

Beyond Privacy, Beyond Rights—Toward a “Systems” Theory of Information Governance

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For decades, we have refined concepts of information privacy, as well as intellectual property, that are largely based on individual rights. Such an approach is undeniably appealing. It does not necessitate a large enforcement bureaucracy, ostensibly enhances human freedom and self-determination, and ensures efficient information allocation through robust markets. As this article explains, a rights-based approach may even lead us to a convergent and coherent concept of information governance on either side of the Atlantic. Such a convergent conception would, however, not be able to extend to both the United States and Europe. For that it may behoove us to take a serious look at the bidirectional information rights structures emerging in Europe. The problem with such rights based approaches is that they have largely failed in practice. In contrast, information privacy protection works when it rests on a rich and deep network of information governance intermediaries. This article concludes by suggesting that studying the system of information privacy and copyright in particular, and of information governance in general, and examining what mechanisms of governance are employed by the various intermediaries may yield a richer, more accurate, and more effective strategy for information governance than the current rights-based approach.

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INTRODUCTION

Fifty years ago Dean William Prosser canvassed decades of judicial and legislative activity to outline a concise yet comprehensive articulation of “the right to privacy”¹ and its protection through torts.² Already some of Prosser’s so-called privacy torts were aimed at offering individuals what we today term “information privacy”—the ability to control and protect one’s personal information.³ Since then global information flows have exploded. Over 1.8 billion people are accessing the Internet.⁴ Google, the world’s most popular search engine, receives well over two billion search requests every day.⁵ And the social networking site Facebook handles more than 3.5 billion pieces of newly shared content each week.⁶

This explosion highlights the importance of and need for laws protecting information privacy. Indeed, information privacy is a recurring concern among the population in general, and Internet users in particular.⁷ But it is not just the

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

2. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

3. See Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2056, at 2058 (2004) (defining “information privacy” as “the result of legal restrictions and other conditions, such as personal norms, that govern the use, transfer, and processing of personal data”).

4. INTERNET WORLD STATS, <http://www.internetworldstats.com/stats.htm> (last visited July 18, 2010).

5. Press Release, comScore, Global Search Market Draws More than 100 Billion Searches per Month, (Aug. 31, 2009) available at http://www.comscore.com/Press_Events/Press_Releases/2009/8/Global_Search_Market_Draws_More_than_100_Billion_Searches_per_Month.

6. *Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited July 18, 2010).

7. See Annie I. Antón, Julia B. Earp & Jessica D. Young, *How Internet Users’ Privacy Concerns Have Evolved Since 2002*, N. C. ST. U. COMPUTER SCI. TECHNICAL REP. (July 29, 2009), http://theprivacyplace.org/blog/wp-content/uploads/2009/07/tr_2009_16.pdf (suggesting that privacy has remained a core concern of Internet users); John B. Horrigan, *Use of Cloud*

perceived need for increased privacy protection that has accompanied the explosion of global information flows. Intellectual property (IP) rights designed to protect the creators of information content equally have risen in importance—as have global tussles over their implementation and enforcement.⁸ This is unsurprising. As we are moving toward an information-centric world, how this “new economy” may affect information governance becomes an increasingly important question.⁹ Both information privacy and IP laws seek to answer those questions.

At first glance, the two bodies of law appear to have little in common. IP laws grant exclusive property rights over a piece of information, while information privacy laws protect individuals against unwanted access to their personal information. Nevertheless, the two areas of law share certain commonalities that potentially could permit the development of a uniform theory of information governance.

In Part I of this Article, I highlight how distinct concepts of information privacy and IP (particularly copyright) in the United States and continental Europe have led to different sets of commonalities, with unique advantages and weaknesses. In the United States, commonality does not yet exist, but theoretically could be built on the “propertization” of personal information, which would result in information privacy being governed through the same governance mechanism as copyright. In contrast, in continental Europe, the

Computing Applications and Services, PEW INTERNET & AM. LIFE PROJECT REP. (Sept. 12 2008), <http://www.pewinternet.org/Reports/2008/Use-of-Cloud-Computing-Applications-and-Services.aspx> (explaining that privacy concerns extend to new services on the Internet such as cloud computing); see also JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 53–69 (2008) (describing the privacy attitudes of “Digital Natives” and stating that societies must begin taking seriously the privacy concerns that young people face).

8. See generally JESSICA LITMAN, DIGITAL COPYRIGHT (2006) (analyzing the recent strengthening of copyright laws in the United States and predicting a clash between the strengthened laws and our expectations of freedom of expression in the digital age); see also RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY (1996) (arguing that capitalism and capitalists control culture through ownership of copyrights); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004) (arguing that the successes of the copyright holders has led to an accelerated strengthening of IP rights and their enforcement, to the detriment of cultural development); RENEE MARLIN-BENNETT, KNOWLEDGE POWER: INTELLECTUAL PROPERTY, INFORMATION, AND PRIVACY (2004) (examining the interconnected roles of intellectual property, information, and privacy from an international studies and political science perspective); KEITH E. MASKUS, INTELLECTUAL PROPERTY IN THE GLOBAL ECONOMY (2000) (offering a global view of the economic role of IP); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (2001). For a balanced overview of the development of copyright as a legal and political institution, see PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY, FROM GUTENBERG TO THE CELESTIAL JUKEBOX (1994).

9. Viktor Mayer-Schönberger, *Information Law amid Bigger, Better Markets*, in GOVERNANCE AMID BIGGER, BETTER MARKETS 266 (John D. Donahue & Joseph S. Nye, Jr., eds., 2001).

commonality exists in how information rights are structured—as personal rights with complementary “moral” and “economic” dimensions. While this approach may work in continental Europe, it would likely face difficulties becoming adopted in the United States. At best it could act as a novel conceptual foundation for understanding information privacy and intellectual property as related instances of information governance.

Part II critiques the propertization and continental European models of information governance. In particular, I focus on the fact that both are premised on individuals enforcing their information rights—which it turns out they rarely do. I then examine the effectiveness of the individual-enforcement approach in the context of information privacy protection in Europe. Given the rather limited success there, I suggest a very different alternative: a “systems”¹⁰ approach to information governance, which emphasizes not only a variety of governance mechanisms beyond individual rights, but also the central role of dedicated groups of information governance intermediaries. The European experience with such governance mechanisms demonstrates the potential effectiveness of the systems approach.

I conclude by suggesting that looking at information-governance systems might offer us novel opportunities toward a more coherent structure of information governance—a prospect that I hope will prompt additional research.

I.

DISCOVERING COMMON GROUND: OF MECHANISMS AND CONCEPTS

This Part begins by analyzing the differences as well as the commonalities of intellectual property (with a focus on copyright) and information privacy in the United States. It then lays out how the “propertization” of information privacy could lead toward a uniform theory of information governance. This “propertization” model contrasts with the situation in continental Europe, where such propertization is unlikely to occur. There, common ground exists in that all information rights are structured as personal rights with complementary “moral” and “economic” dimensions. I conclude with a preliminary assessment of the two different ways of finding common ground. While still saddled with structural deficiencies, a shared conceptual foundation of “information rights” like the one in continental Europe may offer advantages over convergence based on a specific governance mechanism, and thus might have potential (conceptual) appeal in the United States.

10. I use “systems” here to capture a view of the law going beyond individual rights; my use of “system” should not be confused with system theory put forward by Niklas Luhmann. *E.g.* NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* (1993); NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* (Fatima Kastner, et. al, eds., Klaus A. Ziegert, trans., 2008) (conceiving of law as a communicative system that can be understood by understanding its structure).

A. Differences and Commonalities in the United States

At first sight, intellectual property and information privacy laws have little in common. In general, the former are seen as granting exclusive rights over a piece of information, while the latter are seen as protecting individuals against unwanted access to their personal information.¹¹ A closer look at the aims of the two areas of law reveals further differences. Two core IP protections, copyrights and patent rights, aim to protect the creator or inventor.¹² From an economic viewpoint, such exclusivity is necessary for two complementary reasons. First, it offers authors and inventors an incentive to create; otherwise, societies would risk underproduction of information products.¹³ Second, exclusivity enables the creation of markets for, and thus the efficient transfer of, IP rights.¹⁴ Information privacy laws do not have similar utilitarian goals. Instead, information privacy rights aim at bolstering an individual's control of his or her personal information,¹⁵ autonomy,¹⁶ and participatory self-determination.¹⁷

IP and information privacy also differ in how the law recognizes them. The need for IP protection was already evident to the Framers of the Constitution: they explicitly empowered Congress to protect IP through federal statutes.¹⁸ Federal copyright, patent, and trademark laws have established a

11. On copyright, see, e.g., Mark A. Lemley, *Ex Ante versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 142 (2004) (differentiating between ex ante and ex post reasons for intellectual property, and suggesting that better arguments are needed for ex post justifications of intellectual property rights); on information privacy, see, e.g., Charles Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968) ("Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves.") (emphasis original).

12. Michael A. Carrier, *Cabining Intellectual Property through a Property Paradigm*, 54 DUKE L.J. 1, 33 (2004) ("patent and copyright laws grant inventors a right to exclude").

13. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 13 (2003).

14. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 210-11 (suggesting that clear property rights are necessary for markets).

15. Fried, *supra* note 11, at 482-83.

16. See Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1423 (2000).

17. Viktor Mayer-Schönberger, *Generational Development of Data Protection in Europe*, in *TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE* 219, 232-35 (Philip E. Agre & Marc Rotenberg eds., 1997); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1653 (1999) (linking information privacy to participatory democracy); Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 559-60 (1995) (suggesting a conception of privacy resting on participation principles); see also Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U. PA. L. REV. 707, 733-34 (1987) (describing the German view of a right to "informational self-determination," without which "[n]either freedom of speech nor freedom of association nor freedom of assembly can be fully exercised"); see generally Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1094 (2002) (identifying six general conceptions of privacy: "(1) the right to be let alone; (2) limited access to the self; (3) secrecy; (4) control of personal information; (5) personhood; and (6) intimacy").

18. One of Congress's enumerated powers is "[t]o promote the Progress of Science and

thicket of IP rights,¹⁹ which courts have been enforcing for many decades. In contrast to the relative homogeneity of intellectual property, privacy is notoriously ill defined. It is not explicitly mentioned in the U.S. Constitution, and it is unclear exactly what protections the constitution affords.²⁰ What is true for privacy in general is even more pertinent for information privacy. Unlike with IP, there is no comprehensive federal information privacy law offering a definitive regulatory scheme.²¹ Statutory protection of information privacy is dispersed across different legal sources and jurisdictions. On the federal level, the 1974 Privacy Act serves only to protect individuals against overreach of the federal government, while broader but sector-specific information privacy rights can be found in many other federal statutes.²² State law adds a further

useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8. See L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 192-96 (1968) (retracing the Constitutional debates).

19. See Copyright Law Revision Act, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-1332 (2006)); The Patent Act, 35 U.S.C. §§ 1-376 (2006); The Trademark Act of 1946 (codified at 15 U.S.C. §§ 1051-1141 (2006)).

20. At times, the Supreme Court found privacy to be protected through the penumbras of the Constitution (e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965)), or individual liberty guaranteed in the Due Process Clause of the Fourteenth Amendment (e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003)). It is unclear, therefore, what this constitutional guarantee entails. Is it a negative liberty to be free from intrusion, especially of the governmental kind? Or does it reflect a broader right to choose for oneself, especially how to interact with society? For a recent critical assessment, see Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715 (2010).

21. In the 1970s, in light of widespread concern over digital information processing, Congress debated information privacy statutes covering both the public and the private sector. The Federal Privacy Act of 1974 was directed at the information processing of federal government agencies. It also established a Privacy Protection Study Commission, which was "primarily concerned with the problems of the private sector," and which, before ceasing to exist, "produced thoughtful analyses and recommendations"; however, no general federal legislation directed at private sector information processing ensued. DAVID H. FLAHERTY, PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES 309 (1989).

22. The Privacy Act 1974, Pub. L. No. 93-579, 88 Stat. 1896, (codified at 5 U.S.C. § 552a (2006)); for sector specific federal privacy legislation, see the Fair Credit Reporting Act (FCRA) Pub. L. No. 90-321, 84 Stat. 1114 (1970) (codified at 15 U.S.C. § 1681 (2006)), the Family Educational Rights and Privacy Act (FERPA); Pub. L. No. 93-380, 88 Stat. 484 (1974) (codified at 20 USC § 1232g (2006)); the Right to Financial Privacy Act, Pub. L. No. 95-630, 92 Stat. 3641 (1978) (codified at 12 U.S.C. §§ 3401-3422 (2006)); the Privacy Protection Act, Pub. L. No. 96-440, 94 Stat. 1879 (1980) (codified at 42 U.S.C. § 2000aa (2006)); the Electronic Communications Privacy Act (ECPA), Pub. L. No. 99-508, 100 Stat. 1848 (1986); the Employee Polygraph Protection Act (EPPA), Pub. L. No. 100-618, 102 Stat. 646 (1988) (codified at 29 U.S.C. §§ 2001-2009 (2006)); the Video Privacy Protection Act (VPPA), Pub. L. No. 100-618, 102 Stat. 3195 (1988); the Computer Matching and Privacy Protection Act (CMPP), Pub. L. No. 100-503, 102 Stat. 2507 (1988); the Driver's Privacy Protection Act (DPPA), Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified at 18 U.S.C. §§ 2721-2725 (2006)); the DNA Identification Act, Pub. L. No. 103-322, 108 Stat. 2065 (1994) (codified at 42 U.S.C. §§ 14131-14134 (2006)); the Children's Online Privacy Protection Act (COPPA), Pub. L. No. 106-170, 112 Stat. 2681 (1998) (codified at 15 U.S.C. §§ 6501-6506 (2006)); the relevant parts of the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified at 15 U.S.C §§ 6801-6809, §§ 6821-6827 (2006)); the Video Voyeurism Prevention Act of 2004, Pub. L. No. 108-495, 118 Stat. 3999 (codified at 18 U.S.C. § 1801 (2006)).

layer of complexity to information privacy rights.²³ Courts, in part recognizing Prosser's privacy torts, have added yet another source of information privacy protection.²⁴ The result is a heterogeneous and complex mesh of information privacy rights.

IP and information privacy also differ in the primary legal mechanism employed to effect governance. Copyright gives authors a temporary monopoly in the form of an exclusive right over the use of their creations.²⁵ At least in the public rhetoric, the contours of this exclusive right resemble a conventional property right: authors can transfer the right to third parties, bequeath it, and enforce it through courts.²⁶ It is no misnomer that such rights are often referred to as intellectual *property*.²⁷ Information privacy rights, on the other hand, stop others from disclosing or otherwise misusing one's personal information without individual or legal authorization. The right is decidedly not seen as one of "property": it is generally conceptualized as "inalienable"—and thus not easily transferred—leading to a system of permission and consent.²⁸

In practice, information privacy's permission-and-consent structure has led to individuals having only limited control over how others use their personal information. In part, the reason for this lies in the complexity, cost, and limited usability of the governance mechanism information privacy utilizes—*especially* compared to the quasi-property rights of IP.²⁹ This has

23. This began with the right to privacy guaranteed by the New York Civil Rights Law §§ 50-51 (1903). Today, a number of states have enacted fair information practices statutes governing the processing of personal information by state authorities. See ALASKA STAT. § 44.99.300 (1993); CAL. CIV. CODE § 1798 (West 2009); CONN. GEN. STAT. ANN. § 4-190 (2010); HAW. REV. STAT. § 92F (2009); IND. CODE § 4-1-6 (1993); MASS. GEN. LAWS ch. 66A (1994); MINN STAT. § 13.01 (1995); N.H. REV. STAT. ANN. § 7-A:1 (1994); N.Y. PUB. OFF. LAW § 91 (McKinney 2008); OHIO STAT. tit. XIII, § 1347.01 (2010); UTAH CODE ANN. § 63-2-101 (1994); WIS. STAT. ANN § 19. III-IV (2010); see also PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW 130-51 (1996). Many of these and other states also have enacted sector-specific information privacy norms that extend to use of personal information by the private sector. See, e.g., CAL. FIN. CODE §§ 4050-4090 (extending financial privacy beyond the federal level mandated by Gramm-Leach-Bliley); CAL. CIV. CODE §§ 1798.81.5 (West 2009); the California Anti-Paparazzi Act, CAL. CIV. CODE § 1708.8 (West 2009). For sector-specific federal norms, see generally PAUL M. SCHWARTZ & DANIEL J. SOLOVE, INFORMATION PRIVACY: STATUTES AND REGULATIONS 2010-2011 (2010).

24. For court decisions based on Prosser's taxonomy, see, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (discussing appropriation); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (discussing the dissemination of false information); *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (discussing "intrusion upon seclusion"); *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1964) (discussing "public disclosure of private facts"). Courts have also gone beyond Prosser's categories in identifying privacy interests. See DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW (3d ed. 2009).

25. U.S. Copyright Act, 17 U.S.C. § 106 (2006).

26. *Id.* §§ 201(d), 501.

27. GOLDSTEIN, *supra* note 8, at 8-9.

28. See Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy (What Larry Doesn't Get)*, 2001 STAN. TECH. L. REV. 1, ¶ 29 (2001).

29. As such permission-consent combinations are more customized to individual contexts, they are not only more costly to negotiate, they also are more costly to enforce as those wanting to

prompted a number of legal scholars in recent years to propose a new governance mechanism for securing information privacy: a quasi-property right to personal information.³⁰ Such a right would give individuals a clear and understandable claim over their personal information.³¹ It would empower them to gain economically through the transfer of usage rights over their personal information, much like authors and creators benefit from licensing their copyright to third parties.³² Clear-cut property rights in personal information would also facilitate the creation and function of robust markets for personal information, limiting illicit trade as well as unauthorized free riding.³³ Enforcement would be streamlined through established procedures developed and fine-tuned for property rights in general, and for quasi-property rights like IP in particular.³⁴ Moreover, because we are so familiar with “property” as a metaphor, individuals and society would have an easier time grasping and exercising such propertized information privacy rights.

Kenneth Laudon was one of the first to suggest such a propertization of information privacy.³⁵ He advocated it as part of a larger proposal to establish an efficient nationwide market for personal information.³⁶ Lawrence Lessig put forward a similar idea, utilizing technical measures to ensure compliance, in his first edition of *Code*.³⁷

enforce cannot make use of a more standardized, and thus simpler, legal enforcement procedure. See VIKTOR MAYER-SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* 137–40 (2009) (examining the role of forgetting, and suggesting ways to reintroduce forgetting in the digital age). On the cost of a property mechanism, and the relative cost of a property mechanism for information privacy compared with intellectual property, see, e.g., Edward J. Janger, *Privacy Property, Information Costs, and the Anticommons*, 54 *HASTINGS L.J.* 899, 902 (2002).

30. Kenneth C. Laudon, *Markets and Privacy*, 39 *COMM. OF THE ACM* 92 (1996) (proposing the creation of a “National Information Market” based on a quasi-property right in personal information); see also LAWRENCE LESSIG, *CODE* 122–34 (1999) (advocating a combination of propertization of personal information and technical measures to ensure transactional efficiency and enforcement); James Rule & Lawrence Hunter, *Towards Property Rights in Personal Data*, in *VISIONS OF PRIVACY: POLICY CHOICES FOR THE DIGITAL AGE* 168, 170 (Colin J. Bennett & Rebecca Grant eds., 1999) (proposing the creation of “a property right over commercial exploitation of personal information”) (emphasis in original); Janger, *supra* note 29; Jerry Kang & Benedikt Buchner, *Privacy in Atlantis*, 18 *HARV. J.L. & TECH.* 230 (2004); Patricia Mell, *Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness*, 11 *BERKELEY TECH. L. J.* 1, 26–41 (1996); Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 *GEO. L.J.* 2381 (1996); Schwartz, *supra* note 3. On the movement towards propertization of personal information, see COLIN J. BENNETT & CHARLES D. RAAB, *THE GOVERNANCE OF PRIVACY: POLICY INSTRUMENTS IN GLOBAL PERSPECTIVE* 148–49 (2006).

31. This is what Judge Easterbrook recommended for information governance. Easterbrook, *supra* note 14.

32. See Laudon, *supra* note 30.

33. See *id.*; see also Schwartz, *supra* note 3.

34. See Laudon, *supra* note 30.

35. *Id.*

36. *Id.*

37. LESSIG, *supra* note 30, at 159–62.

Such proposals to “propertize” personal information have been criticized by a variety of scholars, highlighting potentially severe shortcomings.³⁸ Some have argued that a property right’s quality of remedying the underproduction of information is unlikely to be useful in the information privacy context.³⁹ The U.S. Constitution does not foresee a propertization of information beyond the utilitarian purpose of advancing science and the arts, leaving unclear whether Congress would have the power to propertize personal information in the first place.⁴⁰ Structurally, a property right is generally assumed to be fully alienable and transferable, while such transferability would be anathema to the notion of information privacy as furthering personal autonomy and control. Copyright is largely independent of the context of consumption, while information privacy is mostly about preventing the use of information in a particular context or for a particular purpose.⁴¹ In addition, propertization runs counter to the very foundation of information privacy: it aims at interdicting the publication of personal information, rather than (like copyright) protecting an individual’s interest in the publication process.⁴²

Addressing some of these concerns, information privacy scholar Paul Schwartz has offered a rational and nuanced assessment of the prospects for the propertization of personal information, and the conditions necessary to make it work: some form of inalienability, default norms of disclosure of the terms of trade, a right of exit, a framework for damages, and enforcement institutions.⁴³ What Professor Schwartz’ assessment demonstrates is that, under certain circumstances, propertization of personal information *could* work.

The aim of this Article is not to argue in favor or against propertization of personal information, but rather to speculate about the consequences for information governance should propertization occur. Both copyright and information privacy would then utilize essentially the same governance

38. For general critiques, see Pamela Samuelson, *Privacy as Intellectual Property?* 52 STAN. L. REV. 1125, 1136–46 (2000) (offering a multifaceted critique of the propertization proposals, and offering alternatives); see also Rochelle Cooper Dreyfuss, *Warren & Brandeis Redux: Finding (More) Privacy Protection in Intellectual Property Lore*, 1999 STAN. TECH. L. REV. 8, 12 (1999); Janger, *supra* note 29, at 914–16; Rotenberg, *supra* note 28; Paul M. Schwartz, *Beyond Lessig’s Code For Internet Privacy: Cyberspace Filters, Privacy Control and Fair Information Practices*, 2000 WIS. L. REV. 743 (criticizing Lessig’s propertization proposal as failing to take the structural failures of personal information markets into account, and suggesting “fair information practices” instead).

39. Kang & Buchner, *supra* note 30, at 1193 n.237; Samuelson, *supra* note 38, at 1139–40 (noting that, because the personal data most likely to become the subject matter of a property right already exist, property rights are not needed either to bring them into being or to achieve widespread distribution of them).

40. Samuelson, *supra* note 38, at 1140–41.

41. See Kang & Buchner, *supra* note 30, at 234 (“Privacy must not be viewed as a commodity. Instead, it must be viewed as a fundamental human right grounded in the dignity of the person.”). On de- and re-contextualization see Mayer-Schönberger, *supra* note 29, at 88–90.

42. Rotenberg, *supra* note 28, ¶ 93 (“copyright typically protects an interest once publication occurs, privacy protects a right to simply not publish”).

43. Schwartz, *supra* note 3.

mechanism: a quasi-property right in intellectual creations and personal information. Much like copyright claims, information privacy claims, too, would be framed in property terms, utilizing similar legal mechanisms, structures, and institutions for transacting, transferring, and enforcement. This would establish common ground between these different information governance systems—based not on goals, but on mechanisms of governance.

It is unclear whether the shared use of the metaphor, mechanisms, and institutions of (quasi) property may induce, facilitate, or enable a further convergence between copyright and information privacy through norm transplantation, emulation, or adaptation.⁴⁴ Perhaps over time such similarities would bring other, somewhat related rights—like the right to publicity⁴⁵—into the same fold.

Convergence originating from the information privacy end and based on “proPERTIZATION” represents the most probable strategy toward information rights convergence in the United States, as the inverse—a reconceptualization of copyright along the lines of information privacy—is neither advocated nor likely to be advocated soon given that information privacy itself does not enjoy comprehensive legal protection in the United States. Neither is the implementation of a completely novel concept likely, in no small part because the advantages of such radical changes remain unclear.

Whether such common ground between intellectual property and information privacy can be achieved rests on proPERTIZATION, and thus ultimately on the concept of property as the mechanism of choice to govern these types of information. ProPERTIZATION will fail where information privacy is based on theoretical foundations other than property.

This is the case in continental Europe. In contrast to the situation in the United States, information privacy in Europe is seen as a fundamental right and accordingly afforded continent wide⁴⁶ as well as national constitutional protection.⁴⁷ It is also implemented throughout the European Union through a

44. On such dynamics, see David Lazer & Viktor Mayer-Schönberger, *Governing Networks: Telecommunication Deregulation in Europe and the United States*, 27 *BROOK. J. INT'L L.* 819, 847–49 (2002); David Lazer, *Regulatory Interdependence and International Governance*, 8 *J. EUR. PUB. POL'Y* 474, 480–82 (2001).

45. See, e.g., *Haelan Labs, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953); Melville B. Nimmer, *The Right of Publicity*, 19 *LAW & CONTEMPORARY PROBS.* 203 (1954); Note, *The Right of Publicity: A Doctrinal Innovation*, 62 *YALE L. J.* 1123 (1953). Judge Posner has remarked that “[t]here is a good economic reason for assigning to the individual the property right in a photograph of him used for advertising purposes.” RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 255 (1981).

46. See Article 8, Charter of Fundamental Rights of the European Union, Dec. 7, 2000, OJ (C364) 1 (2000), which now has obtained full legal status pursuant to Article 6, Treaty of Lisbon, Dec. 17, 2000, OJ (C306) 1 (2000); see also Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Jan. 28, 1981, 20 *I.L.M.* 377 (1981).

47. For example, see: in Austria, Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl

European Union Directive that empowers individuals to determine when, for what purpose, and in what context their "personal data" is "processed."⁴⁸ Hence, European information privacy is not imagined as a negative liberty—a right to keep others away from one's personal information and to maintain an enforceable boundary between oneself and the world. Rather, it strives to accept and appreciate human beings as constantly engaged in sharing information with others. The envisioned individual is not a neo-luddite information recluse, but rather a confident human being empowered to choose and shape her informational destiny.⁴⁹ European information privacy rights, as expressions of individual dignity and an individual's freedom of action, are thus conceptually both personal and inalienable.⁵⁰ Propertizing these rights, as has been suggested in the U.S. context, would be contrary to the theory, history, and practice of European information privacy and would require a concerted effort of dramatic proportions: EU-wide legislation accompanied by constitutional change in many member states. The prospects of such change occurring are slim.

Importantly, propertization of personal information in Europe, even if it were to happen, would not lead to a convergent governance mechanism of information rights because of how copyright's equivalent in Europe—so-called authors' rights—are conceptualized. On the surface they are, much like in the United States, exclusive rights over creations afforded to authors for a limited period of time. Conceptually, however, authors' rights are not a utilitarian mechanism to incentivize intellectual production.⁵¹ Neither are they the product of an agrarian nineteenth-century nation intent on developing its economy through legal incentives to stimulate knowledge creation, importation, and

No. 165/1999 art. 1 (Datenschutzgesetz) (Austria); in the Czech Republic, Ústava ČR [Constitution] art. 10(3) (Charter of Fundamental Rights and Freedoms, amended in 1993) (Czech Rep.); in Estonia, Eesti Vabariigi Pohiseadus [Constitution] art. 42 (1992) (Est.); in Finland, Constitution of Finland § 10 (Fin.); in Greece, 2001 Syntagma [SYN] [Constitution] 9 (Greece); in Hungary, A Magyar Küztársaság Alkotmánya [Constitution] art. 59 (Hung.); in Lithuania, Lietuvos Respublikos Konstitucija [Constitution] art. 22 (1992) (Lith.); in the Netherlands, Grondwet voor het Koninkrijk der Nederlanden [GW] [Constitution] art. 10 (Neth.); in Poland, Konstytucja Rzeczypospolitej Polskiej 1997 [Constitution of the Republic of Poland] art. 51 (Pol.); in Portugal, Constituição [Constitution] art. 26 (Port.); in Slovakia, Ústava Slovenskej republiky [Constitution] art. 19(3) (Slovk.); and in Spain, Constitución [C.E.] [Constitution] art. 18 (Spain).

48. See Directive 1995/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 OJ (L281) 7; see also Mayer-Schönberger, *supra* note 17, at 223.

49. See Schwartz, *Privacy and Democracy*, *supra* note 17; Simitis, *supra* note 17; see also Mayer-Schönberger, *supra* note 17.

50. On the general difference between the U.S. concept of privacy steeped in liberty, and the European concept of privacy founded on human dignity, see James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1153 (2004).

51. JULIA ELLINS, COPYRIGHT LAW, URHEBERRECHT UND IHRE HARMONISIERUNG IN DER EUROPÄISCHEN GEMEINSCHAFT 76–77 (1996).

utilization.⁵² Instead, continental European theorists emphasize the invaluable contribution of authors to society. For example, when German philosopher Immanuel Kant argued against book piracy, his concern was one of individual control, not economic incentives.⁵³ He believed that authors retain an inalienable right to speak with their readership through their creative works.⁵⁴ While authors do not retain ownership over the books printed containing their words, they do retain the right to communicate their ideas and thoughts to their readers.⁵⁵ Authors' rights are thus rooted in highly personal rights, rather than easily transferable quasi-property claims as is the case with U.S. copyright.⁵⁶

Johann Gottlieb Fichte, one of the founders of the German idealist movement, expanded upon Kant's ideas.⁵⁷ Fichte differentiated between an idea, its intellectual instantiation and its material manifestation.⁵⁸ The latter—the book as a physical object—can be owned by anybody. The intellectual instantiation—for example, the concrete story—is under the intellectual control of the author. Finally, the idea itself becomes part of the intellectual commons of society (or at least the readership).⁵⁹ This complex view, founded on the individual and her importance, prepared the ground for legislative initiatives protecting what nineteenth-century jurist Johann Kaspar Bluntschli termed "authors' rights."⁶⁰

During the century since their birth, much as copyright in the United States, European authors' rights have transformed into powerful tools for the content industry to protect the economic dimension of creative works, rather than idealistic tools to guarantee the human dignity of countless authors. Content markets have seen a high concentration of ownership, much as in the United States.⁶¹

Moreover, a set of international treaties has ensured acceptance and enforcement of intellectual property across national borders, as well as driven

52. Mercantile objectives by the governing elites, however, did play a role in the enactment of intellectual property rights in continental Europe, though the theoretical foundations for authors' rights were vastly less utilitarian. VIKTOR MAYER-SCHÖNBERGER, *INFORMATION UND RECHT* 65 (2002). The story of the United States' attempt in the nineteenth-century to protect domestic creators but pirate foreign ones is retold in Thomas Hoeren, *Charles Dickens und das internationale Urheberrecht*, 3 GRURInt 195 (1993).

53. Immanuel Kant, *Von der Unrechtmäßigkeit des Büchernachdrucks*, reprinted in 106 UFITA 137 (1987); see also Heinrich Hubmann, *Immanuel Kants Urheberrechtstheorie*, 106 UFITA 151 (1987).

54. Hubmann, *supra* note 53.

55. *Id.*

56. Hubmann, *supra* note 53; see also ELLINS, *supra* note 51, at 78.

57. Johann Gottlieb Fichte, *Beweis der Unrechtmäßigkeit des Büchernachdrucks*, BERLINER MONATSSCHRIFT 433 (1793).

58. *Id.*

59. *Id.*

60. Manfred Rehbinder, *J. C. Bluntschlis Beitrag zur Theorie des Urheberrechts*, 123 UFITA, 29 (1993).

61. See BETTIG, *supra* note 8, 34–42.

legislative action toward convergence between the author's rights and copyright model.⁶² This, however, has not necessarily pushed the authors' rights notion closer towards the quasi-property model of copyright. For once, international and transatlantic harmonization over the last decades has led to the injection of important elements of authors' rights into the U.S. system of copyright rather than the other way around.⁶³ The abolition of registration requirements for protection,⁶⁴ the extension of copyright duration linked to the life of the author,⁶⁵ and the limited importation of so-called "moral" rights are but three cases in point.⁶⁶

In addition, on a fundamental level, the conceptual and structural distinctions between common law copyright and civil law authors' rights remain. Authors' rights are generally seen as consisting of two distinct, but intertwined,⁶⁷ dimensions: an economic dimension and a moral one.⁶⁸ The economic dimension is quite similar to the Anglo-American conception of copyright. It ensures the author the right to gain economically through the use and licensing of her creation—in part by making use rights transferable (mostly through licensing) and in part by offering authors effective tools to enforce their rights in a court of law. Mostly absent in copyright, however, is the second, "moral," dimension of authors' rights.⁶⁹ This dimension guarantees that a creation is identified as that of a particular author should she so choose, and that it cannot be altered substantially except with the author's consent.⁷⁰ Moral rights make sense if authors' rights in general are seen as personal rights in the Kantian spirit. In contrast, the existence of moral rights is difficult to square with the traditions of quasi-property copyright. In fact, utilitarian

62. See, e.g., Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 as last revised at Paris, July 24, 1971, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 [hereinafter "Berne Convention"]; WIPO Copyright Treaty, April 12, 1997, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65.

63. See, e.g., the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified as amended in scattered sections of 17 U.S.C.).

64. See, e.g., *id.* §§ 7-9.

65. See Copyright Law Revision Act, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-1332 (2006)).

66. Albeit only for the visual arts: See Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A (2006).

67. There is a long and largely fruitless debate in Europe whether the two dimensions are intertwined but separable, or inseparable. The former view is held by the so-called dualists, while the latter represents the opinion of monists. On dualism, see BALZ HÖSLY, *DAS URHEBERRECHTLICH SCHÜTZBARE RECHTSSUBJEKT* (1987); on monism, see EUGEN ULMER, *URHEBER- UND VERLAGSRECHT* 116 (1980).

68. On the moral dimension of authors' rights, see Otto von Gierke, *Privatrecht: Nachdruck*, 125 UFITA 103 (1994); on the two dimensions, see JOSEF KOHLER, *DAS AUTORRECHT* (1880); JOSEF KOHLER, *URHEBERRECHT AN SCHRIFTWERKEN UND VERLAGSRECHT* (1907).

69. See, e.g., Berne Convention Implementation Act, *supra* note 63, § 3b (limiting the Berne Convention's reach with regards to moral rights).

70. See Berne Convention, *supra* note 62, art. 3bis.

considerations of economically optimal balancing common in copyright have no role in a universe of highly personal authors' rights, in which rights are offered to authors to demonstrate society's gratefulness for past creations, not to reflect society's utilitarian encouragement to continue creating. Moreover, at their core, authors' rights are inalienable, while copyright is generally seen as fully transferable and alienable.⁷¹

The duration of copyright offers a further case in point. Copyright as enacted by Queen Anne initially offered fourteen years of protection from the time of creation and could thereafter be renewed for a second fourteen-year term.⁷² Duration of copyright was thus an arbitrary time span that commenced at the moment of creation, intended to strike an appropriate balance between the need to provide an economic incentive for authors to create, and the desire of society to benefit freely from such creations over time.⁷³ In addition, copyright required positive action. For most of the history of U.S. copyright, authors were required to register their creative works in order to receive protection.⁷⁴ And renewal of copyright protection required the author to become active yet again, lest the work fall into the public domain.⁷⁵

Such a setup is well aligned with a utilitarian view of a temporal exclusion right based on a quasi-property claim. It makes little sense, however, in the context of highly personal authors' rights. Why should authors who created a work at a young age lose protection over that work while old authors enjoy protection for all of their (remaining) life? Why should the duration of protection be tied to the arbitrary moment of its creation if the desire of society is to express its gratitude to the author for her creations? Why should authors have to register to receive protection, when authors' rights emanate from their individuality and personality? And why should authors need to renew their rights after a certain time? If one subscribes to an authors' rights approach, in which the creative individual is the core focus, protection must commence at

71. On the inalienability of authors' rights, see HANS FORKEL, *GEBUNDENE RECHTSÜBERTRAGUNGEN* (1977). On the question of alienability of property, see Schwartz, *supra* note 3, at 2090-94, and Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403 (2009).

72. Article I of The Statute of Anne states:

[T]he author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer.

Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies During the Times Therein Mentioned, 1710, 8 Ann. c. 19 (Eng.). The first copyright law in the United States, enacted in 1790, also set the term at fourteen years. LESSIG, *supra* note 8, at 133. For a history of the extensions of that term by Congress, see *id.* at 133-34.

73. See LESSIG, *supra* note 8, at 133-34 ("After the initial term of fourteen years, if it wasn't worth it to an author to renew his copyright, then it wasn't worth it to society to insist on the copyright, either.").

74. See *id.*

75. See *id.*

the moment of creation, last for the author's life (plus perhaps a certain amount of time), and need not be renewed to afford protection. Unsurprisingly, and in stark contrast to the original copyright law in the United States, this is exactly how the continental European authors' rights systems are set up.

In sum, if property were the wrong concept to capture the essence of both authors' rights and information privacy rights in continental Europe, propertizing information privacy rights, even if it were to happen, would fail to establish a commonality of governance mechanisms among disparate rights over information. Does this imply that no common ground can be found in the continental European context?

B. Differences and Commonalities in Continental Europe

As mentioned above, authors' rights are creations of a continental European mindset quite different from the Anglo-American notion of a more utilitarian copyright. They are characterized by a strong emphasis on personal rights.⁷⁶ This is evident in their protection of moral rights. It is also evident in the duration of authors' rights, their inalienability, and the lack of any registration requirements to assert authors' rights in the European context.⁷⁷

This personal rights dimension complements the largely economic dimension of permitting others—mostly through licensing—to use one's work for a fee. In fact, the personal dimension shapes the economic dimension. A case in point is the so-called *droit de suite*, literally the "right to follow" (often termed "resale royalty").⁷⁸ It guarantees authors of certain works that they will receive a (small) cut of the profits from each subsequent sale of the work.⁷⁹ Originally developed in France but now a legal norm throughout the European Union,⁸⁰ the *droit de suite* is a logical extension of the inalienable tie between the author and her work. If such a tie continues to remain even after the first sale of the work for moral rights (like attribution and integrity), there is no reason why it should not extend to some economic aspects as well. The concept of a personal and economic dimension has become the established and accepted conceptual framework at the European Union level. As a result, the United Kingdom had to accept the existence of moral rights as well as the *droit de*

76. Viktor Mayer-Schönberger, *In Search of the Story: Narratives of Intellectual Property*, 2005 VA. J. L. & TECH. 1, ¶ 15–19 (suggesting that copyright jurisprudence is advanced through distinct narratives).

77. *Id.* ¶ 17; on the lack of registration requirements, see Council Directive 93/98 art. 1, 1993 O.J. 290 (harmonizing the term of protection of copyright and certain related rights).

78. See Michael Rushton, *The Law and Economics of Artists' Inalienable Rights*, 25 J. CULTURAL ECON. 243, 249–50 (2001) (discussing *droit de suite*); notably, California recently passed a statute creating a *droit de suite*-like royalties framework, but within traditional copyright. See California Resale Royalties Act, CAL. CIV. CODE § 986 (West 2007); see generally ELLINS, *supra* note 51, 315–22.

79. *Id.*

80. Council Directive 2001/84, 2001 O.J. L 272 (resale right for the benefit of the author of an original work of art).

suite and at least in part jettison its more utilitarian copyright heritage.⁸¹

Information privacy rights in continental Europe are also based on a strong personal rights foundation. Individuals are given a set of rights to control what, when, where, and by whom their personal information is used.⁸² Hence, through negotiations and permission an individual defines the concrete context and purpose of how her personal information can be used.⁸³ Information privacy rights are also inalienable and cannot be simply transferred to others.⁸⁴ This offers a striking contrast to a (quasi) property right such as copyright.

Moreover, European information privacy rights extend the duration of protection to well before and well after the actual moment of an individual's consent to the use of personal information. It extends before consent in the sense that information privacy rights give individuals legal claims to be informed about the intended use of their personal information. Such transparency is seen as both an indispensable condition for consent, and as a way to shine a light onto processing practices and purposes. The protection extends beyond the moment of consent in the sense that consent is premised on a particular processor, context and purpose of usage. Generally, none of these elements can change without the need to go back to the individual and ask for permission. Such a legal constraint on changing context and purpose is both necessary to ensure that individual consent has bite, and a consequence of the inalienability of information privacy rights.

Taken together, these features point toward a strong personal rights bias among European information privacy rights. These rights do not, however, create an absolute barrier against personal information markets. On the contrary, such rights empower individuals to negotiate and permit third parties to process their personal information. Individuals do not face a simple binary decision of whether or not to permit others to use their personal information, but have the power and legal capacity to define the purpose and context of such use.⁸⁵ This enables individuals (at least in principle) to negotiate with information processors the concrete details of information use. Thus, the very concept of information privacy rights facilitates agreement between individuals and information processors in which individuals give their permission to process personal information in return for some economic good (ranging from direct payments to enhanced service offerings).

European information privacy rights, therefore, just like European authors' rights are rooted in the individual as person, and consist of two

81. For the implementation of the *droit de suite* in the UK see The Artist's Resale Right Regulations, 2006, S.I. 2006/346. For a critical assessment of the UK's adoption of moral rights see Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L. L. J. 353 (arguing that the UK and US implementation of limited moral rights have not facilitated moral rights).

82. See Mayer-Schönberger, *supra* note 17, at 229–32.

83. MAYER-SCHÖNBERGER, *supra* note 52, at 136–42.

84. *Id.* at 148–49.

85. See Schwartz, *supra* note 3, at 2077.

complementary dimensions: a strong "moral" element and a somewhat less developed "economic" one. This is an important commonality that information privacy rights share with authors' rights, and which may eventually lead toward a common understanding of these two rather distinct areas of information governance, much like quasi-property rights in the U.S. context.

Thus, we have identified the potential for common ground between two rather distinct information governance areas—copyright and information privacy rights—both in the United States and in Europe. The exact shape of this common ground, however, differs. In the United States it does not yet exist, but could be built on the governance mechanism of quasi-property rights. In Europe, the foundation of such common ground already exists in how information rights are structured—as personal rights with complementing "moral" and "economic" dimensions.

C. Conceptualizing Common Ground

Thus far, we have identified in the European context a shared, distinct mechanism of governance: a personal right over information, with a unique combination of moral and economic dimensions. To this we can add another wrinkle: a number of continental European nations have recognized individual's rights over additional categories of information. German law, for example, affords individuals a right over images in which they are depicted,⁸⁶ a right over the name they use,⁸⁷ and a right over their economic reputation⁸⁸ (a claim quite distinct from claims over one's honor).⁸⁹ Austria⁹⁰ and Switzerland⁹¹ have similar protections in place. As I have shown in an earlier work,⁹² these rights over information, like information privacy rights, are founded on personal rights with deeply intertwined but complementary moral and economic dimensions.⁹³ In the continental European context, the common ground mapped out here between authors' rights and information privacy rights may hence come to be extended to incorporate other information governance rights as well.

The fact that information governance areas beyond authors' rights and information privacy utilize this kind of governance mechanism may point

86. Kunsturheberrechtsgesetz [Visual Arts Copyright Act] 1907, § 22f (F.R.G.).

87. See, e.g., Bürgerliches Gesetzbuch [BGB] § 12 (F.R.G.).

88. See Bürgerliches Gesetzbuch [BGB] § 824 (F.R.G.); Grundgesetz [GG] [Basic Law] art. 1(1), 2(1) (F.R.G.).

89. See Bürgerliches Gesetzbuch [BGB] § 823(2) (F.R.G.); Grundgesetz [GG] [Basic Law] art. 1(1), 2(1) (F.R.G.).

90. See Urheberrechtsgesetz [UrhG] [Copyright Act] § 78 (Austria); Allgemeines Bürgerliches Gesetzbuch [ABGB] [Civil Code] §§ 43, 1330(1), 1330(2) (Austria).

91. See Schweizerisches Zivilgesetzbuch [ZGB], Code civil Suisse [Cc], Codice civile swizzero [Cc] [Civil Code] art. 29 (Switz.) (right to one's name); art. 28, 28g (right to one's honor).

92. MAYER-SCHÖNBERGER, *supra* note 52.

93. *Id.* at 89–100, 102–09, 161–65.

toward something more fundamental that information rights have in common: a conceptual, rather than operational, common ground. Such commonality is a tantalizing prospect. If, in fact, the conceptions of different information rights in Europe's legal culture are similar, a more fundamental (and thus broader and more solid) common ground may emerge, opening the door to a conceptual common view of information rights.

It is important here to highlight a cautionary note. A conceptual commonality of information rights would neither imply nor necessarily lead to a convergence of information rights into a single, universal information right, or even a converged information rights statute. Given the contextual differences of information types and use, such homogeneity would be not only impractical, but also normatively undesirable. In contrast, a common *conceptual lens* of information rights may offer a standard framework of how information ought to be governed utilizing individual rights, and what qualities such rights ought to include.

Information rights give individuals control over information. In this respect, they appear to be similar to (quasi) property rights, which, too, are mechanisms of control. Conceptually, there is a relation between a subject, who is in control, and a piece of information that the subject controls. Such subject-object relations are common legal concepts to characterize human control over objects that surround them. Property (and possession) is a quintessential (but not the only) subject-object relation. Implicit in such notions is a strong element of hierarchy and control: the subject controls the object. If I possess a chair, most likely I have control over it, creating a clear subject-object relation.

Such a one-way subject-object relation cannot fully capture the link between individuals and information.⁹⁴ Information reflects back on the subject who controls it. A picture I have painted reflects back on who I am as a painter and what I thought when I painted it. A text I wrote reveals something about me as an author, as do images of myself, my medical records, or personal information regarding my sexual preferences or religious beliefs. When the object is information, the object says something about the subject, reveals an aspect, whether trivial or important, of the subject's personality, and creates in essence an object-subject relation.⁹⁵

As information rights strive to offer individuals some modicum of control over their personal information, we combine a relationship of control and a relationship of revelation into one, establishing a fundamentally two-way subject-object bond. Through authors' rights, for example, an author (as subject) has some control over her creative work (the object). At the same time, the work reflects back on the author. This two-way relationship between subject and object exists every time the object is an intellectual creation or

94. MAYER-SCHÖNBERGER, *supra* note 52, at 55.

95. *Id.*

personal information.⁹⁶ This conceptual commonality is at the core of all individual rights governing information, from authors' rights to information privacy rights.

On the normative side, the bidirectionality of the relationship finds its expression in the two distinct dimensions of continental European information rights. The "moral" dimension acknowledges that information reflects back on the individual, and thus affords the individual additional protection. The "economic" dimension can be seen as the normative reflection of the subject's power to negotiate and permit the use of information in exchange for economic gains.⁹⁷

To be sure, even non-information objects often embody information, which may reflect back on the person controlling it. For example, the fact that I own a brown chair with a blue cover may say something about my color preferences and tastes, even though that chair is a physical object, not information. In contrast, some pieces of information, though personal, reveal relatively little information. Consider, for example, one's middle name: devoid of much context, such a trivial piece of information may be personal but it reveals very little about an individual. Hence not all subject-information relations have equally strong bidirectionality, and some relations between an individual and a non-information object can offer information about the individual. But as a general conceptual lens of analysis, the differentiation holds true between subject-information relations—which are always at least minutely two-way in nature—and more conventional subject-object relations.

Subject-information relations provide a conceptual foundation for the bidirectionality of authors' rights and information privacy rights in continental Europe. This foundation yields rights with distinct normative features. Such features include inalienability during and after the life of the subject: information transactions are based on permissions rather than rights transfers; and such inalienable rights to be passed on to heirs.⁹⁸ The conceptual framework also pertains to concrete mechanisms of enforcement: injunctive relief and damages for infringement.⁹⁹

Even in the U.S. context, with its more property-based approach to information rights, the conceptual lens of a bidirectional relationship between subject and information may offer valuable insights. Of course, whether it opens a viable normative strategy for rights-based information governance remains to be seen, even though its conceptual promise may be tempting.

This conceptual approach to information governance, however, may suffer from a much more fundamental weakness—and one that potentially saddles not just this but all information rights-based approaches.

96. *Id.*

97. *Id.*

98. *Id.* at 176–84.

99. *Id.* at 184–225.

II.

THE LIMITATION OF INFORMATION (PRIVACY) RIGHTS

In this Part, I first examine the pros and cons of a rights-based approach to information governance. I then consider the effectiveness of the approach in the context of information privacy protection in Europe. Given the rather limited success, I analyze whether alternatives based on individual enforcement fare better. In the absence of clear evidence that this is the case, I suggest a very different alternative: a systems approach, which highlights not only a pluralism of governance mechanisms beyond individual rights, but also the central role of dedicated groups of information governance intermediaries. I conclude by suggesting that looking at information governance systems might offer us fresh insights and novel opportunities for a more coherent structure of information governance—a prospect that I hope may prompt additional research.

A. Advantages and Weaknesses of a Rights-Based Approach

All approaches discussed thus far rest on the same concept of governance. They may differ in the concrete governance mechanism—property rights or personal rights—but they are all based on individual rights. This commonality has vast implications. On the one hand, this focus empowers individuals. It puts individuals at the core of our concept of information governance: they negotiate and choose how they want “their” information to be used by third parties. Such a strategy does not require governments to set up regulatory bodies or entrust agencies with supervision and enforcement. Instead, enforcement is decentralized and delegated, saving scarce resources. Nor does individual rights enforcement rely on a complex bureaucracy to collect and aggregate information on enforcement action. Rather, enforcement happens where it is most needed. Through appropriate economic incentives, individuals who sue successfully to enforce their rights over information can be reimbursed for the legal costs they incur, making those that violate information rights pay for their illegal incursions, rather than—in the case of regulatory enforcement—taxpayers. Government agencies may fail to manage enforcement actions efficiently given the multitude of cases and circumstances, while affected individuals likely will act more prudently and efficiently. Such a strategy also spares society from having to sustain an enforcement bureaucracy which itself collects and processes a huge amount of potentially sensitive information—and thus itself may give rise to information governance concerns. Moreover, perceptions of what constitutes an intrusive incursion into one’s information rights differ from individual to individual.¹⁰⁰ Thus only individuals themselves are able to decide, for example, what personal information is sensitive to them,

100. See, e.g., 45 Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 65, 1; see also SPIROS SIMITIS, “SENSITIVE DATEN:” ZUR GESCHICHTE UND WIRKUNG EINER FIKTION, in Festschrift für Pedrazzini 469–71 (1990).

and what information they are willing to share.¹⁰¹

In contrast, having a government agency ensure enforcement may require either complex information flows from individuals to this agency about alleged breaches, or—more likely—require the agency to assess independently the facts of an information privacy intrusion. This in turn may lead to more standardized, less subjective, but also less flexible (and thus potentially less effective) information privacy norms.¹⁰²

At the same time, however, information governance through individual rights also has its weaknesses. As enforcement rests on the uncoordinated and independent actions of millions of individuals, the effectiveness depends upon the appreciation these individuals have for information privacy, and their willingness to enforce it through legal action. This effectiveness also depends on the ability of the judicial system to interpret correctly the individual claims of infringement brought to it for adjudication. If either factor is absent—individuals not enforcing their rights or the judicial system not ensuring a coherent adjudication of such claims—the concept of a decentralized governance mechanism founded on individuals fighting for their rights will remain a “toothless paper tiger.”¹⁰³

In theory, legal incentives may facilitate enforcement by making it less costly and less onerous for individuals to pursue enforcement action. A clearly defined and easy-to-interpret individual right over information can go a long way in assisting the judicial system to develop—albeit over time and through an iterative process—a coherent and consistent understanding of the meaning of individual rights over information.

In the following, I examine the effectiveness of information rights enforcement for a particular sector, namely—with a nod to Dean Prosser—information privacy. To give individual rights the best possible chance of demonstrating effectiveness in the information privacy context, I focus not on the United States, where the lack of a comprehensive federal information privacy statute may limit the effectiveness of individual rights enforcement, but on Europe, with its long history of stringent information privacy rights laws covering both governmental and private sector information processing.

101. *Id.*

102. This reflects two more general debates about regulation and enforcement—one on regulatory competition versus regulatory coordination, and one on rulemaking through laws versus rulemaking through precedents. On the former see e.g., David Lazer, *Global and Domestic Governance: Modes of Interdependence in Regulatory Policymaking*, 12 EUR. L.J. 455 (2006) (suggesting a dynamic of three modes of regulatory interdependence: competitive, coordinative, and informational); on the later see, e.g., FREDERICK F. SCHAUER, *PLAYING BY THE RULES* (1993) (arguing for rules as versatile devices for allocating power among a variety of different institutions). On the implications of a property regime for the economics of information privacy, see, e.g., Janger, *supra* note 29.

103. Mayer-Schönberger, *supra* note 17, at 232.

B. The Effectiveness of Information Privacy Rights in Europe

In Europe, many elements are present that should support and facilitate individual information privacy rights as an effective governance mechanism. First, laws affording a comprehensive set of information privacy rights to individuals have been in place in many European nations for decades.¹⁰⁴ Second, the harmonization of information privacy at a high level in the European Union through the Directive in 1995 has led all twenty-seven EU member states to implement comprehensive information privacy rights.¹⁰⁵ Third, the European Court of Justice has repeatedly acknowledged the central importance of information privacy rights in its judgments, thus signaling an institutional context that is sympathetic to enforcement from the very top of the judicial system.¹⁰⁶ Fourth, information privacy has featured prominently in many national debates over the last decades, from the census debate in Germany to the ID card debate in the United Kingdom, suggesting that we should expect a heightened level of awareness of information privacy rights in the population.¹⁰⁷ Finally, more recent European information privacy norms, including the 1995 EU Directive, have lowered enforcement costs for individuals.¹⁰⁸

Although these reasons seem to point toward a vigilant population consistently enforcing their comprehensive information privacy rights, the empirical evidence does not support it. For example, the number of court cases involving individuals suing information processors for damages due to a violation of individuals' information privacy rights is very small. My research with state data protection commissioners in Germany in the early and late 1990s yielded not a single such case among over eighty million Germans. Similarly, I found not a single case in Austria—despite more than three decades of constitutionally guaranteed information privacy rights. European information privacy literature offers shockingly few cases of individuals enforcing their information privacy rights, let alone the recovery of damages, which is arguably the most stinging enforcement tool available to individuals. The academic literature as well as data protection advocates lament—the lack of

104. See BENNETT & RAAB, *supra* note 30, at 127 tbl.

105. See Spiros Simitis, *From the Market to the Polis: The EU Directive on the Protection of Personal Data*, 80 IOWA L. REV. 445, 448 (1995).

106. See, e.g., Case C-301/06, Ireland v European Parliament and Council of the European Union, 2009 E.C.R. I-593; Case C-275/06, Promusicae v. Telefónica, 2008 E.C.R. I-271; Case C-101/01, *In re* Bodil Lindqvist, 2003 E.C.R. I-12971.

107. On cases and controversies in the public debates in Europe, see COLIN J. BENNETT, *THE PRIVACY ADVOCATES: RESISTING THE SPREAD OF SURVEILLANCE* 133–67 (2008); on the UK ID card controversy, see in particular EDGAR A. WHITLEY & GUS HOSEIN, *GLOBAL CHALLENGES FOR IDENTITY POLICIES* (2010).

108. For example, Article 23 EU Data Protection Directive combines no-fault compensation elements with a shift in the burden of proof; for details, see ULRICH DAMMANN & SPIROS SIMITIS, *EG-DATENSCHUTZRICHTLINIE* 262–64 (1997).

enforcement action by individuals.¹⁰⁹

The abysmal record of individuals enforcing their information privacy rights is not a recent development. In Germany, for example, individual enforcement has been low ever since the Federal Data Protection Act was enacted in 1977. The Act has been repeatedly revised and strengthened, in no small part to specifically reduce the cost of enforcement for individuals.¹¹⁰ The introduction of no-fault compensation for losses incurred through illegal government processing of information, and the shift of the burden of proof for losses incurred through illegal private sector processing are just two cases in point.¹¹¹ Yet no significant increase in individual enforcement action resulting from any of these legal amendments has been reported in the literature.

Whatever the concrete reasons, individuals in Europe are not enforcing their information privacy rights through court action, despite strong rights, ample time, sufficient publicity, and lowered transaction costs. The result is a fundamental chasm between broad and deep information privacy rights on the books, and the disturbingly limited enforcement of these rights in practice and through courts. This must trouble those who advocate using individual rights as the preferable governance mechanism for personal information. More broadly, it may imply that a rights-based approach in general is not effective in guaranteeing information governance.

There are at least three objections to such a conclusion. First, one could argue that the case of information privacy rights in Europe is special and holds no general clues for information governance elsewhere or beyond the narrow confines of information privacy. Second, one could suggest that the problem of information governance is overblown, and that the lack of individual enforcement reflects a general notion in favor of free information flows. Third, one could argue that it is not the number of individual cases that makes a difference in influencing the behavior of information processors, but rather how well-reported they are. Europe has witnessed several highly reported information privacy cases, beginning perhaps with the German Census case in 1984 up to recent decisions on information privacy by the European Court of Justice.¹¹²

These three objections are plausible, but, at least in part, of questionable validity. First, there is little empirical evidence that the concept of information privacy in Europe is fundamentally different from that in the United States. European information privacy rights are in no small part influenced by and modeled after the OECD Data Protection Guidelines,¹¹³ which in turn were

109. BENNETT & RAAB, *supra* note 30.

110. Mayer-Schönberger, *supra* note 17, at 233.

111. See Bundesdatenschutzgesetz [BDSG] [Federal Data Protection Act] Dec. 20, 1990, §§ 7, 8; MAYER-SCHÖNBERGER, *supra* note 52, at 125.

112. See BENNETT, *supra* note 107, 133-67.

113. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD),

influenced not only by European information privacy theory, but also by the rather similar principles originating from U.S. studies in the 1970s.¹¹⁴ And although, as I have detailed above, important differences over the most appropriate mechanism of governance persist across the Atlantic, the general themes are similar and the differences unlikely the main cause of the ineffectiveness of information privacy rights in the European context.¹¹⁵

It is also unlikely that information privacy is not a serious problem. Surveys conducted both in the United States and in Europe during the last decade have shown no significant dip in the widespread concerns individuals harbor vis-à-vis the use of their personal information.¹¹⁶ If individuals perceive information privacy as a serious concern but fail to act, something else must be at play.

The third argument—that it is not the quantity of cases that matter, but whether they cause behavioral change—is generally correct. However, the argument lacks concrete evidence. In fact, individual enforcement action of information privacy has not been the driving force behind judicial action in Europe. For example, the census decision of the German Constitutional Court was not an act of individual enforcement of information privacy rights guaranteed in the German data protection statute, but rather a claim of unconstitutionality of the German Census law.¹¹⁷ Similarly, the high publicity fight for information privacy and against identity cards in Great Britain was not fought in the courts, and individuals enforcing information privacy through the judicial system played no role whatsoever.¹¹⁸

Recent cases on information privacy that came before the European Court

GUIDELINES ON THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA (1980), available at http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html.

114. See FLAHERTY, *supra* note 21, at 209.

115. The fact that individual enforcement activity is not much different in the United States, even when sector-specific statutes in the United States afford individuals information privacy rights, is further evidence for this view.

116. Sixty percent of U.S. adults using social networking tools online are concerned about their information privacy, as are the majority of teens. Amanda Lenhart, *Adults and Social Network Websites*, PEW INTERNET & AM. LIFE PROJECT REP., Jan. 14, 2009, available at <http://www.pewinternet.org/Reports/2009/Adults-and-Social-Network-Websites.aspx> (adults); Amanda Lenhart & Mary Madden, *Teens, Privacy and Online Social Networks*, PEW INTERNET & AM. LIFE PROJECT REP., Apr. 18, 2007, available at <http://www.pewinternet.org/Reports/2007/Teens-Privacy-and-Online-Social-Networks.aspx> (teens). The numbers are very similar in Europe, where a Eurobarometer survey found some 64 percent of the population concerned about information privacy online. See Press Release, Europa, Eurobarometer Survey Reveals that EU Citizens are Not Yet Fully Aware of Their Rights on Data Protection, (Apr. 17, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/592>.

117. Neither were the plaintiffs ordinary individuals. Among the four individuals selected by the court to present their case were a famous information privacy scholar (who had popularized the term “informational self-determination”, the very term the court then used in its decision), and a liberal politician. See 65 BVerfGE 1 (1984).

118. See WHITLEY & HOSEIN, *supra* note 107, at 76–95.

of Justice (ECJ) were not brought by concerned individuals enforcing their information privacy rights. One was brought to the ECJ by a Swedish court, which heard a case brought by a Swedish prosecutor against an information processor (the owner and operator of a nonprofit website) on the scope of the Directive.¹¹⁹ A Spanish court, which adjudicated a copyright conflict between a nonprofit organization representing copyright holders and Spain's telecom incumbent Telefonica, referred another case to the ECJ.¹²⁰ At stake was whether a Spanish law mandating that Telefonica disclose customer information to the rights holders' organization violated the EU information privacy directive.¹²¹ The Court found the Spanish copyright statute did not violate the EU Directive.¹²² The third case was based on an action brought by member states—Ireland and Slovakia—against the European Parliament and the European Council, alleging that they acted *ultra vires* in mandating that telecom operators retain personal traffic data.¹²³ In none of these cases did an individual attempt to enforce her information privacy rights in court.

In sum, European individuals have opted overwhelmingly not to enforce their broad and strong information privacy rights. While their exact motives remain unclear, neither European specificities, nor a lack of concern for information privacy, nor near-perfect compliance with information privacy rights by information processors are likely explanations. Perhaps hoping for individuals to enforce their rights through costly court action is too ambitious a vision, and thus the problem lies in the governance mechanism used to afford information privacy.

C. Beyond Rights, but Still Within Individual Action

It is conceivable that information privacy rights resting on complex constitutional notions and guarantees such as informational self-determination, human dignity, and freedom of action may simply be too abstract for individuals to employ effectively. Perhaps a quasi-property right, more common to the public, may fare better. After all, such property rights claims are likely familiar to everyone in Western societies based on private property. In fact, the enforcement of copyright—an existing quasi-property right—seems to offer a case in point. Just in recent years, we have seen copyright enforced successfully against tens of thousands of individuals accused of illegally sharing copyrighted content online.¹²⁴ Intriguingly, such enforcement action,

119. See Case C-101/01, *In re Bodil Lindqvist*, 2003 E.C.R. I-12971.

120. Case C-275/06, *Promusicae v. Telefónica*, 2008 E.C.R. I-27.

121. *Id.*

122. *Id.*

123. Case C-301/06, *Ireland v. European Parliament and Council of the European Union*, 2009 E.C.R. I-593.

124. Kim F. Natividad, Note, *Stepping It Up and Taking It to the Streets: Changing Civil & Criminal Copyright Enforcement Tactics*, 23 BERKELEY TECH. L.J. 469, 474 (2008); see also LESSIG, *supra* note 8, at 50–52 (describing an instance of RIAA enforcement).

however, was not conducted by countless individual authors, but rather agreed upon by important commercial entities in the highly concentrated content industry, and implemented through specialized intermediaries focused on and dedicated to enforcement action.¹²⁵ It certainly was not a decentralized grassroots-based enforcement movement by a sea of individual authors. And thus, copyright is not a successful test case for an individuals-based enforcement strategy.

Perhaps, then, the lack of enforcement is not caused by the complexity (or simplicity) of the individual right to be enforced, but by the costliness of the specific enforcement process. If that were the case, reducing the enforcement cost (including the risk of enforcement) could result in the needed increase in enforcement action. There are numerous strategies to lower enforcement costs for individuals. One could choose a less costly legal basis that would lead to less costly enforcement action: for example, employing a different legal vehicle (such as switching from rights to torts), increasing the economic incentive for success (e.g., the amount of statutory damages awarded), or adjusting procedural elements (e.g., by shifting the burden of proof or implementing no-fault compensation schemes).

It is conceivable that such action could lead to an increase in enforcement activity. There are two reasons, however, not to raise our hopes. First, and normatively, such enforcement costs are rarely eliminated. Reducing these costs for individual litigants regularly leads to redistribution of these costs to others, such as defendants or society at large, possibly leading to societal inefficiencies. Second, and arguably more damning, is the history of information privacy rights in Europe. As I explained above, over the last four decades European lawmakers have implemented a wide variety of measures *reducing* enforcement costs to induce European individuals to fight for their information privacy rights—but with no discernable success. If all these measures of inducement have failed so far, lowering them further may not provide us with the much-desired silver bullet.

Perhaps, therefore, the very idea of individual action, of individuals protecting their information privacy through enforcement actions in court is flawed. Moreover, perhaps Europeans have few incentives to enforce their information privacy rights individually, because information privacy is already effectively enforced through other mechanisms.

D. From Individual to Collective Action

Information privacy rights are at the heart of European information privacy statutes, but individual, decentralized legal enforcement action by concerned citizens is not the only governance mechanism of European privacy statutes. Audits and investigations of complaints by specialized agencies—

125. See LESSIG, *supra* note 8, at 50–52.

sometimes combined with public disclosure—direct regulatory enforcement, and the facilitation of a multi-tiered network of information privacy professionals are major alternative mechanisms affecting compliance.

1. Government Investigation and Public Disclosure

Many European information privacy statutes establish an independent data protection commissioner (or a data protection agency). This commissioner audits information processors, investigates complaints of potential violations of information privacy statutes, and renders reports, with the hope that a much-publicized “shaming” of information processors for their behavior will push them toward compliance and also send a powerful signal to other information processors to stay within the legal limits of the information privacy statutes.¹²⁶ Data protection commissioners also comment publicly on planned legislation, thereby influencing the legislative trajectory in favor of information privacy before enactment—much earlier than individual enforcement action could take place.¹²⁷

The German federal data protection commissioner is an example of such a setup. Although lacking direct regulatory power, the commissioner has had repeated success influencing and changing the behavior of information processors by making illegal processing behavior public.¹²⁸ Thus the commissioner performs two complementary roles. First, by reporting to the public, the commissioner engages in public shaming of illegal or questionable practices. Second, the commissioner in effect passes judgment on the information processor’s behavior, easing possible later judicial enforcement actions brought by affected individuals. At the same time, such actions lack the directness of court enforcement, and their effectiveness depends in no small part on the acumen of the data protection commissioner herself—to what extent she is able to get the media to report and the public opinion to focus on a particular information privacy breach. German citizens at least seem to think the Commissioner is effective: In 2006, the commissioner received an impressive 5,516 individual complaints to investigate further.¹²⁹

126. See, e.g., ELECTRONIC PRIVACY INFORMATION CENTER, *PRIVACY & HUMAN RIGHTS: AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND DEVELOPMENTS 2006* 383 (2006) (on the Czech Commission) [hereinafter EPIC]; *id.* at 377 (on the Cypriot Commission); *id.* at 397 (on the Danish DPA); *id.* at 701 (on the Dutch CBP); *id.* at 423 (on the Estonian DPI); *id.* at 445 (on the Finnish Data Protection Ombudsman); *id.* at 457–58 (on the French CNIL); *id.* at 523 (on the Hungarian DPA). For a discussion of the auditing function, see BENNETT & RAAB, *supra* note 30, at 135–38.

127. BENNETT & RAAB, *supra* note 30, 140–41.

128. See EPIC, *supra* note 126, at 482.

129. *Id.* at 482.

2. Direct Regulatory Enforcement

In 1973, Sweden became the first nation in the world to pass a comprehensive information privacy law.¹³⁰ For enforcement, it relies on a data protection commission set up by the government to investigate independently and enforce information privacy infringements.¹³¹ Since its inception, the commission has developed a comprehensive history of regulatory enforcement action, providing information processors and the general public a detailed sense of permissible and prohibited information processing behavior. Moreover, because the commission has a relatively wide and flexible mandate, it can react quickly to new and emergent information privacy threats without the need for legislative amendments. Austria, Denmark, France, Ireland, Italy, and Portugal are among the European nations that have followed the Swedish model of instituting direct regulatory enforcement.¹³²

In stark contrast to individuals enforcing their information privacy rights through courts, these regulatory agencies have been quite active in investigating citizen complaints and, if necessary, employing regulatory enforcement measures, such as fines. For example, the French Commission Nationale de l'informatique et des libertés took on 5,372 complaints (2006), the Hungarian data protection commissioner investigated 2,350 cases (2005), and the Irish Data Protection Commissioner followed up on 658 complaints (2006).¹³³

3. Network of Information Privacy Professionals

The European information privacy directive envisions a multi-tiered, thick network of information privacy commissioners throughout Europe to ensure information privacy. Such activity can take the form of public reporting (as in the German case), or regulatory action (as in the Swedish setup), but it yields more than simple enforcement. It establishes a formal institution entrusted with protecting information privacy, and thus dedicates continuous resources to the protection and advocacy on behalf of information privacy.¹³⁴

Moreover, commissioners keep close contact with each other in a pan-European network through which they discuss new threats and coordinate their responses. In essence, this structure creates an institutional lobbying network on behalf of information privacy, with clearly defined institutional skin in the

130. BENNETT & RAAB, *supra* note 30, at 127.

131. EPIC, *supra* note 126, at 913.

132. See EPIC, *supra* note 126, 250–53 (on Austria); *id.* at 397 (on Denmark); *id.* at 457–58 (on France); *id.* at 559 (on Ireland); *id.* at 581–83 (on Italy); *id.* at 788–89 (on Portugal); see also BENNETT & RAAB, *supra* note 30, at 143.

133. EPIC, *supra* note 126, at 458 (on the French situation); *id.* at 523 (on Hungary); *id.* at 560 (on the Irish DPC).

134. The size of the permanent staff can be quite significant. For instance, the Belgium data protection agency has 34 full-time staff. EPIC, *supra* note 126, at 263.

game.¹³⁵ European-level working groups of these commissioners and a European information privacy commissioner further stabilize and structure this network, lending it formal credibility and actual power.¹³⁶

In some nations, such as Germany, private and public sector organizations are required to nominate an internal data protection representative, who is afforded a modicum of organizational independence and entrusted with ensuring compliance.¹³⁷ In every large organization, this creates an additional group of individuals who protect and lobby for information privacy, who form networks among themselves, and who liaise with the data protection commissioners to advance their agenda.

The many nongovernmental organizations in Europe that promote information privacy nationally, or even continent-wide, further augment this network of information privacy professionals. They have much to gain from working with each other: while their specific roles may differ, they all share the common goal of protecting information privacy.

Taken together, these three governance mechanisms—government investigation and public disclosure, regulatory enforcement, and networks of privacy professionals—contribute significantly to ensuring information privacy protection. Because the actors employing them are networked and coordinated, they are likely more effective. They rest on highly specialized information privacy experts, and are effectuated by organizations designed to ensure information privacy with dedicated resources, and whose power—and at times, existence—is derived from the effectiveness in protecting information privacy. By contrast, information privacy rights are based on decentralized enforcement by uncoordinated individuals. This enforcement is dependent on the limited expertise of judges in general purpose courts.

Political scientists studying the watershed moments in information privacy protection in Europe have suggested a rising caste of information privacy intermediaries.¹³⁸ It was these intermediaries who mobilized the German public in the census debate of the 1980s, who broadened and deepened national information privacy legislation, and who resurfaced as successful political entrepreneurs on the European level drafting and then ensuring passage of the comprehensive EU directive.¹³⁹ They were instrumental in the successful

135. On transnational networks in general, see ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

136. See, e.g., the Article 29 Data Protection Working Party, established through Council Directive 95/46, art. 29–30, 1995 O.J. (L 281) 31 (EC); the European Data Protection Supervisor, established through European Parliament and Council Regulation (EC) No.45/2001 of 18 Dec. 2000, 2001 O.J. (L 8) 1.

137. Bundesdatenschutzgesetz [BDSG] [Federal Data Protection Act] Dec. 20, 1990, §§ 4f, 4g.

138. See, e.g., BENNETT, *supra* note 107, at 133–67.

139. See *id.*

opposition to the British identity card proposal.¹⁴⁰ They also achieved temporary stoppage—and later judicial victory—regarding the airline passenger data sharing agreement with the United States.¹⁴¹ And they, so far unsuccessfully, aimed at derailing Europe's broad telecommunications data retention directive.¹⁴² In sum, European information privacy works because of alternative compliance mechanisms effectuated through a network of professional information privacy intermediaries.

E. Information Governance Intermediaries Beyond Information Privacy

Such intermediaries are not confined to information privacy. They are also highly visible in protecting intellectual property on both sides of the Atlantic. As I have mentioned, rarely are copyrights or authors' rights enforced by the original creator. In the vast majority of cases commercial rights holders, powerful players in a highly concentrated market are responsible for enforcement, regularly utilizing a further layer of governance intermediaries to act on their behalf. Take, for example, the recent wave of enforcement activity against peer-to-peer file sharers.¹⁴³ Huge media companies that owned a large number of copyrighted works (as in the United States) or held exclusive licenses for these works (as in Europe) were the driving force of such action, not individual authors.¹⁴⁴ And regularly on both sides of the Atlantic, these companies utilized specific copyright intermediaries to enforce their claims in court.¹⁴⁵ This enabled consolidation, specialization, and the benefits of scale economies. In part, some European nations mandated this by law (which the content companies had long lobbied to get enacted).¹⁴⁶ In addition, it allowed

140. See WHITLEY & IAN HOSEIN *supra* note 107 (detailing how a group of Information Privacy experts at the London School of Economics lead the opposition against the national ID card project, together with NGO Privacy International).

141. Case C-317/04, European Parliament v. Council of the European Union, 2006 ECRI-4721; on the airline passenger data sharing controversy see the extensive documentation at ELECTRONIC PRIVACY INFORMATION CENTER, EU-US AIRLINE PASSENGER DATA DISCLOSURE, http://epic.org/privacy/int/passenger_data.html (last visited Jul. 22, 2010).

142. The challenge before the European Court of Justice against the directive was initiated by Irish privacy NGO Digital Rights Ireland; see Press Release, Digital Rights Ireland, DRI Challenge to Data Retention (July 29, 2006), available at <http://www.digitalrights.ie/2006/07/29/dri-challenge-to-data-retention/>; see also Case C-301/06, Ireland v European Parliament and Council of the European Union, 2009 E.C.R. I-593.

143. See Lessig, *supra* note 8, at 50–52; Natividad, *supra* note 124, at 473.

144. See LESSIG, *supra* note 8, at 50–52; Natividad, *supra* note 124, at 473.

145. See Lessig, *supra* note 8, at 50–52; Natividad, *supra* note 124, at 473. These include the Recording Industry Association of America (RIAA), the Motion Picture Association of America (MPAA), the Business Software Alliance (BSA); but it may also include copyright collection agencies and copyright collection societies, such as (in the United States) ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music Incorporated) and CCC (Copyright Clearance Center).

146. For example, in Germany actions were brought by the Urheberrechtswahrnehmungsgesetz [UrhWG] [Copyright Administration Act], Sept. 9, 1965, BGBl. I S. 1294, as amended Oct. 21, 2007, BGBl. I S. 2513, 2517.

the media companies—which were potentially vulnerable in the court of public opinion—the option to take cover behind independent enforcement actors, thereby deepening and re-enforcing the role of these actors as highly important information governance intermediaries.

These intermediaries lobby legislators and regulators to broaden rights as well as facilitate enforcement.¹⁴⁷ In doing so, intermediaries act both as agents for their principals and on their own, as every strengthening of the relevant intellectual property statutes will bolster the intermediaries' role and enhance their power.¹⁴⁸ They exist as private companies and nonprofits, national regulatory agencies set up to ensure intellectual property protection,¹⁴⁹ national and international courts specializing in IP litigation,¹⁵⁰ and international organizations set up to promote compliance and ensure enforcement globally.¹⁵¹

To summarize, information privacy governance happens largely beyond individual enforcement of information privacy *rights*, and is taking place through governance mechanisms that information privacy intermediaries utilize. This yields a *system* of information privacy protection that is much larger, more complex and varied, and likely more effective, than individual information privacy rights. This is not peculiar to information privacy. We can find a similar *system beyond rights* in the area of copyright (in the United States) and authors' rights (in the European Union), in which a range of special intermediaries play a central role.

If that is the case, then in thinking about information governance writ large, it may be less useful to focus on a specific information governance mechanism, such as property or torts, or even *rights* in general, as this may lead us to rely on a decentralized, uncoordinated mechanism founded on individual action, ill-suited for the challenge at hand. Instead, taking a cue from the practice of information privacy as well as intellectual property, we may see information governance *systems* emerge. Studying the similarities they share with each other (as well as where and why they differ) may eventually lead to the discovery of a common DNA of information governance systems, and thus offer a more suitable strategy for coherent information governance than a

147. LITMAN, *supra* note 8, at 124.

148. This may also lead to principal-agent problems. See generally Kathleen Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. OF MGMT. REV. 57-74 (1989).

149. For example, the United States has the United States Patent and Trademark Office (PTO) and the Copyright Royalty Board.

150. For example, the United States had the United States Court of Customs and Patent Appeals (CCPA) until 1982, and from thereon the United States Court of Appeals for the Federal Circuit; the United Kingdom has the Patents Court, and Germany the Bundespatentgericht.

151. The most important such international organization is the World Intellectual Property Organization (WIPO) in Paris. Content owners as well as collection agencies, too, have formed international organizations, such as the International Federation of the Phonogram Industry (IFPI), the Association of International Collective Management of Audiovisual Works (AGICOA), and the International Confederation of Societies of Authors and Composers.

narrow focus on a particular governance mechanism.

Examining the determinants and features of systems of information governance may bring us fresh insights, a suitable strategy for the future, and additional advantages. To start, it may help us overcome the deficiencies and limitations of the current rights-based approach. Second, it may afford lawmakers a broader and more versatile framework to consider and conceptualize governance of different types of information. Third, it may also help us understand what core features information governance setups ought to have in common. Over time, this may also lead to more structural coherence and avoid unnecessary contradictions.

Much more research is needed to show whether a systems approach is useful. But given the inherent difficulties of the current rights-based regimes, as well as the obvious inconsistencies across different information types, a fresh approach that is grounded in an understanding of existing governance mechanisms may be just what is needed.

CONCLUSION

Fifty years ago, in a seminal article, Dean Prosser advanced our thinking of privacy. He took the Warren and Brandeis concept, augmented by numerous differing court decisions, and offered coherence where there was chaos, clear categories where there had been overly complex shades of grey.

This Article argues that today we may approach a similar pivot point with respect to information privacy. For decades, we have refined concepts of information privacy, as well as intellectual property, that are largely based on individual rights. Such an approach is undeniably appealing. It does not necessitate a large enforcement bureaucracy, ostensibly enhances human freedom and self-determination, and ensures efficient information allocation through robust markets.

Moreover, as I have detailed in Part I of this Article, a rights-based approach may even lead us to a convergent and coherent concept of information governance on either side of the Atlantic. A convergent concept covering both the United States *and* Europe, however, it is not. Should we desire to advance one concept of coherent information governance resting on individual rights, it may behoove us to take a serious look at the concept of bidirectional information rights structures emerging in Europe.

Part II of this Article examined the pros and cons of such rights-based approaches. At least in the context of well-established European information privacy, the rights based approach has failed in practice—and failed badly. That information privacy in Europe has nevertheless survived points us toward the existence of alternative governance structures, resting on a *system* of information governance rather than just individual rights. It shifts the agency away from individuals who are clueless about the complex information privacy decisions that must be made to exercise and enforce their rights, and instead

moves us toward a rich and deep network of information governance intermediaries who are aiming at ensuring information privacy in a larger organizational or even societal context.

Part II concluded by suggesting that studying the system of information privacy and copyright in particular, and of information governance in general, and examining what mechanisms of governance the various intermediaries employ may yield a richer, more accurate, and more effective strategy for information governance than the current rights-based approach.

This Article can do no more than point in the direction of further research and study, in the hope that others may take on this challenge at an auspicious moment. If the time was ripe fifty years ago for Dean Prosser to re-conceptualize privacy, perhaps it is time now to do so for information privacy.

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