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# Internet Privacy: Does the Use of "cookies" Give Rise to a Private Cause of Action for Invasion of Privacy in Minnesota?

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## INTERNET PRIVACY: DOES THE USE OF "COOKIES" GIVE RISE TO A PRIVATE CAUSE OF ACTION FOR INVASION OF PRIVACY IN MINNESOTA?

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## I. INTRODUCTION

*"The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close."*<sup>1</sup>

Minnesota recognized a cause of action for invasion of privacy for the first time in the landmark case, *Lake v. Wal-Mart Stores, Inc.*,<sup>2</sup> in July 1998. The convergence of this newly recognized right to privacy<sup>3</sup> in Minnesota, with the recent and seemingly limitless expansion of Internet technology, raises many intriguing legal issues.

One issue involves the recent use of a technology referred to as "cookies," which are text files that are placed by web sites onto Internet users' hard drives when a computer visits that web site, thus enabling the Internet company behind the web site to gather information about that user's activities, preferences, and interests. Impressive as this technology may seem, however, it may enable Internet companies to intrude just a little too far into the personal affairs of the unwitting computer users it monitors. Indeed, the legality of the cookie technology under the common law right of privacy is currently at issue in a landmark lawsuit against the Internet advertising company, DoubleClick.

The use of cookies in the United States is staggering. DoubleClick has issued more than forty million of them in just over a year of operation.<sup>4</sup> A recent study that included a survey of ninety-one of the 100 busiest web sites, and a random sample of 335 web sites, found that web sites collect a vast amount of personal information about consumers. The study found that 99% of the busiest web sites and 97% of the random sample web sites collected some type of personal identifying information.<sup>5</sup>

This article will analyze the three new causes of action now

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1. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998).

2. *Id.*

3. The distinguished privacy advocate, Arthur R. Miller, has described privacy law in the United States as being a "thing of threads and patches." ARTHUR R. MILLER, *THE ASSAULT ON PRIVACY* 169 (1971).

4. CONGRESSIONAL INFORMATION SERVICE, Apr. 15, 1997.

5. FEDERAL TRADE COMMISSION REPORT, *Privacy Online: Fair Information Practices in the Electronic Marketplace: Hearing before the Senate Commission on Commerce, Science and Transportation* (May 2000) (Statement of Robert Pitofsky, Chairman of the FCC), available at <http://www.ftc.gov/os/2000/05/testimonyprivacy.htm>.

recognized in Minnesota under the invasion of privacy tort. It will also address the issues being decided in the *DoubleClick* litigation and describe the legislation currently in the works to address privacy concerns over cookies and similar Internet technology that renders our apparent anonymous and private activity on the Internet readily available to interested parties. Finally, this article will opine on whether Internet cookies and other computer monitoring devices could give rise to a similar claim for invasion of privacy under this evolving cause of action in Minnesota.<sup>6</sup>

## II. LAKE V. WAL-MART: RECOGNIZING PRIVACY RIGHTS IN MINNESOTA

In 1998, Minnesota became the forty-eighth state to recognize a common law right to privacy.<sup>7</sup> In *Lake v. Wal-Mart*,<sup>8</sup> the Minnesota Supreme Court adopted, under the umbrella of an invasion of privacy claim, three separate causes of action: intrusion upon seclusion; appropriation; and publication of private facts.<sup>9</sup> The plaintiffs in *Lake* had brought several rolls of film from their vacation to Wal-Mart for development.<sup>10</sup> The film contained some nude pictures of the plaintiffs, which Wal-Mart refused to return because of "their nature."<sup>11</sup> Some Wal-Mart employees, however, showed the pictures to their friends and, eventually, the pictures circulated throughout the community.<sup>12</sup> Based on these facts, the court for the first time recognized the tort of invasion of privacy, defining the causes of action according to the Restatement (Second) of Torts.<sup>13</sup> Although recognizing the three privacy actions mentioned above, the court declined to adopt the cause of action for false light publicity, another traditional privacy tort. The claims recognized in *Lake* can be

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6. This article will not address statutory causes of action based on the cookie technology discussed herein, such as a possible cause of action under the Electronic Communications Privacy Act, 18 U.S.C. § 2701 (2000); the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2000); or any other cause of action beyond the common law action for invasion of privacy in Minnesota.

7. Neither Wyoming nor North Dakota has recognized a common law or statutory right to privacy. Every other jurisdiction recognizes some form of the right to privacy. *Lake*, 582 N.W.2d at 234.

8. 582 N.W.2d 231 (Minn. 1998).

9. *Id.* at 235.

10. *Id.* at 232-33.

11. *Id.* at 233.

12. *Id.* at 232-33.

13. *Id.* at 233.

applied retroactively.<sup>14</sup> Citing only the definitions found in the Restatement, the supreme court in *Lake* “conferred upon other courts the task of defining the contours of these newly recognized causes of action.”<sup>15</sup>

### A. *Intrusion Upon Seclusion*

A cause of action for intrusion upon seclusion requires that a person “intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns ... if the intrusion would be highly offensive to a reasonable person.”<sup>16</sup> This tort thus involves three key elements: (1) an intrusion (2) that is highly offensive to a reasonable person (3) into a matter in which the person has a legitimate expectation of privacy.<sup>17</sup> An intrusion occurs when the actor “believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act.”<sup>18</sup>

Following *Lake*, a line of cases alleging intrusion upon seclusion have begun to develop in the U.S. District Court for the District of Minnesota in the context of repossession, although none have been successful so far.<sup>19</sup> In *Saice v. MidAmerica Bank*, the plaintiffs had left their car running and unattended in their apartment complex parking lot with their two-month old daughter inside.<sup>20</sup> According to the plaintiffs, they were loading furniture into an attached U-haul and were only out of sight of the car for a couple of minutes. When the Minnesota Recovery Bureau repossession agent came to repossess the car, however, he found it running and unat-

14. Applying the three-part test articulated by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), the Minnesota Court of Appeals concluded that “the privacy rights recognized by the supreme court in *Lake* must be available to any litigant, regardless of whether the conduct occurred before *Lake* was decided.” *Summers v. R & D Agency, Inc.*, 593 N.W.2d 241, 245-47 (Minn. Ct. App. 1999).

15. *C.L.D. v. Wal-Mart Stores, Inc.*, 79 F. Supp. 2d 1080, 1083 (D. Minn. 1999).

16. *Lake*, 582 N.W.2d at 233 (quoting RESTATEMENT (SECOND) OF TORTS § 652B (1977)).

17. *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 975 (8th Cir. 2000).

18. *Id.* (quoting *O'Donnell v. United States*, 891 F.2d 1079, 1083 (3d Cir. 1989) and applying RESTATEMENT (SECOND) OF TORTS § 652B (1977)).

19. *E.g.*, *Saice v. MidAmerica Bank*, No. 98-2396, 1999 U.S. Dist. LEXIS 20845, at \*19 (D. Minn. Sept. 20, 1999); *Revering v. Norwest Bank Minn.*, No. 99-480, 1999 U.S. Dist. LEXIS 20726, at \*8-9 (D. Minn., Nov. 30, 1999).

20. *Saice*, 1999 U.S. Dist. LEXIS 20845, at \*2-3.

tended, so he got in and drove off.<sup>21</sup> The plaintiffs called 911 when they found their car and daughter missing, and when the police received the call, they informed the plaintiffs that the car had been repossessed.<sup>22</sup> The police contacted the repossession agent and retrieved the child, and returned her to her parents about forty-five minutes after the agent had driven away in the car.<sup>23</sup> The plaintiffs subsequently sued the repossession bureau and MidAmerica bank for, among other claims, intrusion upon seclusion.<sup>24</sup>

Rejecting this claim, the court reasoned, "[p]laintiffs cannot persuasively argue that their privacy was invaded when they voluntarily thrust their affairs into the public realm."<sup>25</sup> Plaintiffs had entered the public realm, the court found, by using their car as collateral for a loan, and by leaving the car running, unlocked and unattended in a parking lot easily accessible to the public.<sup>26</sup> Concluding that the thing intruded or pried into—the car—was not under these circumstances "private," the court granted summary judgment on the plaintiffs' privacy claim.<sup>27</sup>

A few months later, the district court again had the opportunity to examine an intrusion upon seclusion privacy claim in the context of the repossession of an automobile.<sup>28</sup> In *Revering v. Norwest Bank Minnesota*, the repossession agent came to the plaintiffs' home to repossess their car following the plaintiffs' default on loan payments.<sup>29</sup> The plaintiffs invited the agent into their home, and he stood inside the doorway for approximately forty-five minutes while the plaintiffs removed their personal possessions from the car.<sup>30</sup> The repossession agent then drove the car out of the garage and waited on the street, in his own car, for a tow truck to arrive.<sup>31</sup> The plaintiffs sued for intrusion upon seclusion based on the conduct of the repossession agent in entering their home.<sup>32</sup>

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21. *Id.* at \*3.

22. *Id.* at \*3-4.

23. *Id.* at \*4.

24. *Id.* at \*17-18.

25. *Id.* at \*18-19.

26. *Id.* at \*18.

27. *Id.* (citing *Gosche v. Calvert High School*, 997 F. Supp. 867, 872 (D. Ohio 1998)).

28. *Revering v. Norwest Bank Minn.*, Civ. No. 99-480, 1999 U.S. Dist. LEXIS 20726 (D. Minn. Nov. 30, 1999).

29. *Id.* at \*3-4.

30. *Id.* at \*4.

31. *Id.*

32. *Id.* at \*7.

The court rejected this claim on the grounds that the conduct would not be highly offensive to a reasonable person.<sup>33</sup> Significantly, the court found the plaintiffs never objected to the repossession agent's presence in their home and, to the contrary, invited him inside while they reviewed the paperwork and removed their personal belongings from the vehicle.<sup>34</sup> Absent evidence that the plaintiffs themselves found the repossession agent's presence in their home highly offensive, a reasonable person most likely would not find the presence highly offensive either.<sup>35</sup>

In addition to cases decided after the adoption of the privacy action in *Lake*, it is also instructive in assessing the scope of this new tort to look at some of the decisions by Minnesota courts prior to the *Lake* decision. The Minnesota Court of Appeals has long been struggling with asserted claims for invasion of privacy for which no cause of action existed in this state. One such case in which the court of appeals opined on the scope of the intrusion upon seclusion claim is *Copeland v. Hubbard Broadcasting Co.*, in 1995.<sup>36</sup> There, the appellants claimed invasion of privacy based on an incident where a veterinarian obtained the plaintiffs' permission to bring a student to their house to observe the treatment of their cat.<sup>37</sup> The student had not informed either the veterinarian or the plaintiffs that, in addition to attending college part-time, she was also employed by a local news station and had come in order to videotape the veterinarian's practice methods.<sup>38</sup>

Although dismissing the plaintiffs' claims because Minnesota courts did not recognize invasion of privacy torts, the court opined that the plaintiffs had likely met the elements for a claim of intrusion upon seclusion.<sup>39</sup>

### B. *Appropriation*

The second cause of action recognized by the *Lake* court is appropriation. Appropriation occurs where a person "appropriates to his own use or benefit the name or likeness of another."<sup>40</sup> This type

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33. *Id.* at \*8.

34. *Id.* at \*4, 8.

35. *Id.* at \*8.

36. *Copeland v. Hubbard Broad. Co.*, 526 N.W.2d 402, 405-06 (Minn. Ct. App. 1995).

37. *Id.* at 404.

38. *Id.*

39. *Id.* at 406.

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

of privacy claim "is intended to protect the value of an individual's notoriety or skill .... [T]he appropriation tort does not protect one's name per se; rather, it protects the value associated with that name."<sup>41</sup> This type of privacy action is most frequently asserted in the commercial context, for example, when a company uses a celebrity's name without his or her consent to endorse a product.

Interestingly, although Minnesota state courts had uniformly rejected this cause of action before *Lake*, federal courts interpreting Minnesota law had already speculated that the Minnesota Supreme Court would adopt a similar cause of action, publicity rights. In *Ventura v. Titan Sports, Inc.*,<sup>42</sup> Minnesota's governor, when he was still affiliated with wrestling, sued Titan Sports, Inc., the operating company of the World Wrestling Federation, for royalties flowing from the use of Ventura's likeness on wrestling videotapes.<sup>43</sup> One cause of action Ventura asserted was misappropriation of publicity rights.<sup>44</sup> The Eighth Circuit determined that the Minnesota Supreme Court would recognize this tort even though it had refused to recognize an appropriation cause of action under the theory of invasion of privacy, reasoning that the policies underlying the right of publicity differ from those underlying the right to privacy.<sup>45</sup> Because the right to publicity involves pecuniary interests rather than the emotional distress at issue in an appropriation action under an invasion of privacy theory, the court found the tort of violation of publicity rights more akin to trade name protection, which Minnesota has long recognized.<sup>46</sup>

With the *Lake* decision, however, Minnesota apparently chose to protect not only the pecuniary interests at issue in a case such as *Ventura*, but also the personal and emotional interests attendant to an invasion of privacy claim. The United States District Court for the District of Minnesota also has had the opportunity to address the scope of this newly recognized claim following *Lake*.<sup>47</sup> In *Kovatovich v. K-Mart*, the defendant pharmacy had sent to a number of customers promotional letters bearing the plaintiff's name as the

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41. *Kovatovich v. K-Mart Corp.*, 88 F. Supp. 2d 975, 986 (D. Minn. 1999) (citing *Mathews v. Wozencroft*, 15 F.3d 432, 437 (5th Cir. 1994)).

42. 65 F.3d 725 (8th Cir. 1995).

43. *Id.* at 728.

44. *Id.*

45. *Id.* at 731.

46. *Id.*

47. *Kovatovich v. K-Mart Corp.*, 88 F. Supp. 2d 975, 985 (D. Minn. 1999).



author—after the plaintiff had been discharged.<sup>48</sup> The plaintiff claimed that by sending these letters the defendant appropriated her name and good will for the purpose of soliciting business and increasing sales.<sup>49</sup>

The focus of the court's analysis in *Kovatovich* was on the requirement of intent to state a claim. In concluding that intent must be present to sustain an action for appropriation, the court reasoned: "[t]o tortiously appropriate an individual's name, one must appropriate for the *purpose* of taking advantage of that individual's name, or reputation. It would seem axiomatic that an individual could not commit an act *for a purpose*, without implicitly demonstrating an intent to accomplish that purpose."<sup>50</sup> Accordingly, the court denied summary judgment on the plaintiff's claim, finding a fact issue on whether the defendant possessed the requisite intent to appropriate the plaintiff's name.<sup>51</sup> The court emphasized that the *incidental* use of a plaintiff's name or likeness would not sustain an action for appropriation.<sup>52</sup>

### C. *Publication Of Private Facts*

The third privacy claim recognized by the Minnesota Supreme Court in *Lake* is publication of private facts, which occurs when a person "gives publicity to a matter concerning the private life of another ... if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."<sup>53</sup> The essential elements that a plaintiff must show, then, are: (1) publicity; (2) of a private matter, or something that is not of legitimate concern to the public; and (3) which publicity is highly offensive.

In the only published Minnesota case addressing a publication of private facts claim after *Lake*, *C.L.D. v. Wal-Mart*, the District Court for the District of Minnesota focused on the issue of "publicity."<sup>54</sup> Turning for guidance to the Restatement (Second) of Torts, the court stated:

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48. *Id.*

49. *Id.*

50. *Id.* at 986-87.

51. *Id.* at 985-88.

52. *Id.* at 987-88.

53. *Lake*, 582 N.W.2d at 233 (quoting RESTATEMENT (SECOND) OF TORTS § 652D (1977)).

54. *C.L.D.*, 79 F. Supp. 2d at 1084 (quoting RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a (1977)).

"Publicity," as it is used in this Section, differs from "publication," as that term is used ... in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any communication by the defendant to a third person. "Publicity," on the other hand, 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 .... Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons.<sup>55</sup>

In *C.L.D.*, the plaintiff, an employee of Wal-Mart, requested a medical leave of absence from her employer.<sup>56</sup> In a meeting with her supervisor, the plaintiff volunteered the information that she was pregnant and was "losing the baby."<sup>57</sup> The plaintiff claimed that when she returned from her medical leave, other Wal-Mart employees knew that she had been pregnant and had an abortion.<sup>58</sup> She sued under the theory of publication of private facts, claiming that her supervisor disclosed private and personal information to her co-workers.<sup>59</sup>

The district court dismissed the privacy claim on the grounds that the plaintiff failed to show that the matter was disseminated to a sufficiently large number of people to constitute publicity.<sup>60</sup> Adopting the Restatement's definition, the court held that the requirement of publicity could be met only by disclosure to a significantly large number of people, in the media, or in other forms that would make the information accessible to the public at large.<sup>61</sup> The *C.L.D.* court reasoned that the Minnesota Supreme Court, although offering no guidance in *Lake*, would most likely also follow the Restatement and refuse to allow a claim for publication of private facts to lay based on disclosure to only a few individuals.<sup>62</sup>

The court also relied on a 1975 decision by the supreme court

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55. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a (1977)).

56. *Id.* at 1082.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1086.

61. *Id.* at 1084-85.

62. *Id.* at 1085.

in *Hendry v. Conner*,<sup>63</sup> which provides additional guidance as to how this tort will be construed in the future. In *Hendry*, the plaintiff claimed that a hospital had invaded her right to privacy by stating in a loud voice in the presence of several people in the waiting room that her child would not be admitted until the plaintiff paid her outstanding bill. The hospital staff also commented on the plaintiff's petition for bankruptcy.<sup>64</sup> The court did not even reach the issue of whether it should recognize a right to privacy, as it found that the plaintiff would not have stated a claim in any event because the disclosure of the information to a small group does not constitute publicity.<sup>65</sup>

The Minnesota Court of Appeals seemed less rigid in its speculation on the parameters of this cause of action in the later decision, *Stubbs v. North Memorial Medical Center*.<sup>66</sup> *Stubbs* involved a claim for publication of private facts based on a hospital's unauthorized publication of "before" and "after" photographs of the plaintiff's face to promote the hospital's cosmetic surgery center.<sup>67</sup> Although acknowledging that it is not the function of the court of appeals to adopt new causes of action,<sup>68</sup> the court indicated its desire to provide a remedy for the claim before it: "[w]here as here, unwanted publicity is given to an aspect of an individual's life which is inherently private, justice would seem to require that there be some form of redress under the law. It is especially distressing that the published information was disclosed by a physician."<sup>69</sup>

#### D. False Light Publicity

The Minnesota Supreme Court declined to recognize in *Lake* the fourth traditional privacy cause of action, false light publicity.<sup>70</sup> False light publicity is defined by the Restatement as when a person:

... gives publicity to a matter concerning another that places the other before the public in a false light ... if (a) the false light in which the other was placed would be

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63. 226 N.W.2d 921, 923 (Minn. 1975).

64. *Id.* at 922.

65. *Id.*

66. 448 N.W.2d 78 (Minn. Ct. App. 1989).

67. *Id.* at 79-80.

68. *Id.* at 81.

69. *Id.* at 80-81.

70. *Lake*, 582 N.W.2d at 236.

highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in a reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.<sup>71</sup>

The court rejected a claim for false light publicity, finding it too similar to a claim for defamation.<sup>72</sup> The court reasoned that not only was a false light cause of action unnecessary due to the protections of defamation, but because a false light claim is more expansive than a defamation claim,<sup>73</sup> it would create too much tension between the tort of false light publicity and the First Amendment.<sup>74</sup> The court did not wish to risk stifling free speech any further to protect a small category of publications not already covered by the defamation cause of action.<sup>75</sup>

In refusing to recognize false light publicity as a cause of action while adopting the other three privacy torts, Minnesota followed in the footsteps of several other jurisdictions, including Texas, which declined to recognize false light publicity for the same reasons in 1994.<sup>76</sup>

### III. INTERNET COOKIES: WHERE IS YOUR PERSONAL INFORMATION GOING?

Many people are unfamiliar with the practices used by Internet companies to track where individual users travel on the World Wide Web. It is not just a coincidence that when users log on to the Internet they are greeted with advertisements and news headlines in their fields of interest.<sup>77</sup> Internet companies track which

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71. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

72. *Lake*, 582 N.W.2d at 235.

73. *Id.* See also *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 793 (Minn. Ct. App. 1998) (citing *Lake*, 582 N.W.2d at 235, for the proposition that defamation is more expansive than false light publicity).

74. *Lake*, 582 N.W.2d at 235. The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

75. *Lake*, 582 N.W.2d at 236.

76. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579-80 (Tex. 1994). See also *Lake*, 582 N.W.2d at 235 (citing cases from Missouri, North Carolina, and Texas).

77. *Internet Cookies: Are You Gambling With Your Privacy?*, COMPUTER SOURCE MAG. 1, 1 (Nov. 1998), available at <http://www.source-magazine.com/archive/1198/feat11981.asp>.

computer travels to what sites so that they can better target their advertisements by using cookies.<sup>78</sup>

Cookies<sup>79</sup> are small text files that can be placed on computer hard drives when the computer visits a particular web site.<sup>80</sup> Cookies can be used to transmit information back to the web site about the users' activities and preferences, or to inform the web site about purchases located in a shopping cart on the site.<sup>81</sup> Generally, the only web site that can read a cookie is the one that placed it on the hard drive.<sup>82</sup>

Netscape Communications, a pioneer in cookie technology, has made three clear statements about cookies: "(1) [c]ookies cannot read information from a consumer's hard drive; (2) they cannot gather sensitive information or in any way give the web site any information not specifically provided by the consumer; and (3) [c]ookies cannot be read or in any way used by any other web site."<sup>83</sup>

There are a number of benefits to Internet users when cookies are used.<sup>84</sup> The use of cookies on the Internet allows consumers to spend less time searching for desired information and specific content.<sup>85</sup> Cookies could alleviate the need for databases of personal information altogether, as everything about a user's preferences can be found on his or her hard drive.<sup>86</sup> For example, when visiting web sites that sell books or CDs, the site automatically would know what types of books and music the user prefers simply because of the information cookies provide. There would no longer be a need to keep a database with personally identifying information such as

78. *Id.*

79. Most of the available literature discusses the use of cookies. However, personal information is collected in other ways as well. A new vehicle known as a "web bug" or "1-pixel GIF" is also being used. Web bugs are electronic tags that help web sites and advertisers track visitors' whereabouts on the Internet but are invisible on the page and are much smaller than a cookie. Stefanie Olsen, *Tiny New Bugs Threaten Privacy: More Insidious Internet Version of Cookies*, CANBERRA TIMES, July 17, 2000, at A13.

80. Federal Trade Commission, *Privacy Policy*, at <http://www.ftc.gov/ftc/privacy.htm> (last modified Aug. 22, 2000).

81. *Id.*

82. *Id.*

83. DENNIS C. HAYES, COOKIES AND THE INTERNET, U.S. INTERNET INDUSTRY ASS'N (1999), at <http://www.usiia.org/pubs/cookies.html>.

84. *Internet Cookies: Are You Gambling Your Privacy?*, *supra* note 77, at 1.

85. *Id.*

86. *Id.*

phone numbers, addresses, and e-mails.<sup>87</sup>

Some consider cookies useful and beneficial.<sup>88</sup> While cookies attempt to promote efficiency and easy use of the Web, however, they have become the center of an Internet privacy and consumer rights controversy.<sup>89</sup> While some have expressed concern over the use of cookies to track on-line habits, web site marketers have maintained they do not collect personally identifiable information because they cannot identify individual users.<sup>90</sup>

#### IV. *JUDNICK V. DOUBLECLICK: COOKIES GIVE CAUSE FOR INVASION OF PRIVACY ACTION*

On January 26, 2000, Harriet M. Judnick, on behalf of the general public of the State of California, filed a lawsuit against DoubleClick, Inc. ("DoubleClick") in the Superior Court of California, Marin County.<sup>91</sup> DoubleClick is the largest provider of Internet advertising products and services for online advertisers and web site publishers throughout the world.

The complaint seeks permanent injunctive relief enjoining the defendants from using technology to personally identify Internet users, specifically mentioning cookies.<sup>92</sup> The relief sought also includes a mechanism for users to destroy personally identifying information that has been gathered, destruction of all records of personally identifying information, enjoinder from the use of e-mail addresses obtained for commercial e-mail advertising, corrective advertising, costs, and attorney's fees.<sup>93</sup> The basis for the relief sought was the allegation that DoubleClick used unlawful, misleading, and deceptive business practices that violated the privacy rights of the plaintiffs.<sup>94</sup>

87. *Id.*

88. HAYES, *supra* note 83, at 1.

89. *Id.*

90. Michael Geist, *Cookies Crumble Personal Privacy*, CYBERLAW 1, 2 (Feb. 10, 2000), at <http://www.globetechnology.com/archive/gam/Ebusiness/20000210/TWGEIST.html>.

91. Compl. for Injunctive Relief, *Judnick v. DoubleClick*, No. CV 000421 (Cal. App. Dep't Super. Ct. filed Jan. 27, 2000) [hereinafter "Judnick Complaint"].

92. Paragraph 1(a) of the Prayer for Relief seeks a permanent injunction "Enjoining Defendants ... from using any technology for the purpose of personally identifying Internet users or Web Site visitors, including 'cookies,' on the Internet, without obtaining the prior express written consent of the Internet user." *Id.* at 10.

93. *Id.* at 10-11.

94. In paragraph one of the Preliminary Allegations, the Judnick Complaint

The DoubleClick action has received nationwide publicity.<sup>95</sup> In February, 2000, the Federal Trade Commission ("FTC") notified DoubleClick that it would perform a routine inquiry into the privacy policies of the company.<sup>96</sup> In addition, all of the attention on Internet privacy prompted the Electronic Privacy Information Center ("EPIC") to file a complaint against DoubleClick with the FTC on February 10, 2000.<sup>97</sup> The complaint by EPIC made similar allegations and sought similar relief against DoubleClick.<sup>98</sup> DoubleClick also has been the target of actions by the states of New York and Michigan.<sup>99</sup> Michigan has taken the position against DoubleClick that only the primary web site a user visits can place a cookie without obtaining permission from the user, and that secondary sites with which the user has no actual contact must get affirmative permission before placing cookies on users' hard drives.<sup>100</sup>

As if the attention from the FTC, private citizens, and states wasn't enough news about DoubleClick and the use of cookies, February 2000 also saw the introduction of a bill by New Jersey Senator Robert Torricelli which would restrict advertisers from pooling consumer information, and seeks the establishment of two new privacy caucuses.<sup>101</sup>

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states:

Defendants use sophisticated computer technology to identify Internet users, track and record their Internet use and the Internet web sites they visit, and obtain a plethora of highly confidential and personal information about them without their consent, including, without limitation, their names, addresses, ages, shopping patterns and histories, credit card information, bank account information, sexual orientation and preferences, and other private information. Defendants mislead and have misled the General Public into a false sense of security regarding their Internet use, while deceptively acquiring, storing, and selling millions of Internet users' most private and personal information for profit.

*Id.* at 1-2.

95. *E.g.*, Rob Conlin, *DoubleClick Sued for Online Privacy Invasion*, E-COMMERCE TIMES (Jan. 28, 2000) at <http://www.ecommercetimes.com/perl/story/?id=2362>; *The Class Act*, NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS, May 19, 2000, at 6-7.

96. Mike Godwin, *Privacy Group Files FTC Complaint Against DoubleClick Over 'Cookies'*, E-COMMERCE L. WKLY., Feb. 24, 2000, at 1, 1, available at <http://www.lawewsnet.com/stories/A16852-2000Feb23.html>.

97. *Id.*

98. *Id.*

99. Chet Dembeck, *Online Privacy Inside and Out*, E-COMMERCE TIMES, 1, 2 (Apr. 25, 2000), at <http://www.ecommercetimes.com/news/articles2000/000425-la.shtml>.

100. *Id.*

101. Godwin, *supra* note 96, at 5.

### A. *What Did Doubleclick Do To Deserve A Lawsuit?*

The *Judnick v. DoubleClick, Inc.* Complaint describes how (upon information and belief of the plaintiffs) DoubleClick does business in a way that constitutes an invasion of privacy.<sup>102</sup> The Complaint alleges that DoubleClick is the largest Internet advertiser on the World Wide Web, and that it uses cookies to create and assign identification numbers to Internet users.<sup>103</sup> These identification numbers allow DoubleClick to track user's visits to web sites that were maintained by DoubleClick's clients.<sup>104</sup>

The Complaint also claims that DoubleClick acquired a direct-marketing services company that could maintain a database of personal information gathered from customers.<sup>105</sup> DoubleClick did acquire Abacus Direct Corp. for \$1.7 billion, an acquisition objected to by Internet privacy advocates.<sup>106</sup> The allegation is that the direct-marketing service owned by DoubleClick contains identifying information for ninety percent (90%) of the households in America.<sup>107</sup> The Complaint further alleges that prior to the acquisition of the direct-marketing company, DoubleClick made public statements that it did not collect personally identifying information, and that the plaintiffs had and continue to have an expectation of privacy in their Internet usage.<sup>108</sup>

The plaintiffs in this action are especially concerned with the collection of personally identifying information that is "sensitive" in nature.<sup>109</sup> The web sites described in the Complaint as "sensitive" include those regarding sexual orientation and sexually oriented products and services, as well as: "law related sites, political sites, book sites, videotape/DVD sites, and online banking and brokerage sites."<sup>110</sup>

The suit against DoubleClick has prompted many other lawsuits. All complaints, including those against Amazon.com, Inc., RealNetworks, Inc., and Buy.com, Inc., have been consolidated as

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102. Judnick Complaint, *supra* note 91, at 1-2, ¶ 1.

103. *Id.* at 4, ¶¶ 9 & 13.

104. *Id.* at 4, ¶ 13.

105. *Id.* at 4, ¶ 14.

106. Conlin, *supra* note 95, at 2. Privacy advocates felt that the acquisition of Abacus Direct Corp. by DoubleClick would lead to the exploitation of Internet users. *Id.*

107. Judnick Complaint, *supra* note 91, at 4-5, ¶ 14.

108. *Id.* at 6, ¶ 19.

109. *Id.* at 5, ¶ 17.

110. *Id.*



*In re DoubleClick Inc. Privacy Litigation* in the Southern District of New York. A Consolidated Amended Class Action Complaint was filed on May 26, 2000. The parties have completed briefing DoubleClick's motion to dismiss;<sup>111</sup> a decision is likely sometime by the end of 2000 or early 2001.

### B. *DoubleClick's Privacy Policies*

Prior to acquiring Abacus Direct Corp., DoubleClick did not use the information gathered from its placement of cookies to personally identify Internet users. Instead, DoubleClick would create a profile on the users' visits and habits from the information the cookies gathered, and then sell that information to any bidder under the DoubleClick umbrella.<sup>112</sup> In June of 1999, however, DoubleClick announced the merger with Abacus, and announced that it would be revising its privacy policy.<sup>113</sup> Upon completion of the merger between the companies in November, 1999, DoubleClick had at its fingertips personally identifying information which could then be matched to the information gathered by the direct-marketing group and used to target individuals personally.<sup>114</sup> DoubleClick stated when the merger was completed that personally identifiable information would be combined with the information that was collected from web sites.<sup>115</sup> This merging process, commonly known as profiling, allows DoubleClick to obtain the household or individual identity of the person visiting one of the more than 11,000 web sites that use DoubleClick's cookies.<sup>116</sup>

What created the most concern was whether DoubleClick would have an opt-out procedure for Internet users who did not wish to have their information recorded or used with other personally identifiable information that the direct-marketing service might have already collected about them. Because DoubleClick runs the advertising on other sites, most Internet users who are being tracked by DoubleClick never even log on to the DoubleClick site ([www.doubleclick.net](http://www.doubleclick.net)) to be informed of the option they have to

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111. The defendants moved to dismiss only the federal statutory claims. *Id.* DoubleClick did not seek to have any of the state law claims dismissed, including the invasion of privacy claim. *Id.*

112. *Internet Cookies: Are You Gambling With Your Privacy?*, *supra* note 77, at 2.

113. Godwin, *supra* note 96, at 3.

114. *Id.* at 4.

115. *Id.*

116. Will Rodger, *Activists Charge DoubleClick With Double Cross*, at <http://www.USATODAY.com> (last visited May 17, 2000).

refrain from participation.

Early in March, 2000, DoubleClick took the position that the adoption of a new privacy policy allowing the merger of personally identifiable information with anonymous Web activity was a mistake.<sup>117</sup> The chief executive at DoubleClick stated:

Let me be clear: DoubleClick has not implemented this plan, and has never associated names, or any other personally identifiable information, with anonymous user activity across web sites .... We commit today, that until there is agreement between government and industry on privacy standards, we will not link personally identifiable information to anonymous user activity across web sites.<sup>118</sup>

## V. PROPOSED FEDERAL LEGISLATION AND PRIVACY REGULATIONS

The Federal Trade Commission ("FTC"), which is a division of the Department of Commerce, created an Advisory Committee on Online Access and Security in January of 2000.<sup>119</sup> The committee consisted of forty representatives,<sup>120</sup> as well as the FTC, and was slated to spend five months analyzing the impact of security and privacy on the Internet.<sup>121</sup> The members of the committee were selected from over 180 nominees.<sup>122</sup>

### A. *The Federal Trade Commission Report*

The FTC recently issued two reports that reveal its findings regarding online privacy and made recommendations to Congress.<sup>123</sup> The recommendations made to Congress in July of 2000 include a

117. Jerry LaMartina, *DoubleClick Backtracks on Privacy Plan*, MEDIA CENT. (Mar. 2, 2000), at [http://www.mediacentral.com/channels/advertising/952039081\\_307.html](http://www.mediacentral.com/channels/advertising/952039081_307.html).

118. *Id.*

119. Mary Hillebrand, *FTC Committee to Tackle Online Privacy Issues*, E-COMMERCE TIMES (Jan. 26, 2000), available at <http://www.ecommercetimes.com/news/articles2000/000126-3.shtml>.

120. The group of forty includes representatives from twenty-three various Internet and hardware companies, eight consumer and business advocacy groups, one lieutenant governor, and a few attorneys and scholars. *Id.*

121. *Id.*

122. *Id.* at 3.

123. FED. TRADE COMM'N, *ONLINE PROFILING: A REPORT TO CONGRESS* (2000), available at <http://www.ftc.gov/os/2000/06/onlineprofilingreprtjune2000.pdf>; FED. TRADE COMM'N, *ONLINE PROFILING: A REPORT TO CONGRESS, PART 2, RECOMMENDATIONS* (2000), available at <http://www.ftc.gov/os/2000/07/index.htm#27> [hereinafter "FTC RECOMMENDATIONS"].

call for legislation to complement the efforts that the members of the committee (the Network Advertising Industry (“NAI”)) were going to be making in self-regulation.<sup>124</sup> The FTC and the NAI have promulgated once again the four core principles that predated the online medium for fair information practices, this time recommending that they be the cornerstone goals for any future legislation.<sup>125</sup> The four principles are: notice, choice, access, and security.<sup>126</sup> The FTC would like to translate these principles into legislation that would require disclosure of information practices regarding personal information to consumers, give consumers options about how and when personal information can be collected from them, and for what purpose it can be used, enable consumers to access any information collected about them, and make reasonable assurances that the information collected is accurate and not able to be used without authorization.<sup>127</sup>

The report and recommendations have received criticism.<sup>128</sup> Many privacy advocates believe that the FTC needs to take stronger steps to ensure online privacy, and particularly disagree with the way the NAI agreement forces consumers to affirmatively opt-out of information collection instead of opting-in.<sup>129</sup> “Critics are especially concerned about wording in the agreement that allows advertisers to merge information such as names and addresses with online browsing habits.”<sup>130</sup>

Although DoubleClick, Inc. is a member of the NAI and has agreed to abide by the principles set by that body and backed by the FTC, only ninety percent of the industry corporations are members, and therefore only ninety percent are bound by the agreement.<sup>131</sup> Furthermore, the agreement is only for self-regulation, and has no force of law.<sup>132</sup> The NAI’s agreement seeks to enforce privacy protections which would allow consumers to opt-out of anonymous information collection, opt-out of personally

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124. FTC RECOMMENDATIONS, *supra* note 123, at 6.

125. *Id.* “[T]hese fair information practice principles predate the online medium; indeed, agencies in the United States, Canada, and Europe have recognized them in government reports, guidelines, and model codes since 1973.” *Id.* at 3.

126. *Id.*

127. *Id.*

128. D. Ian Hopper, *FTC Backs Online Industry’s Privacy Plan*, ST. PAUL PIONEER PRESS, July 28, 2000, at 1C.

129. *Id.* at 3C.

130. *Id.*

131. FTC RECOMMENDATIONS, *supra* note 123, at 10.

132. *Id.*; see also Hopper, *supra* note 128, at 1C.

identifiable information collection, and give consumers a chance to determine if they want anonymous information merged with personally identifiable information to create a profile.<sup>133</sup>

### B. Pending Legislation

A plethora of legislation is pending in Congress. Two pieces of legislation have received a significant amount of attention: Senator Torricelli's Secure Online Communication Enforcement Act of 2000, and Senator Hollings' Consumer Privacy Protection Act.

Senator Torricelli, from New Jersey, introduced the Secure Online Communication Enforcement Act of 2000 on February 10, 2000.<sup>134</sup> This legislation, which proposes to amend Title 18 of the U.S. Code "to provide for the applicability to operators of Internet web sites of restrictions on the disclosure or records and other information relating to the use of such sites, and for other purposes," was read twice and referred to the Committee on the Judiciary.<sup>135</sup> Rep. Jesse L. Jackson, Jr. introduced an identical amendment in the House of Representatives on March 1, 2000.<sup>136</sup> The legislation pending in the House of Representatives was referred to the Committee on the Judiciary on March 1, and then referred to the Subcommittee on Crime on March 27.<sup>137</sup> There has been no further action taken in either the House of Representatives or the Senate.<sup>138</sup>

The Consumer Privacy Protection Act introduced by Senator Ernest Hollings of South Carolina on May 23, 2000, is much more comprehensive.<sup>139</sup> The bill has the intent to protect the privacy of American consumers, and is broken down into nine separate titles.<sup>140</sup> These titles include Online Privacy; Privacy Protections for Consumers of Books, Recorded Music, and Videos; Enforcement and Remedies; Communications Technology Privacy Protections; Rulemaking and Studies; Protection of Personally Identifiable In-

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133. Hopper, *supra* note 128, at 3C.

134. Secure Online Communication Enforcement Act of 2000, S. 2063, 106th Cong. (2000).

135. *Id.*

136. Secure Online Communication Enforcement Act of 2000, H.R. 3770, 106th Cong. (2000).

137. *Id.*

138. This is based on information posted on the Thomas federal legislative Web site, at <http://thomas.loc.gov>. (n.d.).

139. Consumer Privacy Protection Act, S. 2606, 106th Cong. (2000).

140. *Id.*

formation in Bankruptcy; Internet Security Initiatives; Congressional Information Security Standards; as well as Definitions.<sup>141</sup>

The Hollings' bill provides stringent guidelines about personally identifiable information and its collection and use by Internet and online service providers or web site operators.<sup>142</sup> The bill provides that users whose information will be collected must be provided notice that would inform them of the information that would be collected, how it is to be collected, and the disclosure practices of the provider or operator.<sup>143</sup> Furthermore, the bill requires that the sites receive affirmative consent in advance to collect or disclose information, and that denial of consent is effective until the user changes it regardless of whether the sites are modified or change their policies.<sup>144</sup> The bill also requires that the FTC make rules to implement the provisions. The Act would not be effective until those rules were completed.<sup>145</sup>

The Consumer Privacy Protection Act has seen no developments since it was introduced on May 23, 2000, except to be referred to the Committee on Commerce, Science, and Transportation on that date.<sup>146</sup> Whether either of these pieces of legislation are passed into law remains to be seen. Without question, the Consumer Privacy Protection Act will be much more difficult to pass because of its comprehensiveness, and Internet companies are sure to protest the stringent requirements it places on them. Furthermore, the Consumer Privacy Protection Act conflicts with the FTC report to Congress in the way it implements opt-outs by users—which is a highly contested issue between privacy advocates and the Internet companies.

### C. *Alternatives To Legislation*

The World Wide Web Consortium (WC3) is developing an alternative to legislation called the Platform for Privacy Preferences.<sup>147</sup> Under this plan, Web servers would communicate their privacy policies and only go to sites that meet their specifications,

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141. *Id.*

142. *Id.* § 101-02.

143. *Id.* § 102.

144. *Id.* §§ 102, 105.

145. *Id.* §§ 107-08.

146. This is based on information posted on the Thomas federal legislative Web site, at <http://thomas.loc.gov>. (n.d.).

147. Brenda Sandburg, *Privacy Patrol*, THE RECORDER, June 27, 2000, at 1, 3.

so that users can determine what they feel comfortable with and choose which provider to use accordingly.<sup>148</sup> While most companies believe that technology alternatives are preferable to legislation, EPIC and other privacy advocates believe that the proposed plan does not go far enough.<sup>149</sup>

Litigation regarding the privacy policies of Internet companies is also an alternative to legislation, as is demonstrated by *In re DoubleClick Inc. Privacy Litigation*.<sup>150</sup> Some plaintiffs' attorneys believe that litigation is preferable because the rules are changing so fast in the industry.<sup>151</sup>

Action by state and federal agencies is also a possibility. In June, 1999, the Minnesota Attorney General brought an action against US Bank and US Bancorp alleging that the companies had illegally violated the privacy policy posted on their web sites.<sup>152</sup> The Minnesota Attorney General alleged that US Bank had sold confidential information about its customers to a telemarketing company that sold memberships in a dental and health service. Specifically, it was alleged that US Bank provided the telemarketing company with seventeen items of personal information, including social security numbers, account status and frequency of use, a behavior score, a bankruptcy score, gender and marital status.<sup>153</sup> Shortly after the complaint was filed, US Bank announced that it was terminating the contract with the telemarketing company and a

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148. *Id.*

149. EPIC and other privacy advocates had released a report critical of the plan proposed by W3C, and have maintained that privacy issues exist because of the lack of legislation. *Id.*

150. See generally *DoubleClick Inc.*, SEC 10-Q filing (Aug. 11, 2000), available at <http://biz.yahoo.com/e/000512/dclk.html>. In addition to the *DoubleClick* suit, in early August, 2000, a class action complaint was filed against Toys R Us for, among other things, invasion of privacy. *Benbow v. Coremetrics, Inc.*, No. A 00CA 469 SS (W.D. Tex. Aug. 2, 2000). The *Benbow* complaint alleges Toys R Us had promised as part of its online privacy policy that it would keep all personal information "completely confidential." The complaint alleges that Toys R Us violated its privacy policy by sharing the personal and private information to Coremetrics, Inc. See Complaint, *Benbow v. Coremetrics, Inc.*, No. A 00CA 469 SS (W.D. Tex. Aug. 2, 2000), ¶¶ 38, 39.

151. Sandberg, *supra* note 147, at 1.

152. For a more detailed discussion of the US Bank lawsuit, see Mark E. Budnitz, *Consumer Privacy in Electronic Commerce: As the Millenium Approached, Minnesota Attacked, Regulators Refrained, and Congress Compromised*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y. 821, 828-49 (2000). See also Dee DePass, *U.S. Bank Wrapping Up Privacy Suit*, MINNEAPOLIS STAR TRIB., Sept. 2, 2000, at 1D.

153. Budnitz, *supra* note 152, at 829.

settlement was reached with the Attorney General.<sup>154</sup>

In July, 2000, the FTC sued Toysmart.com to stop the bankrupt toy e-tailer from selling names and other personal information about its customers.<sup>155</sup> Although Toysmart.com had pledged never to share data collected by its online customers, it was allegedly planning to sell that information as part of a bankruptcy sale.<sup>156</sup> The FTC settled its charges against Toysmart.com in late July, 2000.<sup>157</sup>

## VI. COOKIES IN MINNESOTA: CAN THE CAUSE OF ACTION BE SUSTAINED?

In light of the new and still evolving tort of invasion of privacy in Minnesota, it is interesting to speculate as to whether litigation similar to the *DoubleClick* case could be sustained here. It is important to note at the outset of this analysis the egregiousness of the facts under which Minnesota chose to recognize individual privacy rights. While other cases presented themselves as earlier opportunities for the court to recognize a claim for invasion of privacy, the court did not do so until addressing the unauthorized publication of nude photographs to a large number of people.<sup>158</sup> Indeed, the court prefaced its holding by stating: “[o]ne’s naked body is a very private part of one’s person and generally known to others only by choice. This is a type of privacy interest worthy of protection.”<sup>159</sup>

As discussed above, however, certain aspects of the cookie technology, applied to the right factual scenario, might appear equally egregious to a court. First, anonymous information collected by cookies can be matched with personally identifying information, enabling Internet companies to put a name, address and phone number together with an enormous amount of private information ranging from finances, medical conditions, and sexual preferences. This type of conduct seems just as egregious as the disclosure of a nude photograph. Moreover, so-called secondary sites who advertise on web pages can obtain this personal and pri-

154. *Id.* at 831, 843.

155. Carolyn Said, *FTC Sues to Stop Toysmart.com from Selling Data*, SAN FRAN. CHRON., July 11, 2000, at C1.

156. *Id.*

157. FED. TRADE COMM’N, *FTC ANNOUNCES SETTLEMENT WITH BANKRUPT WEBSITE, TOYSMART.COM, REGARDING ALLEGED PRIVACY POLICY VIOLATIONS (2000)* (press release), at <http://www.ftc.gov/opa/2000/07/toysmart2.htm>.

158. *Lake*, 582 N.W.2d at 235 n.1.

159. *Id.* at 235.

vate information without a user even having an opportunity to "opt-out" or prevent the disclosure of the information. This seems particularly unfair. The ability of a company to know, for example, that John Smith accesses pornography sites every evening at 11:00, or that Jane Brown receives treatment for mental illness, and then to sell that information for financial gain, seems to cross the line. Does this conduct, however repugnant it may be, provide a basis for a privacy action in Minnesota?

### A. *Appropriation*

As stated above, a claim for appropriation will lie when a party uses the name or likeness of another for his own benefit. Appropriation is specifically intended to protect the value of a person's name or the notoriety associated therewith,<sup>160</sup> as where a person's name is used without consent to sell a product. A Minnesota court could conclude that the appropriation tort does not apply to the conduct of a company obtaining personal information through the use of computer technology if that personal information did not have some inherent value that the company sought to exploit.

On the other hand, because the name and personally identifying information obtained through the use of cookies and other similar technology is used for the financial benefit of the Internet company collecting the information, this situation is somewhat analogous to *Kovatovich*, where the mere use of the plaintiff's name on a marketing letter formed the basis of the claim when the alleged purpose of the use of the name was financial gain.<sup>161</sup> Even in *Kovatovich*, however, the plaintiff alleged that it was the inherent value and good will of her name—as she was well known and respected among the group who received the letters—that was misappropriated by the store.<sup>162</sup> That is not the case where a person's name is used for the purpose of targeting him to advertise specific products. It is therefore unclear whether a court would apply an appropriation cause of action to the use of personal information by an Internet company, although depending on the egregiousness of the facts, a Minnesota court might be inclined to allow an appropriation action to lie.

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160. *Kovatovich*, 85 F. Supp. 2d at 986 (quoting *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994)).

161. *Id.* at 987.

162. *Id.* at 985.



### B. *Publication Of Private Facts*

The use of cookies may also give rise to a claim for publication of private facts. Again, this cause of action occurs where someone: (1) makes public a matter concerning the private life of another; (2) the publicity would be highly offensive to a reasonable person; and (3) the matter is not of legitimate concern to the public.<sup>163</sup> According to the Restatement, a matter is private if it is not already a matter of public record, such as a person's date of birth or marital status, or if it is available for public inspection, such as income tax returns.<sup>164</sup> Additionally, this tort would not impose liability for "giving further publicity to what the plaintiff himself leaves open to the public eye."<sup>165</sup> Thus, a cause of action would not lie, for example, against a newspaper for publishing a photograph of a person in a public place.<sup>166</sup>

Certainly then, using the Restatement as a guide, the web sites a person visits and the information a person reads on the Internet in the privacy of his own home would be considered private, or not of legitimate concern to the public. In addition, the disclosure of this private matter, at least in some circumstances, could be highly offensive to a reasonable person. Although this showing might not be met if the plaintiff himself had disclosed the same information to others, if the information disclosed was otherwise readily observable by the public, or if it was completely innocuous, it could be met if "a reasonable person would feel justified feeling seriously aggrieved" by the disclosure.<sup>167</sup> For example, having your sexual preferences or serious medical condition disclosed for profit without your consent would easily seem to satisfy this requirement. The final issue then, as in *C.L.D. v. Wal-Mart*, becomes whether the disclosure by one company to other companies is sufficient to constitute publicity to the public at large.<sup>168</sup>

As noted above, the Minnesota Supreme Court has already opined in *Hendry* that communication to a small group of people in a hospital waiting room would not constitute publicity. Later, in *C.L.D.*, the Minnesota federal district court, speculating that Minnesota courts would adopt a narrow definition of publicity—

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163. *Lake*, 582 N.W.2d at 233.

164. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

165. *Id.* at 386.

166. *Id.*

167. *Id.* at 387.

168. *C.L.D.*, 79 F. Supp. 2d at 1084.

possibly even more narrow than the Restatement's definition—rejected communication to a group of employees as publicity and indicated that the disclosure must be made to the media “or in any other form accessible to the population at large.”<sup>169</sup> The disclosure of information obtained by cookies and other tracking devices to various Internet companies seems to fall somewhere between the disclosure to a small group of people, as in *Hendry* and *C.L.D.*, and the public-at-large. The Restatement suggests that publicity would be satisfied by a statement to a thousand people, or by a sign posted in a store window, but not by a statement made to a person's employer.<sup>170</sup> The key is that the communication must be made to so many persons that “the matter must be substantially certain to be become one of public knowledge.”<sup>171</sup>

Although the disclosure of private information among companies may not appear as “public” as disclosure through the media, the potentially unlimited sale of personal information to businesses, advertisers, collection agencies, marketers and financial institutions, is likely broad enough in scope as to satisfy this element. Indeed, in the *DoubleClick* litigation, the plaintiffs alleged that DoubleClick provided the information it gathered about users to more than 11,000 web site clients.<sup>172</sup> In light of the potential reach of this information, it seems likely that even under a narrow definition of publicity, the courts would be inclined to find that this type of disclosure states a cause of action for invasion of privacy.

### C. *Intrusion Upon Seclusion*

The other cause of action likely to apply to computer monitoring is intrusion upon seclusion, which is, again, an intentional intrusion upon the solitude or seclusion or another of his private affairs that is highly offensive to a reasonable person. Unlike the publication of private facts cause of action, this tort does not require any publication or publicity, but only an offensive invasion into one's private life. As for the intrusion itself, a court likely would find that the actor “believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the

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169. *Id.*

170. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a, illus. 1-3 (1977).

171. *C.L.D.*, 79 F. Supp. 2d at 1084.

172. Consol. Amended Class Action Complaint, *Healy v. Doubleclick Inc.*, Master File No. 00-CIV-0641 (NRB), ¶ 27 (S.D.N.Y. filed Feb. 1, 2000).

intrusive act”<sup>173</sup> when the tracking is done without the user’s consent or any opportunity for the user to protect the information.

As with a claim for publication of private facts, a person could not state a claim for intrusion upon seclusion with respect to matters of public record or matters voluntarily disclosed to the public by the plaintiff.<sup>174</sup> In contrast to the repossession cases discussed above, however, where the plaintiffs “voluntarily thrust their affairs into the public realm” by using the car for collateral on a loan, a person likely has a legitimate expectation of privacy in his or her viewing of materials over the Internet in the privacy of his home. Indeed, the Restatement cites as an example of this claim an “investigation or examination into [one’s] private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account.”<sup>175</sup> The secret tracking of a person’s activities on the Internet and the collection of this information seems just as invasive if not more so as the opening of a person’s mail or wallet. Although Internet companies would argue that a person waives her right to privacy by voluntarily accessing different web sites, absent an express release to that effect, the privacy expectation appears strong.

A plaintiff does have to show that the intrusion or interference in her private affairs is so substantial as to be highly offensive to the ordinary person, unlike the publicity action where a plaintiff does not have to show publication or use of the private information by another.<sup>176</sup> Although the federal district court dismissed one of the repossession cases, discussed *supra*, for failure to satisfy the highly offensive element, there, the plaintiffs had invited the repossession agent into their home; accordingly, they could not demonstrate that his presence was highly offensive.<sup>177</sup> Perhaps more instructive was the court of appeal’s dicta in *Copeland* that the conduct of the reporter in secretly filming the veterinarian’s visit to the plaintiff’s home would have stated an action for intrusion upon seclusion if the tort had been recognized in the state at that time.<sup>178</sup> Using

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173. *Fletcher*, 220 F.3d at 876 (quoting *O’Donnell v. United States*, 891 F.2d 1079, 1083 (3rd Cir. 1089)).

174. RESTATEMENT (SECOND) OF TORTS § 652B, cmt. c. (1977).

175. *Id.* at cmt. b.

176. *Id.* at cmt. a.

177. *Revering v. Norwest Bank Minn.*, No. 99-480, 1999 U.S. Dist. LEXIS 20726, at \*10 (D. Minn. Nov. 30, 1999).

178. *Copeland v. Hubbard Broad., Inc.*, 526 N.W.2d 402, 406 (Minn. Ct. App. 1995).

*Copeland* as a guide, the surreptitious placement of cookies on a person's computer and the gathering and monitoring of private and personal information would seem equally offensive to a reasonable person.

## VII. CONCLUSION

Although Minnesota courts were reluctant to recognize a cause of action for invasion of privacy, and analysis of the cases applying the various privacy actions suggest that the courts will apply that tort narrowly, it is likely (at least in the opinion of these authors) that facts similar to the *DoubleClick* case could give rise to a privacy action in Minnesota, most likely for intrusion upon seclusion and publication of private facts. As demonstrated by the public reaction to the sale of private information to telemarketing companies by US Bancorp and the immediate settlement of that case, that type of intrusion touches a nerve—and likely would receive protection from the courts. Accordingly, unless legislation is passed or internal controls are implemented among technology companies, Minnesota courts can expect to see litigation over the merging of cookie technology with private information on individual computer users.

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