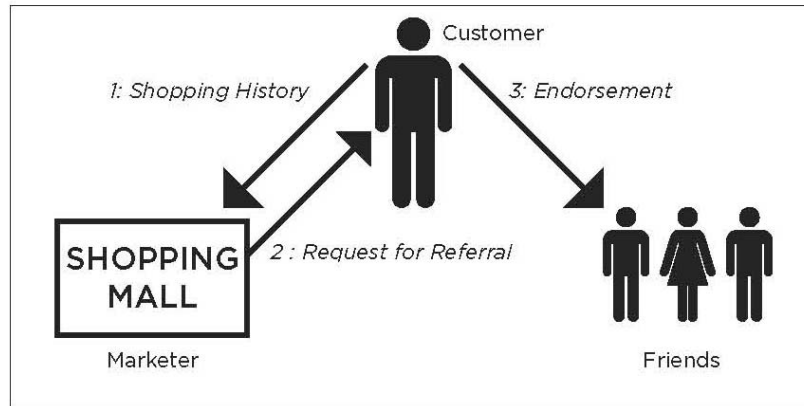
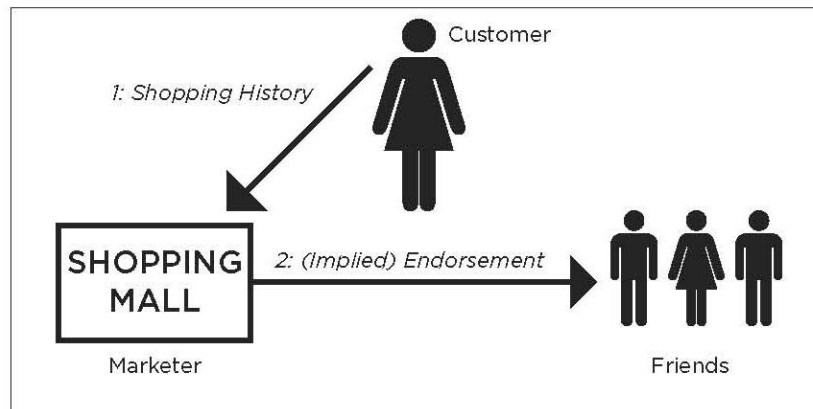


FIGURE 2  
AUTOMATED DIRECT SOCIAL MARKETING



The social marketing structure depicted in Figure 2, in which the marketer sends a message unless the customer intervenes to object, would be unlawful. This was the original set-up of Facebook's Beacon program. The revised form of Beacon sought individual permission for each social marketing message sent. This structure, depicted in Figure 1, ensures that the customer furnishes affirmative consent for the disclosures, the endorsements, and the reputational piggybacking on identity that result from a social marketing message. Requiring action by the subject of a social marketing message recaptures the reality of word of

mouth before the internet. Certainly, this type of social marketing would be legal.

Of course, social marketing will develop new variations beyond the very simple distinction embodied in Figures 1 and 2. For example, suppose Blockbuster Video or Amazon.com created an application that allowed users to share their video rental queues or book purchases with friends through a social networking site. Users would sign up, and every time they chose a movie or book, a message would go to all their friends (or a subset of friends chosen by the user). The message might insert a link allowing recipients to rent or buy the same item. Many users already list favorite movies and books in their Facebook profiles. Applications within Facebook such as Visual Bookshelf offer enhanced sharing of reading choices.<sup>284</sup> Beyond platforms dedicated to social networking, Netflix allows users to share their rental queues with friends, complete with a special purple icon for movies a friend has seen and a percentage showing the similarity of a friend's movie ratings to your own.<sup>285</sup> These popular services exemplify the benefits of the socially connected Web 2.0. Friends use the technology to counsel each other in their consumer choices and propel more popular, and presumably better, offerings to success. This structure affords the user more control than the opt-out of Figure 2, but might not ask permission for every individual social marketing message as does the traditional system in Figure 1.

Early indications suggest that Facebook Connect may be just such a hybrid implementation. Users initially choose to use their Facebook account as a log-in at another site. As a result, that other site can offer "federated identity"—the ability to combine different online profiles together—and also gain access to that user's social network.<sup>286</sup> Presumably, this will become a vector for social marketing. As of spring 2009, Facebook was still reviewing its policies about the level of consent required before a partner site could transmit information to the Facebook News Feeds of a user's friends.<sup>287</sup>

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284. See Facebook, Visual Bookshelf, <http://www.facebook.com/apps/application.php?id=2481647302> (last visited May 26, 2009).

285. See <http://www.netflix.com/Community> (log-in required) (last visited May 26, 2009).

286. SlideShare, Razorfish, Portable Social Graphs: Imagining Their Potential, <http://www.slideshare.net/shivsingh/portable-social-graphs-imagining-their-potential-presentation> (last visited May 26, 2009) (providing mock-ups of hypothetical implementations of Facebook Connect by Amazon, iTunes, and iPhone games); see also Posting of Om Malik to GigaOm, *supra* note 43 (predicting Facebook Connect could emerge as "a highly effective advertising platform"); Rafe Needleman, Facebook Connect: Scary but Good, CNET News (Dec. 1, 2008), [http://news.cnet.com/8301-17939\\_109-10110382-2.html](http://news.cnet.com/8301-17939_109-10110382-2.html) (describing benefits to sites implementing Facebook Connect).

287. See Facebook Developers, Facebook Connect Policies, [http://wiki.developers.facebook.com/index.php/Facebook\\_Connect\\_Policies#Feed](http://wiki.developers.facebook.com/index.php/Facebook_Connect_Policies#Feed) (last visited May 26, 2009). Somewhat confusingly, the policies require a "feed form" seeking consent, but contemplate an approval process—yet to be determined—that would allow developers to skip this step. The policies also articulate "Best Practices" under which developers "should add a check box" to the feed form seeking consent, which could "be pre-checked by default." These policies are quite unclear and seem to send mixed messages about the level of genuine consent built in to Facebook Connect.

In response to these new variations on social marketing, a regulatory approach again proves superior to case-based development of the law by courts. A regulator can work with advocacy groups, social network providers, marketers, and other stakeholders to develop best practices. They might promulgate the resulting decision through formal rulemaking processes or more informal mechanisms such as advisory opinions or other agency guidance. Regulators could mandate very granular permission and apply the opt-in model of Figure 1 to every individual message sent through a system like Facebook Connect. Such intrusive and repetitive opt-in requests might become a nuisance and inhibit social sharing, however. A better rule probably would allow a user to grant global permission, but could require a granular opt-out for particular messages and an easy means to cancel the authorization. So, for example, a user might sign up one time for an application that allows Amazon to send social marketing messages about book purchases, but the user could click a prominent and clearly worded link before making a purchase saying, "Do not tell my friends about these purchases." The user also would be able to cancel the global authorization at any time. These practices more closely approximate the robust requirements for genuine consent found in the persona rights model.

A regulatory approach along these lines combines the flexibility and effective enforcement of consumer protection law, the scope of persona rights and their focus on individual preferences to trigger protection, and the consistent theme of individual consent found throughout the relevant law. Creating that combination does not require dramatic new legal enactments or institutions. Nor does it necessitate any wholesale expansion of ownership rights. Rather, regulators can combine the principles embodied by existing paradigms in a new way.

Importantly, a consent-based regulatory requirement need not displace other remedies. In unusual situations where plaintiffs can successfully sue based on privacy torts, trademark claims, rights of publicity, or private claims under states' "little FTC Acts," they may proceed. The analysis above, however, demonstrates that these ad hoc private legal actions will not respond effectively to most of the challenges of social marketing.

### *B. Potential Objections*

At least three objections might be made to such a consent-based model for regulating social marketing, concerning propertization of identity, free speech, and the need for legal intervention in fast-moving technological developments.

To some extent the proposal above would expand persona rights and could be interpreted as creating additional intellectual property

rights. Critics thus might view it as an unwise further “propertization” of identity. Similar objections have been raised to the right of publicity.<sup>288</sup> At least in this setting, however, a focus on “property” would be an unhelpful and largely semantic distinction. It is a well-worn debate that arises when analyzing most privacy restrictions.<sup>289</sup> Vesting an individual with *any* right can always be conceptualized as propertizing it.<sup>290</sup> That is especially true if, as here, the individual can bargain the right away as part of an exchange (by, for example, consenting to social marketing messages in order to use a web site). Moreover, regulatory best practices lack the most property-like elements of other persona rights regimes: alienability, descendibility, and private enforcement. In any event, if this entitlement represents a form of property, then arguably it exists already—and it belongs to the marketer, who is free to piggyback on the customer’s reputation. If so, then this proposal would merely shift the allocation of identity ownership from the marketer to the customer.

A more substantial objection might arise on free speech grounds. As Eugene Volokh has argued, privacy-oriented regulations that qualify as a “right to stop people from speaking about you” can raise vexing First Amendment issues.<sup>291</sup> The restrictions proposed here sidestep many of these issues because of the entirely commercial nature of social marketing. These messages fall well within the boundaries of commercial speech as defined by the Supreme Court.<sup>292</sup> The marketer, as the speaker of the message, has little purpose beyond “propos[ing] a commercial transaction.”<sup>293</sup> As such, the *Central Hudson* test applies to any regulation, and an opt-in requirement would likely pass muster.<sup>294</sup> Indeed, some courts and commentators have gone further and concluded that sale or trading of customer information for commercial purposes enjoys little or no constitutional protection.<sup>295</sup> Even skeptics like Volokh who

288. See, e.g., Post, *supra* note 127, at 667–70 (expressing concern that right of publicity commodifies personality and detaches it from context of individual circumstances and social arrangements).

289. See Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1157–58 (2000) (calling the debate a “quasi-religious war to resolve whether the nature of a person’s interest in her personal data is a fundamental civil liberty or [a] commodity interest”); Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815, 815–16 (2000) (criticizing “deeply flawed rhetoric” of market-state dichotomy).

290. See, e.g., Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957–58 (1982); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 739–46 (1964).

291. Volokh, *supra* note 150, at 1049–51; see also C. Edwin Baker, *Autonomy and Informational Privacy or Gossip: The Central Meaning of the First Amendment*, 21 SOC. PHIL. & POL’Y 215, 219–20 (2004); Zimmerman, *supra* note 162, at 292–94.

292. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64–65 (1983); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 759–65 (1976).

293. *Va. State Bd.*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)).

294. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564–66 (1980); see *Trans Union Corp. v. FTC*, 245 F.3d 809, 818–19 (D.C. Cir. 2001). But see *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1237–38 (10th Cir. 1999) (finding regulators’ asserted state interest in privacy insufficient to sustain regulation under *Central Hudson*).

295. See *Trans Union*, 245 F.3d at 817–19; Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1192 (2005).

question this result should be comfortable with regulation of social marketing, however, because it is purely a form of advertising.<sup>296</sup> Furthermore, the restrictions here aim not only to protect privacy but also to prevent misleading information in the marketplace, a long-respected justification for commercial speech regulation in areas ranging from trademark law to securities regulation. Indeed, courts have sustained the constitutionality of the right of publicity in cases involving factual information about celebrities whose activities are certainly matters of public interest.<sup>297</sup> Any First Amendment claim for protection of information about ordinary customers' shopping habits must be weaker.<sup>298</sup>

Third, it is reasonable to question whether, in the end, the possible problems with social marketing justify even a lightweight "best practices" form of regulation. Some of this hesitation may derive from an unjustifiably extreme distrust of any government intervention in technology. But some of it might reflect a more measured skepticism as to whether the problems discussed in Part II are serious enough to demand regulatory resources—particularly since, in the case of Facebook Ads, market forces reached a similar result without legal intervention. As I have stated repeatedly in this Article, lawmakers may reach a sensible policy decision against regulation. They could not reach this decision responsibly without first considering the nature of the legal response, however. Law can have a significant, and often neglected, role in shaping technological architecture and ensuring the consistency of that architecture with important social and legal values.<sup>299</sup> In that way, the law can promote best practices through such modest measures as regulatory statements of opinion, standard-setting, and norm entrepreneurship.<sup>300</sup> This response navigates between the two extremes in old debates about "cyberlaw exceptionalism."<sup>301</sup> I do not suggest, as some arguably did in the early days of the internet era, that the online environment is *sui generis* and should or could be regulated only by entirely novel legal models.<sup>302</sup> The first step

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296. See Volokh, *supra* note 150, at 1080–84. More precisely, it is purely a form of advertising as to the marketer, whose speech interests would be at issue in an attack on social marketing. Arguably, messages sent through social networking sites with consent also could implicate speech interests of the consenting customer. In this scenario, however, my proposal would not impose any restrictions against the speaker.

297. See, e.g., *Abdul-Jabbar v. Gen. Motors Corp.*, 75 F.3d 1391, 1400–01 (9th Cir. 1996); 2 MCCARTHY, *supra* note 132, § 7:3 (collecting cases).

298. Cf. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578–79 (1977) (upholding publicity rights against First Amendment challenge).

299. See Jay P. Kesan & Rajiv C. Shah, *Shaping Code*, 18 HARV. J.L. & TECH. 319, 321 (2005); Lawrence Lessig, *Law Regulating Code Regulating Law*, 35 LOY. U. CHI. L.J. 1, 14 (2003); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 570 (1998).

300. Hetcher, *supra* note 267, at 2052.

301. See generally Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207; David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999).

302. See Johnson & Post, *supra* note 301, at 1367.

when facing a new online phenomenon that may require regulation ought to be an evaluation of existing legal paradigms that may suit the situation.<sup>303</sup> Even when viewed in that more humble light, however, straightforward analogies of social marketing to existing legal paradigms fail to address all the concerns that might arise. In that situation, creative adaptation is appropriate. The potential problems arising from social marketing are not the most earth-shattering ever to threaten the internet. That is not, however, a reason to permit those problems to occur, merely because of a changed technological context.

The proposal here does not require upheaval or tremendous resources. It merely articulates a consent standard that exists now, though sometimes obscured, in a variety of other legal settings, particularly the persona rights paradigm. Individuals who object to the use of their identity in social marketing messages already have substantive law on their side through the appropriation tort, but procedural impediments prevent enforcement of that entitlement. Put another way, the proposal here represents a small adjustment of existing legal principles to accommodate a new use of technology. Social marketing falls between the cracks of existing legal regimes because of its novelty, but the principles underlying the nearest legal paradigms support a requirement of genuine consent.

A final justification for legal intervention here is the danger that irresponsible social marketing practices by a few individual firms could damage the entire recommendation ecology. While some individual marketers might see an advantage in transmitting nonconsensual messages, the resulting spamification and mistrust will harm more responsible businesses and the public interest in a robust Web 2.0. Enforceable legal standards, in the form of best practices, could help prevent this outcome.

### CONCLUSION

Social marketing seems likely to grow and evolve in the future. Properly structured, it could offer great benefits to consumers and marketers alike. If poorly designed, however, it could cause a variety of problems: disclosure of private information, misleading endorsements, and appropriation of personal identity. No existing legal paradigm in the United States addresses this full range of problems (including privacy, trademark and unfair competition, the appropriation tort and rights of publicity, and consumer protection law). An approach based upon the common theme of genuine user consent and enforced through promulgation of regulatory best practices offers a superior response. Whatever the ultimate policy decision about appropriate legal intervention, the analysis in this Article demonstrates that the highly interactive communi-

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303. See Easterbrook, *supra* note 301, at 207–08.

cation technologies of Web 2.0 will disrupt settled legal categories and pose new challenges for lawmakers. These effects have been felt already throughout the law of privacy, intellectual property, and free speech. Social marketing enables reputational piggybacking that was never possible before, and like many aspects of Web 2.0, it will force creative thinking about all the ways in which the law regulates disclosure, endorsement, and identity.