

INTELLECTUAL PROPERTY'S LESSONS FOR INFORMATION PRIVACY

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ABSTRACT

There is an inherent tension between an individual's desire to safeguard her personal information and the expressive rights of businesses seeking to communicate that information to others. This tension has multiplied as consumers generate and businesses collect more and more personal data online, forcing efforts to strike an appropriate balance between privacy and commercial speech. No consensus on this balance has been reached. Some privacy scholars bemoan what they see as a slanted playing field in favor of those wishing to profit from the private details of other people's lives. Others contend that the right in free expression must always trump the diffuse, emotional concerns at the heart of privacy interests. What is missing from the debate is a detailed examination of the way another legal regime—intellectual property law—also seeks to resolve its own tension with the First Amendment. Rather than adopting a one-size fits all approach, intellectual property law has advanced a variety of approaches to reconciling property rights in intellectual creations with free speech rights. This Article describes those various approaches and maps them on to the different, yet similar terrain of information privacy regulation. This comparison reveals that courts and legislators have a number of potential tools to resolve the privacy/free speech divide.