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PRIVACY AND DIRECT MAIL ADVERTISING

*DAVID P. BALLARD**

INTRODUCTION

THE individual's right to privacy in the computer age has become a matter of increasing concern in the United States.[1] Mailing lists, a form of data file subject to the effects of increased computer capabilities, have been included in the inquiry into the privacy implications of computer technology.[2] This Article will examine the problems of privacy as they relate to direct mail advertising—the sending of advertisements to persons on mailing lists to promote the purchase of goods or services by mail directly from the advertiser.

The privacy issues in the computer age center around the capability of the individual to control how information about him is used[3] in light of the capability of computers to store and manipulate information.[4] Such privacy issues include three specific concerns. The first is the accuracy of the information on file and the individual's ability to correct misinformation. When an individual is subject to inaccurate and unverified information in a data file he may be the victim of unjust decisions[5] concerning such important matters as whether to grant

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1. *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 522a (1976); U.S. Dep't of Health, Education and Welfare, Records, Computers and the Rights of Citizens (1973) [hereinafter cited as HEW Report]; Privacy Protection Study Commission, Personal Privacy in an Information Society (1977) [hereinafter cited as Privacy Commission Report]; A. Miller, The Assault on Privacy: Computers, Data Banks, and Dossiers (1971) [hereinafter cited as Assault on Privacy]; A. Westin, Privacy and Freedom (1967); A. Westin & M. Baker, Databanks in a Free Society (1972); Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer*, 49 Tex. L. Rev. 837 (1971); Hersbergen, *Regulating Commercial Exploitation of Name Lists and Direct Mail Solicitation Under The Fair Credit Reporting Act—A Victory for Consumer Privacy?*, 1 Ohio N. L. Rev. 1 (1973); Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 Mich. L. Rev. 1089 (1969) [hereinafter cited as *Information-Oriented Society*]; Seiler, *Right of Privacy and Direct Response Solicitation*, 12 Forum 782 (1977); Note, *Commercial Information Brokers*, 4 Colum. Human Rights L. Rev. 203 (1972).

2. *See* HEW Report, *supra* note 1, app. H, at 288-97; Assault on Privacy, *supra* note 1, at 79-82. *See generally* Hersbergen, *supra* note 1; Seiler, *supra* note 1. For a description of the computer's impact on one major direct mail list compiler, see A. Westin & M. Baker, *supra* note 1, at 154-67.

3. *See, e.g.*, Fried, *Privacy*, 77 Yale L.J. 475, 482 (1968); *Information-Oriented Society*, *supra* note 1, at 1107-09. "[W]hen the individual is deprived of control over the information spigot, he in some measure becomes subservient to those people and institutions that are able to gain access to it." *Id.* at 1108.

4. A. Westin & M. Baker, *supra* note 1, at 4 (modern computer technology may greatly "increase the amount of information collected, consolidated, and exchanged about individuals"); *see* HEW Report, *supra* note 1, at 28-29.

5. Speaking in favor of the Privacy Act of 1974, Senator Percy outlined the problems of verifying data bank information: "[T]he individual is not the depositor, not the beneficiary, and

credit or offer employment.[6] A second concern is that such data will be used for improper purposes, for example, to blackmail for political reasons.[7] A final concern is that because of the computer's ability to collate increased amounts of personal data rapidly, the data itself will begin to take on a new dossier-like character.[8]

At the direction of the Privacy Act of 1974, the Privacy Protection Study Commission has recently recognized the importance of the privacy issues relating to direct mail advertising.[9] Some of the Commission's recommendations, however, are disappointing in that they do not take into account certain economic and societal effects of direct mail advertising. To ignore such considerations may lead to dysfunctional law and policy attacking the wrong problems at an unnecessarily high societal cost.[10] In light of these problems, this Article will suggest a framework of analysis that is designed to accommodate the competing interests at work in this unique area of privacy law.

I. THE ECONOMICS OF DIRECT MAIL ADVERTISING

A. *The Direct Mail Industry*

Direct mail[11] forms an important part of the direct response sales industry, which accounts for a large portion of retail sales in the

not the guardian of personal information stored in a data bank. He is given little or no opportunity to see the information kept on him, and only rarely can he challenge the accuracy of that information. And yet this same information is used by all manner of organizations to make important decisions that may personally affect him." 120 Cong. Rec. 36894 (1974).

6. Countryman, *supra* note 1, at 844.

7. HEW Report, *supra* note 1, at 19. Professor Countryman has labeled these data gatherers the "punitive compilers". Countryman, *supra* note 1, at 846.

8. The Executive Director of the Domestic Council Committee on the Right of Privacy noted when speaking in the context of criminal records: "We have public record information dispersed in courthouses, police courts, and judicial offices around the country. But when we can accumulate this information into a criminal history file, maintained by the Federal Bureau of Investigation, this no longer can be considered the same type of information as it was out in the courthouses, it has changed its character, . . . it has transformed the nature and the quality of this information so that there can be [a] dossier compiled . . . whereas before if you wanted to find out about an individual you had to go to a lot of expense to go around the country to compile information." Address by Douglas Metz, Executive Director of the Domestic Council Committee on the Right of Privacy, Associated Third Class Mail Users Annual Membership Dinner (Sept. 30, 1974). In a similar light the HEW Report remarked that even when small details are compiled into a dossier, the data subject "can never know when some piece of trivia will close a noose of circumstantial evidence around him." HEW Report, *supra* note 1, at 21.

9. *See* Privacy Commission Report, *supra* note 1, at 125-54.

10. Arguing for the need to look at data systems as they in fact operate, Westin and Baker state: "[P]eople must understand that most of the information-analysis capabilities computers make possible are not present in the hardware when it is delivered. Such capabilities must be chosen deliberately by users of computers and put in as the files are designed, programming instructions are set, and other ad hoc system efforts go forward. . . . What managements are doing with computers is therefore a question of empirical fact, not a general computer capability which one may assume without evidence that particular organizations have brought into being and are now using." A. Westin & M. Baker, *supra* note 1, at 279.

11. The term "direct mail" may be defined as the mailing of advertising solicitations directly

United States. Although there is considerable disagreement as to the exact size of the direct response industry, estimates range from $14 billion[12] to $50 billion[13] worth of goods and services sold annually. The amount spent on advertising by direct response advertisers is estimated to be between $2 and $3 billion per year.[14] These advertising expenditures are made in a variety of media, including magazines, newspapers, radio and television broadcasts, and direct mail, all of which initiate direct-to-consumer sales[15] by the advertisers.

The success of any direct mail advertising program depends on which of the approximately 25,000 lists in existence[16] is used.[17] Mailing lists may be divided into three types depending upon their immediate source of names.[18] The internal or "house" list is the advertiser's own list of customers. For example, a retailer's house list might include current charge account customers, while a mail order company's list might include recent purchasers. The second type of list is the direct response list, which includes names of people who have answered a direct response offer of another advertiser. The third type of list is the compiled list, which includes names obtained from automobile registrations, birth certificates, and other public sources.[19]

The primary objective in selecting a list to rent is matching the characteristics of the anticipated consumer of the advertised product with the characteristics of a given list.[20] Advertisers typically consider the source of a list's names[21] or a survey of its members. A survey usually involves statistically sampling list members to determine their purchasing habits and other demographic information.[22] For example, a magazine publisher might want to know subscribers' ages, educational levels, and readership of other magazines. It should be noted, however, that advertisers cannot tell anything about any specific

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to consumers. The term may encompass two situations: the mail order firm that sells only by mail and has no retail stores and the retail store that sells by mail.

12. Direct Marketing, Dec. 1974, at 60. The report indicates that this represents about 12% of all merchandise sold. *Id.*

13. HEW Report, *supra* note 1, at 289. This is reported to represent about 5% of the gross national product of the United States. *Id.*

14. *Id.*

15. Direct Marketing, Dec. 1974, at 60.

16. A. Westin & M. Baker, *supra* note 1, at 30.

17. B. Stone, Successful Direct Marketing Methods 3 (1975).

18. *Id.* at 58; Harper, *Changing Patterns of Lists and How They Affect Markets*, Direct Marketing, Apr. 1975, at 22, 24.

19. For a discussion of R.L. Polk & Co., a compiler of lists from public information sources, see A. Westin & M. Baker, *supra* note 1, at 156-67.

20. B. Stone, *supra* note 17, at 42.

21. For instance, one mailing list catalog classifies lists by source of names, such as responses to magazine ads for specified products. *See* Standard Rate and Data Service, Direct Mail List Rates and Data (1973).

22. For examples containing results of subscriber and reader surveys, see Advertising Age, Jan. 22, 1979, at 9, 17, 19, 21, 31.

individual on the list through a survey since the only survey results they receive are aggregates of the individual data. Moreover, the direct mail advertiser is not concerned with the attributes of any single list member, but looks for group characteristics indicating that a sufficient number of the list members are likely to purchase the advertiser's product.

Direct mail advertising lends itself to statistical testing techniques that can help an advertiser select lists whose members will be responsive, and avoid the expense of extensive mailings to unresponsive consumers.[23] Through more advanced statistical techniques individual lists can be divided into segments, the most promising of which can be selected for the mailing.[24] Mailing costs also can be reduced by periodic editing of the mailing lists to delete names of those who have not been active buyers.[25]

B. *Advantages of Direct Mail as an Advertising Medium*

Direct mail entails certain important economic advantages that are especially important to advertisers. First, the ability to pretest the potential responsiveness of a mailing enables an advertiser to limit the risk of an unprofitable mailing. Second, a small advertiser can rent only a portion of a list from another direct mail advertiser, thereby minimizing the investment required. Third, an advertiser might be able to target precisely those groups of people whose past mail order activity indicates an interest in its product.

Direct mail also has qualitative advantages. For instance, in comparison with newspapers, direct mail has less "clutter" to distract the customer from the advertisement. In addition, direct mail advertisements can present longer and more informative messages to the

23. B. Stone, *supra* note 17, at 42.

24. *Id.* at 51-53. One technique uses factor analysis to compare the demographic census data for different zip codes and then, on the basis of the results from mailing to a sample of zip codes, selects those additional zip codes most likely to generate a favorable response to the mailed advertisement. Hicks, *How Lifestyle Segmentation Selects Prospects from ZIPs,* Direct Marketing, March 1975, at 40. In effect, this technique selects the most favorable zip codes for a given list, in a manner similar to the techniques used to forecast election returns from sample precincts on election night.

A second statistical technique compares the extent to which different lists result in similar response patterns for several products. Then, using such statistical techniques as factor analysis, predictions are made of the products for which specific lists would be effective. The technique would also enable a mailer to make a prediction of another list's performance based on the actual performance of previous lists. As with zip code segmentation, the comparison of lists is directed to the characteristics of the group as a whole, rather than individual members of the lists. Harper, Posgay & Tyszler, *Selection of Mailing Lists by Multivariate Analysis,* Direct Marketing, Feb. 1975, at 34.

25. Direct mail marketers look at three criteria in evaluating the profit potential for members of their house lists: how recently and with what frequency they purchase and the amount of money spent. *See* Harper, Posgay & Tyszler, *supra* note 24, at 22.

consumer. This increased ability to inform the consumer about the product is significant because a consumer is generally unable to inspect the advertised product before responding to the offer.

The immediate resulting sales are not the only source of income for the direct mail advertiser; many mail order marketers look to continuing sales to satisfied customers to achieve a reasonable return.[26] Additionally, a mail order firm often can generate additional revenue by renting the list of respondents to other direct mail advertisers. Indeed, for some mail order companies the fees for the rental of their lists provide the profit margin for the entire mail order operation.[27]

Mail order firms have different policies on renting their lists to other mail order marketers. One industry commentator reports that most list owners will rent out their lists to reputable noncompetitors,[28] but this policy is not universal.[29] Those list owners that do rent their lists for important business reasons maintain close control over the use of such lists. "[N]o direct marketer wants to offend his own customers or risk losing them to a competitor by renting his list to just anyone."[30] In order to protect against misuse of their lists, most firms require that they approve the proposed mailing.[31] In addition, decoy names are added to the list to monitor the mailings made and to trace any mailings by unauthorized persons.[32]

C. *The Societal Impact of Direct Mail*

Because the initial advertising commitment required is low and there is no necessity to establish retail distribution channels, the cost of entering mail order marketing is relatively low. One study has indicated that some sixty percent of small mail order firms were able to start their business with an investment of under $5,000.[33] Indeed, the industry as a whole seems to be dominated numerically by small organizations. One industry source has indicated that two-thirds of the mail order firms have sales under $500,000.[34]

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26. Harper, *supra* note 18, at 24, 26.

27. *Id.* at 24.

28. B. Stone, *supra* note 17, at 44.

29. Fitzgerald, *Book Club Business Booming Following Return to Mails*, Direct Marketing, Jan. 1975, at 26.

30. Harper, *supra* note 18, at 24.

31. *Id.*

32. HEW Report, *supra* note 1, at 294. If a firm adds decoy names, for example those of the firm's executives, and those executives receive unauthorized mailings, the firm is made aware that its list is being abused by its lessee. In addition, some firms rent only through an intermediary that "addresses the mail but does not give the advertiser a copy of the list." A. Westin & M. Baker, *supra* note 1, at 155.

33. Griffin, *Mail Order Retailing—Economic Considerations for Small Operators*, Small Business Administration Report Project 119 (1963).

34. Merchandising Week, Oct. 16, 1972, at 6, col. 3. The HEW Report stated that of all third

The economic importance of mail order firms extends beyond what would be indicated by their size. In effect, a small local retailer can become a "seminational corporation" competing over a much broader area via mail order than it could have through a store alone.[35] One result of this access to wider markets is the greater responsiveness of merchandisers to consumer desires and needs.[36] In addition, direct mail marketing provides other important benefits for the consumer. For instance, a consumer living in an area having few stores can purchase a wider variety of items via mail. Similarly, direct mail marketing can be an important service to "shut-ins" who are unable to use normal retail outlets.[37]

Direct mail also plays a critical role in the dissemination of thought and opinion to American society through the sales of books and magazines. The single largest portion of mailings is magazine subscription offers, accounting for nearly ten percent of all direct mail.[38] Direct mail is the crucial means for many magazines to obtain subscriptions: seventy percent of all subscriptions are sold by direct mail.[39] Direct mail is a particularly important factor in the promotion of subscriptions to new publications. For example, during its first year and a half of existence, the *National Observer* obtained eighty-five percent of its subscriptions through direct mail solicitation.[40]

Direct mail has also had a significant impact on charitable and political fundraising, collecting substantial sums of money from large numbers of people offering support in small amounts. Direct mail accounts for approximately eighty percent of all contributions to nonprofit public interest organizations.[41] Senator McGovern reportedly raised approximately $4 million during his 1972 Presidential campaign via direct mail appeals;[42] the Republican direct mail effort in the same

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class mail permit holders, the majority of which are mail order firms, only a tenth had more than one hundred employees, with half having fewer than ten. HEW Report, *supra* note 1, at 289.

35. *See* Merchandising Week, June 12, 1972, at 3, col. 3.

36. One industry publication has reported that increased mail order competition has forced local retailers of stereo components to lower prices or improve services. Merchandising Week, Aug. 7, 1972, at 1, col. 2.

37. In addition to invalids, people working long hours would seem to benefit from being able to shop at home during their free time via mail order. Direct Marketing, Dec. 1974, at 60.

38. HEW Report, *supra* note 1, at 289.

39. Direct Marketing, Dec. 1974, at 60. Mail order accounts for some $700 million of magazine subscriptions and $550 million of book sales. Privacy Commission Report, *supra* note 1, at 148.

40. R. Mockler, Circulation Planning and Development for the National Observer 29 (Oct. 1967) (unpublished research paper, Georgia State College). In the following year, after a substantial effort to diversify its circulation sources, nearly half of the subscriptions still came from direct mail. *Id.* at 35.

41. Privacy Commission Report, *supra* note 1, at 134.

42. Collins, *McGovern Mailings Emphasize Issues, Motivation, Needs,* Direct Marketing, Nov. 1972, at 39.

campaign raised about $8 million in average contributions of about $22 each.[43] Similar success with direct mail fundraising has been reported for public television.[44]

II. THE PRIVACY ISSUES RAISED BY DIRECT MAIL

One major privacy concern presented by direct mail lists is the possibility of merging and comparing different lists to compile dossier-type data on an individual.[45] In practice, however, there would seem to be little business motivation to develop data on specific individuals, since direct mail advertisers are primarily concerned with the response performance of entire mailing lists.[46] A typical mailing elicits responses from only three or four percent of those persons receiving the mail;[47] to make wide-ranging file investigations of every list member would involve the expense of investigating one hundred percent of the list in order to find four percent who would both qualify for and respond to the mailing. In other words, the advertiser would be wasting about ninety-six percent of his investigatory efforts on people who would not respond to his offer.

Direct mail marketers might be interested in compiling detailed data on individual customers' direct response purchasing histories. Such

43. Weintz, *Republicans Find Lists, Testing, Copy, Key to Successful Mailings*, Direct Marketing, Nov. 1972, at 39. The Privacy Commission Report has noted the critical importance of direct mail political fund raising under the new federal election laws. Privacy Commission Report, *supra* note 1, at 147.

44. Hicks, *WNET TV Raises Funds by Direct Mail and Telecasts*, Direct Marketing, Feb. 1975, at 32. Since lawyers have been given the right to advertise, even they have taken advantage of direct mail advertising. *See* N.Y.L.J., Jan. 31, 1979, at 1, col. 3.

45. "Because the new technology makes it possible to integrate personal information from a variety of sources, solicitation lists increasingly will become the product of wide-ranging file investigations into the background and finances of prospective customers." Assault on Privacy, *supra* note 1, at 80. Miller quotes a computer-written letter received by an acquaintance soliciting his participation in a commercial venture. The letter lists four items of information about the addressee: his ownership of his home; his automobile ownership; his income "in the critical $12,500 to $19,500 range"; and his "few hundred dollars . . . in the bank." Miller has misapprehensions about the information contained in the "computer letter". *Id.* at 80-81. Although the home ownership and automobile data would be unique for the addressee, probably compiled from publicly available lists of home buyers and motor vehicle registration, the financial data mentioned in the letter would be less so. The income range would encompass a major portion of the middle class, and would be even more inclusive on an individual neighborhood basis. At the same time the "few hundred dollars in the bank" would not seem to be very informative or descriptive, both for reasons of vagueness and the likelihood that most people in the income range hypothesized could be expected to have a "few hundred dollars" saved. Miller's analysis of the letter, therefore, overestimates the prying into the addressee's background: "The letter's content makes it clear that the writer pursued a number of sources to determine the [addressees'] status as home owners and a two-car family, as well as their bank balance and income range." *Id.* at 81.

46. Because the response rate is so small, a small change in the response rate could have a relatively large economic effect on the mailer. HEW Report, *supra* note 1, at 295.

47. *Id.*

information, as maintained by a single mail order firm, hardly creates an invasion of privacy, since the compiled purchase history would be produced by the retailer from information necessarily and voluntarily supplied by the individual. However, sale or rental of a mailing list containing consumer purchasing histories as its attribute might constitute an unwarranted breach of confidentiality.

In addition to the concern about the ability of direct mailers to compile dossiers on their prospective customers, there is a belief that names and addresses which are supplied by citizens under compulsion for government registrations should not form the basis of commercial mailings.[48] In part, this concern arises from a belief that the data disclosed under compulsion in many registration procedures is not intended for direct mail advertising.[49]

Direct mail does not raise all of the privacy issues raised by other data systems. In particular, direct mail does not raise accuracy concerns, because the data contained in a mailing list is largely names and addresses which are easily distinguished from more sensitive data such as that gathered by credit bureaus.[50] Nevertheless, the question of the relative rights of the individual list member and the direct mail advertiser regarding privacy remains. It is instructive, therefore, to examine the courts' response to such questions and the applicability of the common law right of privacy to direct mail practices.

III. COMMON LAW RIGHT OF PRIVACY AND DIRECT MAIL

A. *Theoretical Basis*

In what has been labeled the "gospel article",[51] Warren and Brandeis introduced a right of privacy imprecisely defined by Judge Cooley as "the right 'to be let alone.'"[52] Perhaps the most influential chronicler of the right of privacy since Warren and Brandeis has been Dean Prosser,[53] who has provided the analytical basis of privacy for a number of courts[54] as well as the Restatement (Second) of Torts (Restatement).[55]

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48. *See* notes 126, 128 *infra* and accompanying text.

49. A. Westin & M. Baker, *supra* note 1, at 385-86.

50. *Id.* at 24. The mere sending of unsolicited mail, however, is often seen as an invasion of the privacy of the recipient. *See* HEW Report, *supra* note 1, at 290. This claim is usually dismissed, however, with the argument that mail is more of an "annoyance" than an "invasion." *See id.* at 71.

51. York, *Extension of Restitutional Remedies in the Tort Field,* 4 U.C.L.A. L. Rev. 499, 534 (1957).

52. Warren & Brandeis, *The Right to Privacy,* 4 Harv. L. Rev. 193, 195 (1890).

53. *See* Prosser, *Privacy,* 48 Cal. L. Rev. 383 (1960).

54. *See, e.g.,* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 825 (9th Cir. 1974); Household Finance Corp. v. Bridge, 252 Md. 531, 537, 250 A.2d 878, 882 (1969).

55. *See* Restatement (Second) of Torts § 652J (Tent. Draft No. 13, 1967) [hereinafter cited as

Prosser defines four separate interests within the right of privacy.[56] Intrusion covers acts such as wiretapping and prying into bank accounts, and is intended to protect an individual from mental distress. Public disclosure of embarrassing facts deals with the publication of personal information by the mass media when there is no overriding public interest in having those facts revealed. The false light branch of Prosser's analysis involves falsely attributing to a person criminality or political stands, for example, by publishing his picture as part of a rogue's gallery or falsely including his name on a political petition. Both public disclosure and false light are designed to protect the individual's mental peace and reputation. Finally, appropriation covers the use of a person's name or likeness for commercial purposes, as in endorsing a commercial product. Here the interest is presumably pecuniary; in essence appropriation creates an exclusive license for the use of an individual's name.[57]

Professor Bloustein, on the other hand, rejects Prosser's classifications virtually point-by-point,[58] and concludes that privacy really protects the general interest of human dignity.[59] Bloustein and Prosser establish two important branches of legal thought underlying the law of privacy. The line of thought represented by Bloustein bases the right of privacy on incorporeal grounds, while Prosser purports to have discovered a number of interests that have evolved under the right of privacy. Although Prosser has been followed by a number of courts,[60] the Bloustein analysis remains an important development in the law of privacy.[61] Thus, it is important to consider both analyses when analyzing privacy and direct mail advertising.

B. *Mailing List Cases*

Mailing list cases can be divided into three basic groups. The first group arises with the release of names from state-compiled files such as state motor vehicle registrations. The second group includes cases involving the release of federally compiled information, often pursuant to the Freedom of Information Act (FOIA).[62] The final group involves privately compiled lists.[63]

Restatement Draft]; Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 964 n.11 (1964).

56. Prosser, *supra* note 53, at 389.

57. *Id.* at 389-407.

58. Bloustein, *supra* note 55, at 966-1000.

59. "The injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered." *Id.* at 1003.

60. *See* note 53 *supra* and accompanying text.

61. Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 Law & Contemp. Prob. 326, 328 (1966).

62. 5 U.S.C. § 552 (1976).

63. A related group of cases addresses the obligation of corporations facing a unionization

Taken together, these cases are important as an indication of judicial thinking concerning the issues of privacy and direct mail. It must be kept in mind, however, that among the different groups of cases somewhat different privacy interests are at stake. For instance, although the right of privacy is the central interest asserted in the cases involving privately compiled lists, it is but one of several competing interests arising in the FOIA cases. Hence, in evaluating the mailing list cases, it is important to consider the context in which the privacy questions are raised.

1. State-Compiled Lists

The court in *Lamont v. Commissioner of Motor Vehicles*[64] considered both constitutional and common law privacy issues. The suit was one to enjoin New York's Motor Vehicle Commissioner from selling registration records under a competitive bidding system. Plaintiffs claimed that a constitutional and common law invasion of privacy arose from the leasing of the list of names to direct mail advertisers. As a result, plaintiffs claimed that they and other registrants were subjected to "considerable annoyance, inconvenience and damage . . . by reason of the large volume of advertising and crank mail and other solicitation" they received.[65] In granting defendants' motion to dismiss, the court stated:

> The mail box, however noxious its advertising contents often seem to judges as well as other people, is hardly the kind of enclave that requires constitutional defense to protect 'the privacies of life.' The short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.[66]

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election to provide union representatives a list of the employees eligible to vote. In these cases the employers argued that to disclose the lists would invade their employees' privacy. *See* NLRB v. Beech-Nut Life Savers, Inc., 274 F. Supp. 432, 437 (S.D.N.Y. 1967), *aff'd*, 406 F.2d 253 (2d Cir. 1968), *cert. denied*, 394 U.S. 1012 (1969); NLRB v. British Auto Parts, Inc., 266 F. Supp. 368, 373 (C.D. Cal. 1967), *aff'd*, 405 F.2d 1182 (9th Cir. 1968). The courts, however, did not find the disclosure sufficiently violative of the employees' privacy rights to block the release of the lists. The court in *British Auto Parts*, for instance, noted that the employees were free to turn away the union organizers. *Id.* at 373. Similarly, the court in *Beech-Nut Life Savers, Inc.* found the potential for unwanted intrusion outweighed by the public interest in having an informed electorate for union election. 274 F. Supp. at 438.

64. 269 F. Supp. 880 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968).

65. *Id.* at 882.

66. *Id.* at 883; *accord*, Chapin v. Tynan, 158 Conn. 625, 264 A.2d 566 (1969). On the other hand, in Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970), the Court found that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37. In *Rowan*, however, the Court dealt with the right of households to prevent pornography from being sent to their homes. The subject matter of the mailings clearly had potential for causing greater offense than would be the case with the typical direct mail advertisement. In addition, *Rowan* involved a statute that enabled the addressees to notify the Post Office that the specified pornography was not wanted. *Id.* at 731-35.

The court further noted that the information sold by the state was in the "category of 'public records', available to anyone upon demand."[67]

The *Lamont* court enunciated three principles regarding direct mail and privacy. First, direct mail advertising does not violate the Constitution with regard to privacy. Second, following the Prosser analysis, there is no violation of common law privacy based on the intrusion portion of the tort; the court found the "journey to the trash can" an acceptable social burden. Third, also following the Prosser analysis, there is no "public disclosure of private facts" invasion since the court found the names to be public information.[68]

2. Federally Compiled Lists

This second group of cases deals with attempts to use the FOIA to obtain federally compiled lists. In *Wine Hobby USA, Inc. v. IRS*,[69] a distributor of winemaking supplies sued the Internal Revenue Service to obtain a list of those households registered to produce wine for family use. The government argued that the disclosure of the names would violate exemption 6 of the FOIA,[70] which allows the government to prohibit disclosure of files when disclosures would "constitute a clearly unwarranted invasion of personal privacy."[71] The court held that the term "unwarranted" required a balancing of the interests of privacy against the purpose asserted for the release.[72] Finding that the release of the names and addresses constituted an invasion of privacy,[73] the court determined that the commercial purpose of the disclosure did not outweigh such an invasion.[74]

Getman v. NLRB,[75] which the court in *Wine Hobby* relied upon, considered the need for balancing public and private interests under

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67. 269 F. Supp. at 883.

68. *Id.*

69. 502 F.2d 133 (3d Cir. 1974).

70. 5 U.S.C. § 552(b)(6)(1976).

71. *Id.*

72. 502 F.2d at 136.

73. "One consequence of this disclosure is that a registrant will be subject to unsolicited and possibly unwanted mail from Wine Hobby and perhaps offensive mail from others. Moreover, information concerning personal activities within the home, namely wine-making, is revealed by disclosure. Similarly, disclosure reveals information concerning the family status of the registrant, including the fact that he is not living alone and that he exercises family control or responsibility in the household. Disclosure of these facts concerning the home and private activities within it constitutes an 'invasion of personal privacy.' " *Id.* at 137 (footnote omitted). Indeed, the court noted that the availability of unlisted telephone numbers and rental of post office boxes recognizes a privacy interest in one's mail box and telephone. *Id.* at 137 n.15.

74. Because Wine Hobby's sole justification for disclosure was private commercial exploitation with no direct or indirect public interest, the court concluded that the invasion, which it did not consider serious, would nevertheless be "clearly unwarranted." *Id.* at 137.

75. 450 F.2d 670 (D.C. Cir. 1971).

exemption 6 of the FOIA.[76] Certain law professors sued the National Labor Relations Board to obtain a list of eligible union voters in order to study attitudes toward union election processes and campaign tactics. The court noted that any invasion of privacy would be minor and that the public interest in having the results of the proposed study outweighed any possible invasion.[77] The court also noted that the potential for disclosure would be limited because use of the list would be confined to the law professors.[78]

It should be noted that the courts' appraisal of the right of privacy in these FOIA cases is not based on a traditional common law notion of privacy. These cases do not look for an invasion of privacy that would be actionable on its own, but instead compare the possible claim of invasion of privacy with the asserted benefits of the disclosure under the FOIA. In this context, access to the lists would be denied if a de minimis invasion of privacy were present and no public interest were asserted for the disclosure. These cases, therefore, have only a limited applicability to common law privacy actions, since privacy claims asserted in the FOIA cases might not be sufficient to support a cause of action in tort.

Although it can be argued that the FOIA cases do not strictly apply to common law privacy actions, they do indicate some judicial attitudes toward direct mail and privacy that differ from those in *Lamont*. In particular, while the *Lamont* court recognized neither an invasion of the intrusion interest nor an actionable disclosure of private information, the FOIA cases purported to find both. The *Wine Hobby* court, for instance, viewed society as recognizing an individual's right to keep his address private by the rental of a post office box.[79] Direct mail, then, was perceived as an unnecessary intrusion into the privacy he would otherwise be able to attain. Similarly, the release of the list of winemakers was seen as being a disclosure of private information. Although this disclosure might be distinguishable from that of auto-

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76. *Id.* at 674; *see* Note, *Invasion of Privacy and the Freedom of Information Act:* Getman v. NLRB, 40 Geo. Wash. L. Rev. 527 (1972).

77. "Both the House and Senate reports . . . indicate that the real thrust of Exemption (6) is to guard against unnecessary disclosure of files of such agencies as the Veterans Administration or the Welfare Department . . . , which would contain 'intimate details' of a 'highly personal' nature. The giving of names and addresses is a very much lower degree of disclosure; in themselves a bare name and address give no information about an individual which is embarrassing." 450 F.2d at 675 (footnotes omitted).

78. *Id.* at 676. Another case arising under the FOIA is Ditlow v. Shultz, 379 F. Supp. 326 (D.D.C. 1974), *decision deferred*, 517 F.2d 166 (D.C. Cir. 1975). The plaintiff, a representative of air travelers in a separate action, sought to obtain names and addresses appearing on customs declarations of air travelers entering the United States from points in the Pacific over a period of eighteen months. The court found that release of the names and addresses would constitute a substantial invasion of privacy. *Id.* at 332.

79. 502 F.2d at 137 n.15.

mobile registrations in that the latter is publicly accessible for purposes such as accident litigation, the *Wine Hobby* case still presents judicial reasoning that is wary of disclosure of information compiled by the government.

It is noteworthy that the *Wine Hobby* court placed a low priority on the use of lists for commercial purposes. The court, however, may have overlooked several benefits of the mailing. The recipients of the proposed mailing by Wine Hobby could have found the advertised products useful and perhaps cheaper than those offered by the local retailer. Hence, instead of finding the purported intrusion offensive, the recipients could have found it helpful. Similarly questionable is the court's statement that Wine Hobby would not be harmed by denying it use of the lists.[80] According to the court, the lists represented some forty to sixty thousand registrants.[81] Although Wine Hobby could reach most of these people through an extensive advertising campaign, the use of general advertising media to reach such a closely defined group of people might cost much more than a direct mail program.

3. Privately Compiled Lists

Shibley v. Time, Inc.[82] considered the right of privacy as it relates to members of privately compiled lists. Shibley, a Cleveland attorney, brought a class action against American Express Co., Time, Inc., and several other magazine publishers alleging an invasion of privacy as a result of the defendants' rental of mailing lists that contained the plaintiffs' names.[83] The trial court dismissed the action on both procedural and substantive grounds. The court found deficiencies in the class action, observing that while some members of the class might be offended by the rental of their names as part of the lists and the subsequent receipt of mail, other members would appreciate receiving the solicitations, thus precluding a finding that the class had a sufficient identity of interest.[84] The court also found no actionable invasion of privacy.[85] The court noted that local statutes permitted the sale of lists of motor vehicle registrants,[86] thereby indicating that the

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80. *Id.* at 137 n.17.

81. *Id.* at 134.

82. 40 Ohio Misc. 51, 321 N.E.2d 791 (C.P. 1974), *aff'd*, 45 Ohio App. 2d 69, 341 N.E.2d 337 (1975).

83. An intervenor joined the suit seeking to have the defendants offer to their list members the ability to remove their names from the lists prior to rental or sale, while at the same time promoting the distribution of the names of those list members wishing to be included on a number of direct mail offerings. The court treated the intervenor's claim with the plaintiff's claim. *Id.* at 52-53, 321 N.E.2d at 793.

84. *Id.* at 60, 321 N.E.2d at 797.

85. *Id.* at 57, 321 N.E.2d at 795.

86. *Id.* at 55, 321 N.E.2d at 795.

legislature had approved the sale of lists and apparently condoned any invasion of privacy that might result.[87]

Having found no invasion of privacy, the court rejected plaintiffs' claim that defendants were unjustly enriched by the rental of lists since there was no actionable tort to make the enrichment unjust.[88] On appeal, plaintiffs renewed this argument claiming that their "personality profiles" had been exploited as a result of the list rentals and that the defendants had been unjustly enriched by the disclosure.[89] The court of appeals rejected the plaintiffs' argument by limiting the actionability of such exploitation to instances of endorsement.[90]

C. *Direct Mail Advertising Issues in a Prosser Framework*

Although *Shibley* casts doubt on the actionability of a privacy claim against direct mail list rentals, the readiness of the *Wine Hobby* court to find a privacy invasion in a somewhat different context indicates some judicial hostility toward direct mail. In an attempt to resolve this conflict, the privacy issues raised by direct mail advertising will be considered under a Prosser analysis.[91]

1. Intrusion

The intrusion cause of action requires an act that intrudes into the private affairs of another and that is offensive to a reasonable man.[92] With direct mail advertisements sent to homes, the key element of the tort would seem to be offensiveness, since it seems clear that the home is a private place and that receipt of mail represents some sort of intrusion. Whether a defendant's actions are offensive to a reasonable man is normally a question of fact which turns on such issues as the content and the manner of communication.[93] The manner in which

87. *Id.* One commentator argues that the *Shibley* court "should have more carefully examined several corollaries of the appropriation argument presented by the appellants." Comment, *Subscription List Sales and the Elusive Right of Privacy*, 62 Iowa L. Rev. 591, 602 (1976) [hereinafter cited as *List Sales*]. Without offering any substantive analysis of the appropriation action, the commentator suggests that the defendants should have been required to obtain the consent of an individual before placing his name on a rented list. *Id.* at 612. Such a requirement would be of doubtful constitutionality. *See* pt. V *infra*.

88. 40 Ohio Misc. at 57, 321 N.E.2d at 795.

89. 45 Ohio App. 2d at 71, 341 N.E.2d at 339. Appellants argued that the buyers of the list could draw certain conclusions about the financial position, social habits, and general personality of the persons on the lists by virtue of the fact that they subscribe to certain publications. *Id.*

90. *Id.* at 72, 341 N.E.2d at 339; *see* W. Prosser, Handbook of the Law of Torts § 117, at 807-09 (4th ed. 1971).

91. The false light cause of action is not applicable and is therefore omitted.

92. Restatement Draft, *supra* note 55, § 652B, Comments b, c, d.

93. In McCormick v. Haley, 37 Ohio App. 2d 73, 307 N.E.2d 34 (1973), a doctor sent notices regarding a patient's need for a check-up for over a year after the patient's death. The surviving husband and children sued the doctor for invasion of privacy. Finding that the doctor's conduct

creditors attempt to collect debts was found to be offensive when there was "a pattern of harrassment on the part of the creditor, or the communication, if not of such frequency as to constitute harrassment, has been of such a nature as to possess a vicious quality."[94] Other cases have found creditors' actions to be tortious when telephone calls were made at inconvenient times.[95]

Direct mail is less susceptible to a charge of intrusion than a solicitous telephone call.[96] One can easily dispose of unwanted mail, but the ringing telephone pervasively interrupts a person's living habits. In addition, given many persons' aversion to discourtesy, a greater mental effort is required to dispose of unwanted calls. On the other hand, a direct mail advertising campaign that is both persistent and offensive in terms of content might be found tortious. Hence, although the intrusion cause of action ordinarily would not create liability for a direct mail advertiser, it could be applied to one using particularly objectionable methods.

2. Public Disclosure

The public disclosure cause of action consists of three elements:[97] the facts must be of a private nature,[98] there must be publicity of the facts disclosed,[99] and "the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sen-

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caused mental suffering, the court overturned a directed verdict in favor of the defendant. *Id.* at 78, 307 N.E.2d at 38.

94. Household Finance Corp. v. Bridge, 252 Md. 531, 541, 250 A.2d 878, 884 (1969).

95. *See* Carey v. Statewide Fin. Co., 3 Conn. Cir. Ct. 716, 223 A.2d 405 (1966); Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

96. *See* Privacy Commission Report, *supra* note 1, at 23; Restatement Draft, *supra* note 55, § 652B, Illustration 5. The increased use of telephone solicitation, often accomplished through the automatic, random dialing of recorded messages, also creates privacy problems. *See, e.g.*, N.Y Times, March 12, 1978, at 45, col. 2; Wall St. J., March 16, 1978, at 7, col. 3. In response, the Federal Communication Commission has instituted hearings, *id.*, and legislation has been introduced in Congress. *See, e.g.*, H.R. 9505, 95th Cong., 1st Sess., 123 Cong. Rec. 10876 (1977). Although both telephone solicitation and direct mail advertising involve communication directly to consumers, the privacy issues involved are vastly different. First, telephone solicitation is much more intrusive than direct mail. "You can tell most junk mail by its cover and chuck it if you choose. But junk calls bring you on the run from your garden, interrupt your concentration while trying to juggle the household accounts, or fall smack in the middle of the family dinner hour." N.Y. Times, March 12, 1978, at 45, col. 3 (quoting Rep. Aspin). The disruptive nature of telephone calls has been recognized by those cases finding calls by creditors to be tortious invasions. *See* notes 94-95 *supra* and accompanying text. On the other hand, to the extent that telephone solicitation is made by automatic random dialing of telephone numbers, the mailing list compilation issues do not arise.

97. Prosser, *supra* note 53, at 392-98.

98. Restatement Draft, *supra* note 55, § 652D, Comment c; Prosser, *supra* note 53, at 394

99. Restatement Draft, *supra* note 55, § 652D, Comment b; Prosser, *supra* note 53, at 393.

sibilities."[100] The public disclosure tort is usually connected with the disclosure of personal information in the mass media. It is arguable, however, that the rental of mailing lists falls within this category because it discloses information about the list members either explicitly, as in the case of their actual addresses, or implicitly, as in the case of specifying the characteristics of the group as a whole, for example, American Express cardholders. Each element of the public disclosure action will be considered in terms of direct mail practices.

a. Publicity

With direct mail advertising the question is whether by renting or selling a list of names a list owner is giving publicity to personal data contained in the list. Publicity, as defined in the Restatement, means that "the matter is made public, by communicating it 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."[101] The Restatement, however, further notes that "to communicate a fact concerning the plaintiff's private life to a single person, or even to a small group of persons"[102] does not create publicity.[103]

Two factors that might be considered in determining whether the rental of a mailing list constitutes publicity are the number of times the list was rented and the resultant availability of the list to the general public. Publication of the list would undoubtedly constitute publicity while rental of the list to only one or two mailers probably would not.[104] It is arguable whether rental of a list ever constitutes publicity. An individual's name on a list is not being publicized in the normal sense because the user of the list is not concerned with the individual's name and characteristics, but rather with those of the list as a whole. Consequently, the publicity is, in many respects, more technical than real, since the address is simply being affixed to envelopes and the mailer is not aware of any specific person on the list. At the same time, it should be noted that the question of publicity is avoided entirely if the list owner actually does the mailing, because the lessee never has possession of the names and thus, by definition, there is no disclosure.

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100. Prosser, *supra* note 53, at 396 (footnote omitted); *accord,* Restatement Draft, *supra* note 55, § 652D, comment d.

101. Restatement Draft, *supra* note 55, § 652D, Comment b.

102. *Id.*

103. One court has held, however, that when creditors call a customer's relatives concerning the customer's debts, the creditors' conduct is the equivalent of publication of the debts. Montgomery Ward v. Larragoite, 81 N.M. 383, 387, 467 P.2d 399, 401 (1970). *But see* Vogel v. W.T. Grant Co., 458 Pa. 124, 132, 327 A.2d 133, 137 (1974). *See also* Voneye v. Turner, 240 S.W.2d 588, 591 (Ky. 1951).

104. *See* Kerby v. Hal Roach Studios, Inc., 53 Cal App. 2d 207, 127 P.2d 577 (1942) (letter sent to 1,000 persons constituted publicity).

In determining whether publicity has occurred, courts also consider the defendant's efforts to limit disclosure. In one case, for example, the court found no publicity when a credit rating company made reports to its clients because the company required its clients to keep all reports confidential.[105] Similarly, list rentals would be especially unlikely to create publicity since a list owner typically salts the list with dummy names to prevent use by unauthorized persons.[106] This salting provides substantially more protection against multiple republications than does the credit rating companies' contracts.

b. Private Facts

The second requirement of the public disclosure cause of action is that the disclosed information must be private. Facts already public cannot be protected by an invasion of privacy action.[107] *Lamont* is an example of the public nature of information barring a claim for invasion of privacy; the public access to the motor vehicle registration records precluded the plaintiff's argument that the information was somehow private.[108]

c. Offensiveness

The third requirement for establishing an actionable disclosure is that the information disclosed be offensive and objectionable to the reasonable man.[109] Offensiveness is a question of fact to be determined on a case-by-case basis. It is interesting to note, however, what courts have considered objectionable. The *Wine Hobby* court found the disclosure of addresses and household status and identification of heads of households to be an invasion of privacy.[110] Although this case examined privacy in a somewhat different context from that of the traditional tort, similar disclosures might arguably be found objectionable in a tort context. In addition, those writers who see privacy as protecting incorporeal values might view any unauthorized disclosure of personal information as objectionable.

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105. Peacock v. Retail Credit Co., 302 F. Supp. 418 (N.D. Ga. 1969), *aff'd per curiam*, 429 F.2d 31 (5th Cir. 1970), *cert. denied*, 401 U.S. 938 (1971). "Only clients of Retail Credit have been supplied with this information, and while this limited publication may have resulted in the denial of an insurance policy, or a denial of credit, the court holds that this is not the type of public disclosure required to establish an invasion of privacy . . . ." *Id.* at 423.

106. *See* note 132 *supra* and accompanying text.

107. Restatement Draft, *supra* note 55, § 652D, Comment c; Prosser, *supra* note 53, at 395-96.

108. 269 F. Supp. at 883.

109. The Restatement refers to "unreasonable publicity," but appears to look to the nature of the matter disclosed rather than the means of disclosure. Restatement Draft, *supra* note 55, § 652D, Comment d.

110. 502 F.2d at 136-37; *see* notes 79-81 *supra* and accompanying text.

In sum, two generalizations can be made about mailing lists and the disclosure portion of the privacy tort. First, if mailing lists are compiled from public sources, the owner of the list cannot be held liable for disclosing the already public information to third parties. Second, disclosure problems can be avoided if the list owner, instead of the lessee, does the actual mailing, thereby precluding any publicity.

3. Appropriation

The appropriation aspect of the invasion of privacy tort typically involves the use of an individual's name or likeness by another for commercial gain, as in advertising endorsements. The Restatement requires an appropriation of some aspect of an individual's reputation or social or commercial standing.[111] Some cases look to a property basis for the appropriation cause of action, while others are more concerned with violations of personal sensibilities.[112]

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111. Restatement Draft, *supra* note 55, § 652C, Comment c. The appropriation action has been codified in many states. *See, e.g.*, Cal. Civ. Code § 3344 (West Supp. 1978); N.Y. Civ. Rights Law §§ 50, 51 (McKinney 1976). A restitutionary remedy in which damages are determined by the profit made by the lessor of the mailing list, rather than the harm caused to the person listed, is also a possibility. *See* Teller, *Restitution as an Alternative Remedy for a Tort*, 2 N.Y.L.F. 40 (1956); York, *Extension of Restitutional Remedies in the Tort Field*, 4 U.C.L.A. L. Rev. 499 (1957).

112. O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir.), *cert. denied*, 315 U.S. 823 (1941), and Hogan v. A.S. Barnes & Co., 114 U.S.P.Q. (BNA) 314 (Pa. Ct. C.P. 1957), refused to grant relief for injuries to feelings, but indicated that the outcome might have been otherwise if the actions had been based on injury to property rights. In *O'Brien*, the court found that a college football player failed to state a claim when he alleged injury to reputation and feelings from a brewer's use of his photograph to illustrate a calendar. The court noted that the football player had sought publicity by maintaining a press file of photographs and was precluded from claiming injury to feelings as a result of distribution of the calendar. 124 F.2d at 170. The majority opinion, however, in response to the dissent's claim that there would be an action in *quantum meruit* based on the property value of the plaintiff's picture as an endorsement, stated that it was only dismissing the claim based on the emotional injuries sustained. *Id.* at 170. Similarly, the *Hogan* court rejected a privacy claim by a professional golfer who alleged that his feelings were injured as a result of his being associated with a book of golf tips. While indicating that a cause of action based on injured feelings might be available for someone not widely known, the court noted that the professional golfer, a celebrity, was actually suing for unfair competition, an economic tort. In effect, *Hogan* would seem to envision a "right of publicity" for the golfer to market his name for commercial benefit. *See* 114 U.S.P.Q. at 320.

Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952), on the other hand, held that injury to feelings alone would constitute grounds to support an appropriation cause of action. In *Eick*, a blind woman alleged she had suffered humiliation and loss of respect after a dog food company had used her picture in an advertisement indicating that she would be obtaining a seeing eye dog from the company.

A more recent line of cases has sought to show the existence of two interests within the appropriation tort: one protecting the property value of names when used for commercial exploitation; the other protecting injury to feelings when someone outside the public eye is unwillingly thrust into the spotlight for another's benefit. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824-25 (9th Cir. 1974); Ettore v. Philco Television Broadcasting

The appropriation issues related to direct mail advertising center around protecting the property value of the names on the lists; it would be difficult to argue that an individual's feelings would be injured by inclusion on a mailing list absent publicity subjecting him to public exposure. The property value argument would seem to be that list members create the value of a list by serving as recipients of the mailings.

Value-creation in the context of mailing lists is unclear. On the one hand, it could be argued that the mailing list compiler is in fact creating the property value by compiling a list of names that would be useful to direct mail marketers.[113] On the other hand, one court has held in a different context that if value is created from use of an individual's name, it rightfully belongs to the individual. In *Canessa v. J.I. Kislak, Inc.*,[114] a real estate broker found a house for a veteran with a large family. The broker then used a newspaper article describing the broker's efforts on the veteran's behalf in its advertising and included a photograph of the veteran's family. The veteran and his family sued, alleging that the use of the article for advertising purposes constituted an unauthorized appropriation. The court found that the veteran had an actionable claim and reasoned that the value of the plaintiffs' names as a form of advertising endorsement resided with the plaintiffs, even though it was the defendant who had created the value.[115] Consequently, even though the veteran had no special drawing power, as would be the case with a celebrity, the name itself was a sufficiently important component of the implied endorsement's value.[116]

Corp., 229 F.2d 481, 488-91 (3rd Cir. 1956); Grant v. Esquire, Inc., 367 F. Supp. 876, 879-80 (S.D.N.Y. 1973).

113. Such a view is expressed by Professor Miller: "In contexts such as the sale of personal information by . . . mailing-list organizations, it is not the subject of the data but a third party who created the commercially valuable record. Thus, recognition of a property right in the data subject cannot be justified by arguing that the law merely is acknowledging the economic realities of the marketplace and protecting his ownership of a valuable item." Assault on Privacy, *supra* note 1, at 213.

114. 97 N.J. Super. 327, 235 A.2d 62 (Law Div. 1967).

115. "[P]laintiffs' names and likenesses belong to them. As such they are property. They are things of value. Defendant has made them so, for it has taken them for its own commercial benefit." *Id.* at 351, 235 A.2d at 76.

116. The court left open, however, the extent of damages and whether recovery would be in restitution or for injury to feelings. Id. at 352 n.5, 235 A.2d at 76 n.5. Several courts have placed some significance on the underlying value of endorsements. A person making an endorsement can be seen as cashing in on a reputation built up over time, and often, in the case of a sports star or actor, after extensive effort. *See, e.g.*, Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970); Palmer v. Schonhorn Enterprises, Inc., 96 N.J. Super. 72, 232 A.2d 458 (Ch. Div. 1967). In *Canessa*, it could be argued that the veteran's reputation was the product of his labors as a veteran and father of eight children. Also, with an endorsement, the endorser often loses something because he weakens his future credibility and, hence, future marketability. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 Tex. L. Rev. 637, 642-43 (1973).

Although a mailing list member might argue on the basis of *Canessa* that his name was of independent value even after being marketed as part of a list, *Canessa* is distinguishable from the direct mail situation since it involved an implied endorsement by the plaintiffs. In addition, absent a publication of the list, it is difficult to see how the direct mail list member would suffer any detriment from the endorsement. *Canessa* is also distinguishable from the direct mail situation in that the veteran did not save any costs on his house by being in the broker's advertisement, whereas mail order buyers can directly benefit by way of the lower prices resulting from the absence of retail intermediaries.[117]

The appropriation portion of the invasion of privacy tort has uncertain applicability to direct mail lists. Most courts seem to view the appropriation action as protecting the pecuniary value of the name or personality and it is unclear whether use of a name outside an endorsement context has such value. At the same time, use of a name on a direct mail list would seem not to involve the publicity associated with many of the endorsement actions.

Thus, the invasion of privacy torts generally have uncertain applicability to direct mail since they seem primarily concerned with the types of wrongs that gave birth to them: intrusion, publication of private information, and unauthorized endorsements. The questionable adaptability of common law privacy remedies to contemporary privacy concerns has indeed been noted as a general problem relating to the rise of the computer.[118] It is therefore instructive to examine the response of the direct mail industry and Congress to such concerns.

IV. Responses to Direct Mail Privacy Concerns

A. *The Industry's Response*

The direct mail industry's response to the privacy controversy has been largely one of offering to remove from its mailing lists the names of those persons who so request. The industry association, the Direct Mail Marketing Association, has established a "Mail Preference Service" through which it distributes to its member organizations the names of persons asking to be removed from mailing lists. The number of names removed from lists in this manner has been minimal, averaging only three or four per 10,000 names.[119] American Express notified its

117. *See* note 33 *supra* and accompanying text.

118. "Unfortunately, the existing tort remedies seem geared to the activities of private mass communications media. The existing common-law structure therefore does not appear readily transferable to regulate the use of personal information by computer networks whose privacy-invading activities are far more subtle than those that traditionally have confronted the courts." *Information-Oriented Society, supra* note 1, at 1180.

119. HEW Report, *supra* note 1, at 291.

cardholders that they could have their names removed from the lists to be rented, but only one percent accepted the offer.[120] On the other hand, sixteen percent of the subscribers to *Ms.* magazine accepted a similar offer.[121]

The industry's response, although restricting certain disclosures on behalf of those persons asking not to have their names rented, does not address all of the privacy issues raised with respect to direct mail. In particular, it does not preclude compilation of dossier-type information from governmental records.

B. *The Congressional Response*

Congress has considered a number of bills relating to privacy issues, some of which have involved proposals respecting direct mail lists.[122] The Privacy Act of 1974 (Privacy Act)[123] is perhaps the most comprehensive privacy legislation yet adopted by Congress, and, in part, addresses the privacy issues surrounding direct mail lists.

The Privacy Act's mailing list provisions pertain to federally compiled information. The Act prohibits federal agencies from renting or selling mailing lists unless expressly permitted by law.[124] Underlying the provisions is the policy that people should have control over information about themselves.[125] Thus, the use of information collected by the government should be limited to the government agency that collects the information. In addition, the committee report saw many government mailing lists as resulting from at least implied compulsion to provide information.[126]

The Act obviates the issues raised in the FOIA cases.[127] The *Wine Hobby* information, for example, would be restricted to the use of the Internal Revenue Service in enforcing taxes on alcoholic beverages and could not be rented for commercial mailings.[128]

Although the committee version of the act would have required

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120. Wall St. J., March 13, 1975, at 1, col. 3.

121. *Id.*

122. *See, e.g.*, H.R. 1984, 94th Cong., 1st Sess. (1975); S. 3116, 93d Cong., 2d Sess. (1974). New York State has recently amended the New York Public Service Law to prohibit utilities from selling lists of customers names. 1978 N.Y. Laws ch. 114 (amending N.Y. Pub. Serv. Law § 65) (McKinney 1955).

123. 5 U.S.C. § 552a (1976).

124. The Act provides: "An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public." *Id.* § 552a(n).

125. S. Rep. No. 1183, 93d Cong., 2d Sess. 31, *reprinted in* [1974] U.S. Code Cong. & Ad. News 6916, 6946.

126. *Id.* at 78, *reprinted in* [1974] U.S. Code Cong. & Ad. News at 6992.

127. *See* pt. III(B)(2) *supra*.

128. *See* notes 69-74 *supra* and accompanying text.

private organizations engaged in interstate commerce to delete names from mailing lists upon written request,[129] the provision was subsequently deleted. The Act, however, did create the Privacy Protection Study Commission (Commission) to study such a proposal and, in general, to examine the individual's privacy rights in the private sector.[130] The Commission released its report on July 12, 1977.

C. *The Privacy Protection Study Commission*

Although never explicitly stated as such, the Commission appears to focus on two related dangers underlying contemporary recordkeeping practices. First, organizations increasingly make decisions concerning individuals based on information in records. The Commission pointed to decisions made by organizations issuing insurance policies, granting credit, and providing employment and social services.[131] Second, the increasing accumulation of information about individuals could lead to an increased capability for governmental control.[132]

The Commission advocated "three concurrent objectives" relating to records and privacy: (1) to minimize the information required to be divulged by individuals; (2) to permit individuals to have access to records about them for purposes of correction and review; and (3) to set standards concerning the uses and disclosures of information contained in records.[133] Throughout its report, however, the Commission also emphasized the importance of balancing asserted privacy interests with other societal interests.[134]

In response to the congressional directive contained in the Privacy Act, the Commission's report contained an entire chapter concerning the privacy issues related to direct mail lists. In making its recommendations, the Commission placed substantial weight on a number of characteristics of direct mail. First, it noted that direct mail advertisers have strong economic incentives for not mailing to persons not wishing to receive advertising mail and that the direct mail industry has demonstrated a willingness to develop means by which persons can inform direct mail advertisers if they desire not to receive such mail.[135] Second, the Privacy Commission identified several societal benefits of direct mail: its importance as a marketing tool for small businesses; its

129. S. Rep. No. 1183, 93d Cong., 2d Sess. 78, *reprinted in* [1974] U.S. Code Cong. & Ad. News 6916, 6992.

130. Pub. L. No. 93-579, § 5(b)(2), 88 Stat. 1896 (1974).

131. Privacy Commission Report, *supra* note 1, at 4-5.

132. *Id.* at 5.

133. *Id.* at 14-15.

134. *Id.* at 21.

135. *Id.* at 141-42.

importance to fund raising by charities; its importance to political fund raising (especially in light of the new federal election laws);[136] and the economic importance of direct mail advertising generally.[137]

The Commission reported that it did not "believe that the mere receipt of mail is the problem."[138] The Commission specifically recommended that legislation should *not* be enacted to require removal of an individual's name and address from a mailing list upon his request.[139] Second, the Commission recommended that those organizations renting mailing lists notify their members of their rental practices and provide them with the opportunity to have their names removed from the lists when rented.[140] The Commission also recommended that state agencies which maintain mailing lists, such as lists of motor vehicle licensees, permit individuals to indicate in a manner sufficient to notify those renting such lists whether they want to receive mail.[141]

The second recommendation appears overbroad, in particular as extended by the Commission to organizations using house lists.[142] In part, the Commission seemed concerned that an affiliate's use of a parent's list might somehow constitute a use of the list which was not originally intended.[143] The Commission's logic with respect to the use of affiliate's mailing lists is unclear. It cited two examples in arguing that affiliates should not be permitted to exchange lists without meeting notice requirements. First, the Commission discussed two affiliated companies, one extending credit and the other selling insurance, and stated that "information about customers" should not be freely exchanged between them. It then stated that, similarly, a retailing affiliate should not rent or lend mailing lists to an affiliate marketing insurance.[144] The Commission's analogy, however, does not follow, since the two examples are markedly different in terms of the information subject to exchange and disclosures resulting from such exchanges.

In the first example, unlike the second example there is an important privacy interest in danger. An individual disclosing information for

136. *Id.* at 134.
137. *Id.* at 147-48.
138. *Id.* at 153-54.
139. *Id.* at 147.
140. *Id.* at 148.
141. *Id.* at 153.
142. *Id.* at 152.
143. "[T]he Commission believes that regardless of the level at which an organization is defined as a unit for the purpose of complying with the Commission's several sets of recommendations, an individual must be assured that information about him collected and maintained in connection with one record-keeping relationship will not be made available for use in connection with another." *Id.*
144. *Id.*

insurance purposes might not want such information disclosed to a credit-granting affiliate. For instance, health deficiencies which might be disclosed to the insurance affiliate arguably should not play a role in the credit-granting affiliate's decisions. The two affiliates' relevant personnel would, almost by definition, be separate, so there would necessarily be disclosure of the sensitive information to additional people.

On the other hand, the exchange of mailing lists by affiliates engaged in marketing different products endangers no privacy interests, especially when the affiliates use common mailing facilities. An individual customer of the retailing affiliate would suffer no loss of privacy as a result of the insurance affiliate's mailing. If the same employees and mailing facilities are used by the affiliates, information about the individual would not be disclosed to any additional persons as a result of the mailing. Even if there were a disclosure of information to additional persons, there would be no especially sensitive information involved.[145] Thus, there would be no privacy violations even if the two affiliates were technically organized as separate subsidiaries or affiliates.

Restrictions on the use of house lists by affiliated organizations would impede the entrance of competitors into new markets through mailings made to existing house lists. For instance, in the second example cited by the Commission, if the retailer were considering entering the direct mail insurance market and sought to establish an affiliate to compete in that market (perhaps to comply with state insurance regulations), its most important asset in entering such market might well be its current house list. Requiring the retailer to comply with an extensive notification procedure before mailing the insurance affiliate's advertisements to such customers could easily block the retailer's entry into the insurance market. The Commission's restrictions on the use of house lists by affiliates would be particularly onerous for those small organizations having limited access to other means of advertising or without sufficient funds to rent outside mailing lists. Similarly burdensome restrictions on competition are even more apparent in the instances of a magazine publisher forming an affiliate to market books by mail or a book club forming a record club affiliate. In the political sector, it would be equally burdensome to require compliance with the Commission's notification procedures in order for a committee of a state political party engaged in fundraising for

145. The insurance affiliate's mailing to the members of the retailing affiliate's mailing list is completely distinguishable from the insurance affiliate's disclosing to the retailing affiliate information contained on insurance applications. This latter type of disclosure would be subject to the restrictions on disclosure contained in other sections of the Privacy Commission Report. *Id.*

legislative candidates to use a mailing list maintained by its affiliate committee engaged in fundraising for a gubernatorial candidate.[146]

Many of the Commission's other apprehensions relating to the accumulation of information on mailing lists would appear to have been more appropriately treated with its recommendations for more sensitive record systems, such as those relating to credit bureaus, depository organizations, insurance companies, and medical care institutions.[147] If the sensitive information collected by these systems were more closely guarded, direct mail privacy problems would be minimized. To the extent that such recommendations were adopted, many of the Commission's concerns about the accumulation and misuse of intrinsically confidential information through the rental of mailing lists would be alleviated without jeopardizing the societal benefits afforded by direct mail advertising.

V. CONSTITUTIONAL IMPLICATIONS OF DIRECT MAIL LEGISLATION

Because direct mail advertising is an important medium of communication, it is important to consider the constitutional constraints on legislative proposals for regulating the rental of mailing lists. Several Supreme Court decisions have examined individuals' constitutional rights to receive or not to receive mail. In *Lamont v. Postmaster General*,[148] the Court held that an addressee had a first amendment right to receive mail without affirmatively requesting that such mail be delivered. The Court invalidated a statute that required addressees of certain foreign political propaganda to make a written request that the Post Office deliver such material.[149] In a concurring opinion, Justice Brennan viewed the right to receive publications as a fundamental right protected by the first amendment,[150] and rejected the argument that the statute protected addressees from receiving "often offensive" material from foreign governments.[151] Justice Brennan noted that under the statute an addressee's failure to request receipt of a particular publication resulted in similar publications being retained by the Post Office, so that the statute "impede[d] delivery even to a willing addressee."[152] He concluded that "[in] the area of First Amendment

146. The required application of the Commission's restrictions in these latter examples would also have tenuous validity under the first amendment. *See* note 148 *infra* and accompanying text.

147. Privacy Commission Report, *supra* note 1, at 85-87, 113, 215-17, 304-16; *see, e.g.*, The Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, § 1100, 92 Stat. 3697.

148. 381 U.S. 301 (1965).

149. *Id.* at 305.

150. *Id.* at 308 (Brennan, J., concurring).

151. *Id.* at 310 (Brennan, J., concurring).

152. *Id.* (Brennan, J., concurring).

freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose."[153]

In *Rowan v. United States Post Office Department*,[154] the Supreme Court upheld a statute permitting a person to require that a mailer stop all future mailings. The statute required the Postmaster General, upon receipt of a notice from an addressee stating that he had received pandering materials, to issue an order directing the mailer to refrain from future mailings to the addressee.[155] The Court noted that under the statute a mailer's right to send mail was limited only by an addressee's affirmative request not to receive mail, and held that the privacy interest against intrusion protected by the statute sufficiently outweighed the first amendment rights of the mailer so as to preserve the statute's constitutionality.[156]

After *Lamont* and *Rowan*, the first amendment may be interpreted as precluding legislation requiring direct mail advertisers to mail only to persons affirmatively requesting receipt of such mail, but not as precluding legislation prohibiting direct mail advertisers from mailing to persons specifically requesting that they not receive such mail.[157]

153. *Id.* (Brennan, J., concurring).

154. 397 U.S. 728 (1970).

155. *Id.* at 730.

156. "Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37.

157. United States v. Treatman, 408 F. Supp. 944 (C.D. Cal. 1976), supports this formulation of the first amendment's requirements. The *Treatman* court held unconstitutional portions of a statute that permitted, under certain circumstances, the issuance of an injunction prohibiting the mailer from mailing any sexually oriented advertisement to any specified addressee, group of addressees, or all persons. *Id.* at 953. The court held that the statute violated the first amendment to the extent that it permitted an injunction to be issued against mailings to all persons. In distinguishing *Rowan*, the court noted that in this case the statute permitted an injunction against mailing to persons other than those specifically requesting not to receive the mail. The court then held that under *Lamont*, absent a specific request not to receive specified mailings, an injunction could not be issued against mailing to persons who had not specifically requested not to receive such mail. *Id.* at 954.

In Van Nuys Publishing Co. v. City of Thousand Oaks, 5 Cal. 3d 817, 489 P.2d 809, 97 Cal. Rptr. 777 (1971), *cert. denied*, 405 U.S. 1042 (1972), the California Supreme Court similarly limited *Rowan*'s holding to instances where individuals had affirmatively requested not to receive materials. The court ruled unconstitutional an "anti-littering" ordinance that prohibited the circulation or delivery of any materials without having first obtained permission from the property owner, resident, or occupant. *Id.* at 819-20, 489 P.2d at 810-11, 97 Cal. Rptr. at 778-79. The court rejected the city's argument that the ordinance was constitutional as a protection of individual privacy. The court noted that the ordinance went beyond what would be required to protect "unwilling listeners" since it could have been more narrowly drawn to preclude distributions only to persons expressing objections. Instead, the ordinance also impeded distributions to persons not raising objections. *Id.* at 826, 489 P.2d at 814, 97 Cal. Rptr. at 782. The court concluded that "a proper accommodation of the competing First Amendment and privacy values at issue requires that the initial burden be placed on the homeowner to express his objection to the distribution of material." *Id.* at 826, 489 P.2d at 814-15, 97 Cal. Rptr. at 782-83.

The Court's decision in *Cohen v. California*[158] sheds further light on this delicate question. There, the Court noted that in some circumstances the intrusion into the home of "unwelcome views and ideas which cannot be totally banned from the public dialogue"[159] may be prohibited. The Court implied that the right to foreclose communication of views and ideas is strictly limited:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.[160]

Under *Cohen*, given the indispensability of direct mail advertising to the communication of various types of expression, it is questionable whether, at least when obscenity is not involved, direct mail advertising can be viewed as such an intolerable invasion of privacy so as to be prohibited.

These decisions cast doubt on the constitutionality of the Commission's recommendations if enacted as legislation. Requiring a list owner affirmatively to notify its list members of the owner's mailing and rental practices arguably might result in too great an "initial burden" being placed on the list owner. The result could be a severe impairment of free dissemination of thought through the mails.[161] This requirement would be especially onerous to those list owners not having regular means, such as monthly bills, for communicating with their list members.

The constitutionality of the Commission's recommendation that mailers notify their list members of their mailing practices before exchanging lists with affiliated organizations would be especially questionable. As applied to affiliated mailers, the recommendation would impair dissemination without producing any corresponding protection of privacy.[162] It should be noted that the Commission was primarily concerned with the potential abuse of mailing lists in compiling dossier-type information, as explicitly contrasted to the receipt of mail.[163] The application of the recommendation to affiliated mailers would result in no increased protection of privacy as it would not bar any additional persons from access to the mailing lists. Free expres-

158. 403 U.S. 15 (1971). Cohen was convicted for wearing a jacket bearing an obscenity directed at the draft. The Court held that "absent a . . . particularized and compelling reason . . . [a] State may not, consistently with the First and Fourteenth Amendments, make the simple public display . . . of [a] single four-letter expletive a criminal offense." *Id.* at 26.

159. *Id.* at 21.

160. *Id.*

161. *See* Lamont v. Postmaster General, 381 U.S. at 308.

162. *See* notes 135-45 *supra* and accompanying text.

163. Privacy Commission Report, *supra* note 1, at 149-50.

sion, however, would be substantially impaired as advertisers would be inhibited in mailing to those on their affiliates' lists. Because the Commission could effectively guard against abusive dossier compilations of mailing lists by limiting the application of its recommendation to unaffiliated mailers, the extension to affiliates would be unnecessary and subject to constitutional attack as an overrestrictive abridgment of free expression.[164]

The Commission considered the implication of first amendment issues only in terms of their general application to its own recommendations. As viewed in the context of direct mail advertising, the Commission's analysis is at best unconvincing. The Commission pointed to *Rowan*[165] as establishing that "it is not unconstitutional to give an individual standing to assert his own interest in the flow of communication between private parties."[166] Relying on *Rowan,* the Commission also recommended that an individual be given an opportunity to participate in any change that would materially affect his legitimate expectation of confidentiality.[167] The Commission misread *Rowan.* At most, *Rowan* can be seen as establishing privacy as a counterweight to first amendment considerations. *Rowan* involved the right of an individual to remove *himself* from those persons receiving mail from a specified mailer of pandering materials; it cannot be viewed as establishing any doctrine with respect to the balancing of first amendment and privacy considerations in communications between third parties. In light of *Lamont*, *Rowan* cannot be viewed as supporting the constitutionality of a provision that would require prior action on the part of direct mail advertisers before list members could receive mail.

After a cursory analysis, the Commission concluded that the recent Supreme Court "commercial speech" cases also would not create any obstacles to the implementation of its general recommendations, noting that the cases "almost exclusively concern advertising."[168] Regardless

164. *See, e.g.,* Shelton v. Tucker, 364 U.S. 479 (1960). "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* at 488 (footnotes omitted).

165. Actually, the Privacy Commission Report cites *Lamont,* but discusses the facts of *Rowan.* In the context of the Privacy Commission Report, it seems clear that *Rowan* was the case intended for citation. *See* Privacy Commission Report, *supra* note 1, at 23.

166. *Id.* at 23.

167. *Id.* at 24.

168. *Id.* Specifically, the Privacy Commission Report discusses Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc., 425 U.S. 748 (1976) and Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). The Privacy Commission's analysis of recent developments respecting commercial speech is curious, since it cites *Virginia State Bd. of Pharmacy* as having "swept away" the prior exclusion of commercial speech from first amendment protection and then cites *Pittsburgh Press,* an earlier case, as establishing that "commercial speech remains doctrinally outside the mainstream of the First Amendment in some ways." Privacy Commission Report, *supra* note 1, at 23. In any event, cases decided subsequent

of its relevance to the Commission's other recommendations, the extension of first amendment protection to commercial speech is clearly applicable to those recommendations respecting mailing lists. Of particular relevance to the protection of direct mail as an advertising medium is *Linmark Associates v. Willingboro*,[169] in which the Supreme Court rejected an argument that an ordinance did not violate the first amendment because it restricted only one advertising medium, that is, "For Sale" and "Sold" signs in front of a house.[170] Similarly, regulation of direct mail advertising, even though affecting only one medium, would raise first amendment concerns as there is no adequate, alternative medium for many advertisers, often for the same reasons as listed in *Linmark*.[171]

VI. PRIVACY AND MAILING LIST SOURCES: A FRAMEWORK FOR ANALYSIS

In considering the privacy issues raised by direct mail advertising and the proper policy and legal responses to them, it is essential to distinguish among the three types of mailing lists. Each type raises different issues and provides different societal benefits.

A. *House Lists*

House lists raise few privacy issues. The information embodied in the names and addresses is used for the purpose for which it was originally provided, that is, the list member's purchase of the list owner's product. Intrusion problems are unlikely. A relatively large number of a house list's members are presumably interested in receiving such mail as news of sales, since each list member is already a customer of the list owner. The list owner also has the business incentive to save costs by deleting uninterested, nonbuying customers. Similarly, the list owner is unlikely to send objectionable mail to those on his house list for fear of antagonizing his regular customers. Problems of public disclosure of private facts are not present since there is no disclosure; the entire transaction takes place between the list owner and the list member. Abusive dossier compilations are also

to the preparation of the Privacy Commission Report cast substantial doubt on the extent to which commercial speech may be limited. *See, e.g.*, Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977).

169. 431 U.S. 85 (1977).

170. The Court noted that alternative media were inadequate. Newspaper advertising or listing with real estate agents is generally more costly, less likely to reach persons not deliberately seeking sales information, and less effective in communicating the message conveyed by a "For Sale" sign. *Id.* at 93.

171. One commentator has proposed that direct mail advertisers be required to obtain the consent of an individual before placing his name on a mailing list. *List Sales, supra* note 87, at 612. He defends his proposal as a permissable regulation of commercial speech in terms of time, place, and manner. *Id. Linmark*, however, decided after the commentary, raises serious questions about this proposal given the uniqueness of direct mail as a communication medium.

unlikely because the only dossier-type information that can be compiled is that of the list member's purchases from the list owner. Few additional privacy problems would be raised by affiliated organizations using each others' house lists, provided the mailings were performed by a single operational unit.[172]

Although mailings to house list members raise few privacy issues, under the *Linmark* analysis, the house list is an indispensable advertising medium for many enterprises that would be unable to afford alternative media such as radio or television, whether for raising contributions or selling products. House lists also are an important, inexpensive source of potential customers for list owners entering new markets, whether directly or through their affiliates, and, therefore, have a positive affect on competition. Given both the absence of privacy concerns and the substantial societal benefits arising from the unfettered use of house lists, their regulation on privacy grounds would be unsound from both a constitutional and a public policy perspective.

B. *Direct Response Lists*

The rental of other list owners' house lists involves a somewhat different privacy evaluation, since the relationship between advertiser and list member is more attenuated than it is with house lists. As with house lists, the information embodied in the names and addresses is used for the purpose for which it was provided—a purchase by the list member—except not from the original seller. Here again the list owner has business incentives to prevent intrusion problems. To avoid antagonizing its own customers, a list owner typically monitors the material to be mailed and inserts dummy names to guard against misuse. Unlike house lists, however, direct response lists do raise disclosure concerns, since names and addresses are disclosed, as well as such implicit information as is indicated by the description of the list. Although frequent rentals of a list might raise publicity issues,[173] a more important concern is that the rentals increase the chances of the list being abused in the creation of dossier-type information. The placement of dummy names in the list, while protecting against unauthorized mailings, would not protect against such abuse as dossier compilation. Nevertheless, the disclosure and compilation problems with direct response lists would be largely avoided if the list owner mails the material, so that only those names actually responding to the mailing would be disclosed to the lessee.

On the other hand, rental of mailing lists provides important societal benefits. The existence of lists can lessen the cost of entry into new markets by increasing the sources of targeted mail order audiences to which new competitors can advertise efficiently and without large

172. *See* notes 142-46 *supra* and accompanying text.

173. *See* note 104 *supra* and accompanying text.

investment. In fact, there may be no alternative media available for those wishing to communicate to a narrowly defined group of people, whether potential customers or political or charitable contributors.

To be effective, any regulation of list rentals must strike the proper balance between the privacy concerns and the societal benefits. Disclosure of particularly sensitive information, such as bank, insurance, or medical records, could be easily controlled by regulations directed to the specific type of information, similar to the recommendations advanced by the Privacy Commission respecting these types of records. Such regulation would not greatly impede free communication via direct mail, but would protect legitimate privacy interests. Similarly, allowing individuals to request deletion of their names from direct response lists would enable those concerned about the compilation issues to avoid having their names disclosed, yet maintain the economical availability of lists. It is important to note that there are business incentives for the list owner to make requested deletions: the list owner avoids antagonizing its own customers who do not want to receive mail from others, and the list may command a higher rental price as it contains fewer nonbuying members.

However, requiring the list owner affirmatively to seek out those list members willing to be included on a rental list would be dysfunctional. The list owner's costs of maintaining a list suitable for rental could increase to the point of making list rental too expensive, thereby impairing the societal benefits afforded by list rentals generally. Such a requirement also would be of doubtful constitutionality under *Lamont* and *Linmark*[174] since it would in effect impede dissemination of information absent an affirmative request by an individual wishing to receive it, and would foreclose an indispensable medium for many types of communication.

C. *Compiled Lists*

Compiled lists raise substantially greater privacy problems than do house lists or direct response lists. The purpose for which the name and address of a compiled list member is originally given, for example, registering a car, is generally dissimilar from that of purchasing a list owner's products. In addition, compiled list owners do not have the same business incentives for guarding against intrusion as do list owners using or renting lists of their own customers. Compiled lists also raise greater disclosure questions. By definition, compiled lists are compilations of otherwise publicly available data that when combined may be seen as forming the basis for dossier-type information about the list members. Although arguably the information about the list members is already public, when a number of such different pieces of public information are aggregated into a single mailing list, it might be

174. *See* notes 148-53, 169-71 *supra* and accompanying text.

said that a new type of information about the individuals on the list results. The dossier-creation dangers, however, do not result from the rental of a compiled list or a mailing to its members; the dangers result directly from the compilations themselves, regardless of whether the lists created are later used for direct mail advertising.

Compiled lists, however, provide substantial societal benefits similar to those of direct response lists. In particular, compiled lists may be a uniquely important medium of communication. For instance, a person wishing to promote water conservation legislation might find it indispensable to write to all of a state's licensed fishermen; to convey the same message via broadcast or newspapers might prove substantially more expensive.

Because the real privacy issue raised by compiled lists relates to their actual compilation, and not their rental, privacy interests may most easily be protected by limiting the original disclosure of information to the compiler. As with direct response lists, list compilers could be precluded from obtaining specific types of particularly sensitive information, such as that relating to medical, insurance, or banking records.[175] In contrast to direct response lists, however, permitting individuals to have their names deleted from compiled lists upon their request to the list owner is not likely to be an effective means of protecting privacy. Compiled list owners are much less likely to communicate directly with their list members than are other list owners, so that few people would be aware of which compiled lists contained their names. At the same time, requiring notification of list members of a list compiler's practices would clearly be an additional, substantial cost for the compiler and also of doubtful constitutionality under *Lamont.*

Those persons wishing to keep their names off compiled lists could easily be accommodated by the government agencies that originally obtained the names and addresses. For instance, a state motor vehicle department could omit from the names disclosed to list compilers those persons so requesting. Such an accommodation would avoid any potential *Lamont* problems, since, as in *Rowan,* communication would be impeded only by the prior affirmative request of the potential addressee. Thus, the privacy interests of individuals concerned about compilations would be protected, and the wishes of those who want to receive direct mail advertising would be respected.

In conclusion, to understand clearly the privacy issues relating to direct mail advertising, it is necessary to differentiate among the three types of mailing lists. Only by evaluating both the privacy problems raised and the societal benefits afforded by each type of mailing list is it possible to formulate effective legal and policy responses to direct mail advertising and privacy issues.

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175. *See* note 147 *supra* and accompanying text.