I AM MINE…OR AM I? ANALYZING THE NEED FOR A PROPERTY RIGHT IN PERSONAL INFORMATION

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I. Introduction

- *"We do not own or operate the applications that you use through Facebook Platform (such as games and utilities)… That means that when you use those applications and websites you are making your Facebook information available to someone other than Facebook"*[1] is what you read when you visit Facebook's privacy policy page. While it makes you think that Facebook has no control over third party applications, you read another line, reached through an obscure link in the page- *"When you use an application, your content and information is shared with the application."*, [2] and all your notions of Facebook's straightforward privacy policy disappear in an instant.

- Nancy Graf was shocked to know that while she harvested corn for gold coins on the popular social network based game "Farmville", her private information, made available by her on the application, was being sold to third party advertisers and data companies without her consent.[3]

- Dustin Freeman too was unaware of the fact that the information he had wilfully given while targeting a group of angry green pigs in Angry Birds, making notes through Evernote and catching up with the news on Flipboard on his iPhone was now being used freely by third parties for commercial gain[4].

These are just some of the examples of how personal information through what was generally considered to be simple, non-harmful means of entertainment, has stopped being "personal" and slowly and secretly taken

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1 Facebook's Privacy Policy, http://www.facebook.com/policy.php.

2 *Id.*

3 Graf v Zynga Game Network, Inc, No 3:2010-CV-04680.

4 Freeman v Apple Inc, No 5:2010-CV-05881.

on the role of "public information". As more and more users sign up to use apps on their smart phones, tablets and computers, or have started playing fantasy sports leagues, lucky draws, online games, the issue of who information belongs to and what best can be done to maintain the sanctity and importance of keeping private information "private" has become a raging topic among academics, policy makers and law makers.

Data mining has been defined as the "*non-trivial process of identifying valid, novel, potentially useful and ultimately understandable patterns in data*."[5] It is done by first collecting 'data' from a number of databases, from which business related information gets organized in a 'data warehouse'. [6] Unreliable information is discarded from the data warehouse by employing 'data cleaning' techniques and only 'neutral' information is retained. Once this is done, the actual process of discovering the patterns, i.e., data mining commences, which may involve classification of such data into pre-existing categories; clustering data into new categories created during the analysis of the collected data; summarizing the data; describing dependencies between variables; finding links between data fields; predicting future values of data or modelling sequential patterns in the data to observe revealing trends.[7]

The United States General Services Administration [8] defines personally identifiable information [hereinafter PII] as "*information that can be used to distinguish or trace an individual's identity, either alone or when combined with other personal or identifying information that is linked or linkable to a specific individual.*" Over the past two decades, data mining techniques have found frequent use in a variety of areas ranging from detection of fraud to the promotion of customer service.[9] However, such use has sparked concerns regarding the protection of PII that can be mined by almost any party that may have access to knowledge discovery technologies. The long-standing argument that information put up by an individual in public domain also becomes untenable when it comes to the employment of data mining techniques.

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5 Tal Z. Zarsky, *"Mine your own business!": Making the case for the implications of the data mining of personal information in the forum of public opinion*, 5 Yale J.L. & Tech. 1, 6 2002-2003.

6 *Ibid,* 8.

7 Joseph S. Fulda, *Data mining and privacy*, 11 Alb. L.J. Sci. & Tech. 105, 107 2000-2001

8 Appendix to OMB M-10-23 (Guidance for Agency Use of Third-Party Website and Applications); available at http://www.gsa.gov/portal/content/104256 (last visited on August 30th, 2012).

9 *Ibid.*

Frequently, it is not the data itself but the association of a person with the data that may be private; and consequently, its disclosure problematic.[10] For instance, some may consider it improper for a guest to go through a stack of magazines lying in their living room without their consent, possibly because of the content of such magazines; while others may object to third parties going through a stack of mail to check return addresses without permission even if the letters are not opened in the process.[11] While the above are instances of information which may be accessible to public, it is possible that people may be uncomfortable with being associated with the same and might find it unfair that such association is being disclosed to third parties.

This sentiment was noted by Justice Stewart of the United States Supreme Court in *Katz v United States*[12] when he declared that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected". However, till date, a lot of American privacy litigants have had to face the fact that arguments along the above lines are based on a moral standard as opposed to a legal standard and are hence untenable before the courts.

The Indian jurisprudence on informational privacy is far younger and less developed. But given that privacy concerns have been plaguing citizens across the world, it becomes increasingly important to address the same so as to give individuals control over their personal information and the opportunity to give an informed consent for the use of the same. Through this paper, the authors wish to examine the tenability of statutorily protected property rights in personal information in India.

For this purpose, the paper shall be divided into two parts. The first part of the article would examine the theoretical justifications for the property rights in personal information. This has been addressed most famously in Lawrence Lessig's *Code and Other Laws of Cyberspace.* He states that such a property right in one's persona would benefit "both those who

10 *Id,* 108.
11 *Id,* 111.
12 389 U.S. 347 (1967)

value their privacy more than others and those who value it less, by requiring that someone who wants to take a given resource must ask."[13]

In the second part, the authors seek to emphasize the importance of such rights by highlighting the hurdles faced by privacy litigants, especially in the United States. The authors would then go on to examine possible policy and legal solutions to these concerns and the scope of applying the same in India. While doing so the authors would also briefly discuss the Canadian Personal Information Protection and Electronic Documents Act [hereinafter, *PIPEDA*] and whether the legal principles enunciated in the same can be imported into the Indian legal framework.

II. Theoretical justifications for property rights in personal information

The right of informational privacy can offer a variety of protections which could include on one hand, the right to deny access to certain personal information; and on the other, the right to prevent 'publicity' of one's own name and image, which has manifested itself in the 'right of publicity' which is essentially the right of an individual to command and control the use of his or her name, image, likeness or other unequivocal aspects of his or her distinctiveness[14].[15] In all of the aforementioned cases, however, the 'identifiable' individual claiming to have had its right of privacy violated seeks control over his or her electronic persona which may comprise of any number of identifying characteristics.[16] Thus, most theoretical justifications for viewing information as property seek to achieve this end. In this part, the authors would attempt to justify proprietary rights in PII on the basis of the incentive theory, the allocative efficiency theory and the natural rights theory.

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13 Paul M. Schwartz, *Beyond Lessig's Code for Internet Privacy: Cyberspace filters, privacy-control and Fair Information Practices,* 2000 Wis. L. Rev. 743, 751.

14 Poorvi Chothani, Esq. and Vidhi Agarwal, *Personality Rights,* available online at http://www.itagbs.com/pdf's/Personality%20Rights%201.5.pdf (Last visited August 30th, 2012).

15 Richard S. Murphy, *Property rights in personal information: An economic defense of privacy,*84 Geo. L. J. 2381, 2381.

16 Jeanette Teh, *Privacy Wars In Cyberspace: An Examination of the Legal and Business Tensions in Information Privacy*, 4 Yale J.L. & Tech. 1, 13 2001-2002

A. INCENTIVE THEORY JUSTIFICATIONS

The copyright rationale is primarily based on the understanding that a failure to protect "works" would lead to a situation where people are not incentivized to produce more "works".[17] Therefore, copyright law seeks to incentivize and promote the creation of valuable works of authors for the larger benefit of the society and to ensure discourse and deliberation of these works in society.

While some Courts as well as scholars have tried to justify personality rights like the right of publicity by using the incentive theory justification,[18] adopting that line of reasoning, *in toto*, to justify property rights in personal information (and even to publicity rights to a large extent) is misleading and counter-intuitive.[19]

The authors would like to highlight two approaches to this utilitarian rationale of the incentive theory. The first approach deals with the incentive to develop facets of an individual's personality, while the second approach deals with incentive to disclose personal information. As with the right of publicity[20], the utilitarian approach of the incentive theory when dealing with the first perspective does not fit well within the framework of property rights in personal information. While dealing with the right of publicity, a plethora of scholars have highlighted the fact there does not exist any empirical data to signify that a lack of publicity would lead to lesser time and investment by an individual in becoming famous.[21] Extending that argument to the right in personal information, it is counter intuitive to even assume that individuals will cease to develop character traits and personalities, and invest less time and effort in doing the same due to the absence of a right in personal information. Additional

17 Stewart E. Kirk, *Rhetoric and Reality in Copyright Law*, 94 Mich. L. Rev. 1197, 1198-1204 (1996)

18 Randall T.E. Coyne, *Toward a Modified Fair Use Defense in Right of Publicity Cases*, 29 Wm. & Mary L. Rev. 781, 812 (1988)

19 Stacy L. Dogan& Mark A. Lemly, *What The Right Of Publicity Can Learn From Trademark Law*, 58 Stan. L. Rev. 1161.

20 Wendy J. Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. Dayton L. Rev. 853 (1992)

21 Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 Duke L.J. 1, 43-44 (2004)

protection, would at best, provide marginal incentive.[22] Therefore, using the incentive theory to justify property rights in personal information in the first approach only weakens the cause of property rights in personal information.

However, when the second perspective is viewed from that lens of the incentive justification, the argument for property rights in personal information gets strengthened. A right in personal information would not only grant more control over the use of information by companies to the individual but also lead to economic compensation for the use of that information. The overall sense of control as well as economic compensation leads to incentivization of information sharing by individuals. For instance, according to a study, 80% of internet users provide personalised information with the aim of receiving reciprocal benefits, while 30% of online shoppers had given their personal information to web sites even though they had not purchased anything[23]. This behavioural trend clearly highlights that individuals are more open to the idea of disclosing personal information and being monitored for targeted advertising if a *quid pro quo* arrangement exists and if they stand to gain some tangible benefits. Thus, a right in personal information would incentivize more users to disclose information, in return for benefits like control and monetary compensation. As of consequence of this, there would be more information for companies to efficiently exploit, leading to the growth and development of the information market.

B. ALLOCATIVE EFFICIENCY JUSTIFICATIONS

Another theory that is increasingly being used to justify property rights in personal information and personality primarily deals with allocative efficiency. The premise of the argument by the advocates of this theory, commonly understood as the 'tragedy of commons' argument, is that unless control and centralization of resources such as fame, personal information and the like takes place, there is exists a danger of overuse and eventual reduction of value in these resources leading to overall economic

22 Jay F. Dougherty, *Right of Publicity-Towards a Comparative and International Perspective*, 18 Loy. L.A. Ent. L.J. 421

23 Jeanette Teh, *Supra* n. 12, 13.

inefficiency.[24]

While the tragedy of commons argument fits well in the context of tangible property, the aforementioned argument, as some argue, falls when dealing with intangible property like personal information.[25] As Mark Lemly points out, the problem lies with the inherent lack of understanding of the non rivalrous and non-depleting nature of property in question i.e. information, and that the commons argument would only stand if and only if the information is either under produced or over distributed.[26]

However, we believe that such an understanding is myopic, if not flawed. In an era where internet privacy is becoming more and more valuable, there is a high possibility of individuals not disclosing personal information due to a fear of lack of control over it as well as the way the information is being used by third parties. For example, if X was aware that Google would use his search terms and history and sell it to companies for targeted advertising, X might just restrict what he searches for on the net simply because he doesn't want to either feel a sense of loss of control over his information or because he is uncomfortable with third parties knowing what he searches for on the net. This has the potential of leading to a scenario where information, while not being finite per se, takes a finite form due to the lack of distribution in the information market. Simply put, recognizing property rights in personal information forces the user of the information to disclose how an individual's information will be used by him thereby enabling the consumer to make a more informed choice, which ensures the most efficient allocation in the market.[27]

Another argument by advocates of the allocative efficiency theory, which has faced criticism, is that instead of the information depletion, there is a possibility of overuse and loss of value in the information.[28] This argument has been criticised on the grounds that such an argument is anti-

24 William M. Landes& Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. Chi. L. Rev. 471, 485 (2003)

25 Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. Chi. L. Rev. 129, 144-47 (2004)

26 *Id.*

27 Richard S. Murphy, *Property Rights In Personal Information: An Economic Defense Of Privacy*, 84 Geo. L.J. 2414.

28 Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA Ent. L. Rev. 97, 109 (1994)

market and that competing producers (i.e. third parties who eventually use the said information) would eventually increase production to bring down the net marginal cost.[29]

Hence the argument that there would be overuse, according to these critics, is unwarranted.[30] However, it is precisely because of "competition" that the argument of critics seems weak in the context of personal information. By granting information rights to individuals, companies will be forced to compete for the use of the same. This, we believe, would lead to a promotion of competition in a market economy thereby benefitting the holder of the information. Furthermore, the market created through property rights in personal information would allow individuals to bargain for the most suitable price, through price mechanisms, as per their privacy preferences.[31]

This would also ensure that social costs, related to collection and use of data, are internalized by companies, and not borne by individuals thereby forcing the firms to improve their investment plans relating to the type of data collected and the use of such data.[32] Thus, for example, Company X will be forced to seek only that information relevant for the growth of its business thereby enabling the individual to disclose only that information which is necessary for the Company.

C. NATURAL RIGHTS JUSTIFICATIONS

One theory that stands out, and which we also believe provides the strongest theoretical justification for property rights in personal information, is the natural rights theory.[33] This theory, in the context of intellectual property, focuses more on labour based moral right as opposed to a theory of personal liberty i.e., the right of an individual to his or her own labour and protection against unjust enrichment by competitors.[34]

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29 Mark A. Lemley, *Supra* n. 22, 144-147.
30 *Id.*
31 Pamela Samuelson, *Privacy As Intellectual Property?*, 52 Stan. L. Rev. 1125 (2000).
32 Jeanette Teh, *Supra* n. 12, 13.
33 Roberta Rosenthal Kwall, *Fame*, 73 Ind. L.J. 1, 57 (1997)
34 Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 989 (1964)

Infringing on the right to personal information does not directly concern itself with economic harm to the individual, but concerns itself with the loss of control by the individual of his own personal information. This line of reasoning borrows directly from Kantian philosophy which states that an individual has the right to control the use of his own person and intrusion of the same by anyone else, without the consent and express will of the individual is a an infringement of a person's inherent right of freedom.[35] Prof. McCarthy summarizes the argument aptly by stating that- *"perhaps nothing is so strongly intuited as the notion that my identity is mine—it is my property to control as I see fit. Those who are critical of this principle should have the burden to articulate some important countervailing social policy which negates this natural impulse of justice*."[36]

While it is easier to identify the element of "labour" in the right to publicity[37], the same cannot be said about rights in PII. An argument can be made that no labour goes into the creation and development of personal information. However, it is our opinion that even personal information can fall within the framework of "labour" For example, a certain element of labour is involved in an individual's preference of graphic novels over traditional novels or adherence to a more liberal economic ideology than a conservative economic ideology- all information that companies can use for targeted advertisements. These preferences form important aspects of an individual's personality and an element of labour is employed by an individual in developing these economically exploitable personality traits. Some scholars have even suggested that reputation, being based on "*our abilities, capacities, and even physiognomy as modified over the years by every action we take, every behaviour we display*"[38] is formed by taking natural resources and mixing our labour with it, much like personal property; and since, according to them, privacy concerns are based primarily on concerns about protection of one's reputation, this argument adequately buttresses the natural rights justification for property rights in personal information.

35 Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 411-30 (1999)

36 J. Thomas McCarthy, The Rights of Publicity and Privacy § 1.3 (2nd ed. 2011).

37 Andrew T. Coyle, *Finding A Better Analogy For The Right Of Publicity*, 77 Brook. L. Rev. 1167.

38 Joseph S. Fulda, *Reputation As Property*, ST. Croix REV. 33, April 2000, at 30, 30

The natural rights theory makes room for the argument that while there might not be any visible economic harm to the individual, there still is a possibility of unjust enrichment taking place i.e., a third party exploiting the information of the individual for economic gain (by selling it to advertisers, for example). Therefore, by adhering to this theory and establishing a right, an individual needs to only show only unjust enrichment and an infringement of right, and not necessarily economic harm.[39]

The practicality of adhering to this theory can be better understood by drawing parallels with Commercial Contracts and the right to publicity. When an artist agrees to appear in an advertisement, the advertiser and the artist agree upon the usage of the artist's persona in the advertisement. The artist is compensated for the same and any usage of his persona over and above the agreed terms can be prevented by the artist by enforcing the contract.[40] Therefore, the same idea that an artist has an inherent right over his persona can be transplanted to the case of the use of personal information rights of an individual. The individual and the proposed user of the information set out terms of use of information in a contract and the individual is compensated for the same. Any use of information over and above the agreed terms can be prevented by the individual by enforcing the contract. Additionally, this prevents any unjust enrichment as well i.e., it promotes fairness for individuals and prevents their personal information from being misappropriated.

III. The need for a statutorily protected property right in personal information

While the fact that consumer concerns about privacy have been on a rise can be adequately supported by the recent avalanche of high profile privacy litigation especially in American courts, a certain amount of scepticism to privacy against producers using data mining techniques having their basis primarily in the fear of loss of autonomy has been observed across circuits in the United States. In *In re Double Click Inc. Privacy Litigation*[41][hereinafter *Double Click*], in response to claims challenging the use of "cookies" for information gathering, the Court stated that *"It is*

39 William Prosser, *Privacy*, 48 Cal. L. Rev. 338.

40 Andrew T. Coyle, *Supra* n. 34, 1167.

41 154 F. Supp. 2d 497 (S.D.N.Y. 2001); 2001 U.S. Dist LEXIS 3498.

simply implausible that the entire business plan of one of the country's largest Internet media companies would be 'primarily motivated' by a tortuous or criminal purpose.[42]"

Most claims along these lines are met with the reasoning that they do not satisfy the requirement of Article III (of the U.S. Constitution) standing since the plaintiffs in all these cases have been unable to identify what economic harm resulted from the access or tracking of their personal information. In *In re iPhone Application Litigation*[43] [hereinafter *iPhone Litigation*], where several iPhone users filed a suit against Apple based on the claim that by allowing third party applications running on iOS devices to collect and make use of personal information without the knowledge or the consent of the users, the District Court for the Northern District of California held dismissed the suit on the ground of absence of Article III standing stating that the plaintiffs had been unable to identify the apps used, the personal information that had been accessed, and most of all, they had been unable to provide a 'particularized example' of economic injury or harm to their computers[44]. The court, in holding this relied on *La Court v. Specific Media Inc.*[45] and *In re JetBlue Airways Corp. Privacy Litigation*[46], in addition to *Double Click*. Significantly, the same Court had, in an order passed five months prior to the aforementioned order on *iPhone Litigation* had upheld the plaintiffs' Article III standing[47]. However, in that case, the Court had noted that the plaintiffs, like other RockYou customers, paid for the productions and services bought from RockYou by providing their PII. Therefore, the court held that this PII constituted valuable property that was exchanged not only for RockYou's products and services but also their promise to employ commercially reasonable methods to safeguard their PII. However, unlike in this case where the customers had paid RockYou an ascertainable amount in return for its services, which in the court's opinion, included safeguarding of PII, most online service providers that collect PII offer free services. This makes it more difficult for the customers to prove economic harm in the absence of a specific right protecting personal information vesting in them.

42 Tar Zarsky, *Supra* n. 1, 6.
43 2011 WL 4403963 (N.D. Cal.; Sept. 20, 2011).
44 *In re iPhone Application Litigation,* 2011 WL 4403963 (N.D. Cal; Sept. 20, 2011), p. 6.
45 8:10-cv-01256-GW-JCG (C.D. Cal. April 28, 2011).
46 79 F. Supp. 2d 299 (E.D.N.Y. August 1, 2005).
47 *Claridge v. RockYou, 2011 WL 1361588 (N.D. Cal.; Apr. 11, 2011)*

The privacy litigants' concerns about loss of autonomy are understandable, but without legal backing. In the absence of an express right, the litigants could have only been able to claim compensation by establishing economic harm, possibly by relying on one of the aforementioned theories. It may help to adopt, for instance, the allocative efficiency justification to support the plaintiffs' claims in *iPhone Litigation.* The plaintiffs' primary grouse was that Apple was allowing third party applications to mine their PII. These third party applications would, based on this information, identify the consumers' needs. Based on this, they might also be able to identify the consumers' 'paint points'; 'paint point' being the most undesirable values at which the consumer would agree to transact[48].

In most such transactions, the consumers are price-takers and the prices that the consumers end up paying are beyond their control. It would not be possible for consumers to negotiate on the prices of goods in an online shopping store. They would simply have to accept that price. In such a scenario, knowledge of the consumer's pain points may allow the producers to fix a higher price conveniently.[49] If the consumers were to have an opportunity to bargain, while data-mining techniques may have resulted in an informational advantage to the producers, they would not have necessarily resulted in monopolistic prices. However, if in such a situation the concerned producers, already armed with an informational advantage over competitors establish a monopoly or an oligopoly in the market, they might push the consumers to transact at 'pain point'. While consumer would end up paying higher than the marginal cost of production, the producer would receive a positive surplus.

This would result in economic inefficiencies and reduce the overall allocation of resources.[50] Thus, it can be established before the Court that the fact that the abundance of easily accessible PII about the consumers is available in the market has resulted in economic harm to the same consumers. While this may seem like a convincing explanation, in the *iPhone Litigation* case, it was not possible to even identify what applications were used and whether they were paid applications or not. Without being able to

48 *Ibid,* 518.

49 Doughlas M. Kochelek, *Data mining and Antitrust,* 22 Harv. J. L. & Tech. 515, 521 2008-2009.

50 *Id,* 522.

ascertain the exact economic harm suffered by the plaintiffs, it would not be possible to estimate damages in such a suit.

The *iPhone litigation* can be contrasted with the case of *Fraley v. Facebook, Inc.*[51] where the plaintiffs claimed violation of privacy rights in response to their Facebook profile pictures and user names appearing in "Sponsored Stories" on their Facebook friends' pages every time they "liked" a business or a market product on Facebook. The plaintiffs claimed that by publishing their preferences to their friends, Facebook made it appear like they were endorsing the said businesses or market products. In this case, however, the plaintiffs were able to rely on the statutorily protected right of publicity.

Judge Koh, noting that the plaintiffs were identifiable persons to their friends, held that a tangible property interest *in their personal endorsement of Facebook advertisers' products to their Facebook Friends*" in the form of right of publicity comparable to that of celebrities vested in these users and Facebook having indulged in unauthorized commercial exploitation of their statutory right of privacy, they had suffered an economic harm which satisfied the requirement of Article III standing.[52] This judgment seems to be in consonance with the 11th Circuit's judgment in *Martin Luther King Jr. Center for Social Change v. American Heritage Products Inc.*[53], wherethe term 'celebrity' was given a very expansive connotation. It was held that under the 'direct commercial exploitation of identity' test, any person whose identity has been put to unauthorized use that is both direct in nature and commercial in motivation would by definition become a celebrity for right of publicity purposes.

In both *iPhone Litigation* and *Fraley v. Facebook, Inc.,* the plaintiffs' PIIs were disclosed to third parties without their consent. But commercial exploitation was not found in the former, the latter claim found the support of the Court because the plaintiffs had a statutorily recognized tangible property interest in their PII. In light of this, the authors would like to

51 2011 WL 6303898 (N.D. Cal. Dec. 16, 2012).

52 Eric Goldman, *Facebook "Sponsored Stories" Publicity Rights Lawsuit Survives Motion to Dismiss--Fraley v. Facebook,* Technology and Marketing law blog, December 19, 2011, available at http://blog.ericgoldman.org/archives/2011/12/facebook_sponso.htm (last visited August 30th, 2012).

53 694 F.2d 674, 676 (11th Cir. 1983)

emphasize the importance of having a statutorily protected property right in personal information founded on the natural rights theory. This, as has already been discussed, would allow individuals to seek compensation for unauthorized commercial exploitation of their personal information for economic gain simply by proving unjust enrichment and without having to prove visible economic harm.

IV. Case for the creation of a new species of intellectual property rights in India

The right to privacy is constitutionally protected under Article 21 of the Indian Constitution. Perhaps the most salient Indian case discussing the right of informational privacy as a constitutional right is *Raj Gopal v. State of Tamil Nadu*[54] which held that the citizen has the right (also described as the 'right to be let alone) to safeguard the privacy of his own, his family, marriage, procreation, child-bearing and education among others and that nothing concerning these could be published without consent, except if a person voluntarily thrusts himself into a controversy or any of these matters becomes part of public records. However, protection of personal information from non-state third parties has not adequately been addressed in Indian jurisprudence.

The right of publicity, which has already found mention in this paper, has been defined as "*the inherent right of every human being to control the commercial use of his or her identity*" [55]. While publicity rights have been acknowledged by the Indian judiciary,[56] the jurisprudence on this subject is quite limited. The Delhi High Court in *ICC Development (International) Limited v Arvee Enterprises*[57] held that publicity rights are also a species of privacy rights whose violation would attract Articles 19 and 21 of the Constitution. However, it took a more evolved stance in *DM Entertainment Pvt. Ltd. v.*

54 (1994) 6 SCC 632.¶ 28. Here, a convict's autobiography describing the involvement of some politicians and businessmen in illegal activities, was challenged as invading the privacy of others.

55 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 28.1 (4th ed. 2004)

56 *DM Entertainment Pvt Ltd v Baby Gift House*, MANU/DE/2043/2010; *ICC Development (International) Limited v Arvee Enterprises,* 2003 (26) PTC 245 (Del); *Star India Private Limited v Leo Bunett India (Pvt.) Ltd*., (2003) 2 B.C.R. 655

57 2003 (26) PTC 245 (Del).

Baby Gift House[58], which relied on *Ali v. Playgirl Inc*[59]'s focus on a performer's "*proprietary interest in the profitability of his public reputation or persona"* to hold that the right of publicity protects against "*the unauthorized appropriation of an individual's very persona which would result in unearned commercial gain to another*[60]. This judicial opinion is significant in that, seems to recognize right of publicity as a right more akin to an alienable property right than one protecting the integrity of an individual's identity[61] and finding basis in Article 21. Further, it uses the more expansive term 'individual' as opposed to 'performer' or 'celebrity'. Thus, so long as an individual's persona or some of its essential attributes are identifiable from the defendant's unauthorized use, he or she can claim a right of publicity. The Indian judiciary thus seems quite amenable to recognizing the proprietary right of an individual in his persona.

However, as has been understood by contrasting the *iPhone Litigation* case with *Fraley v. Facebook,* even a statutorily protected right of publicity may not be enough to protect people's PII from being disseminated to third parties without their consent. As has already been discussed in the introduction to this paper, the privacy concern does not arise from the unbridled access to information *per se* but from the fact that such information is likely to indicate preferences[62]. For instance, while the fact that a consumer has purchased a book may not be problematic by itself, the fact that based on such a purchase, his or her taste in books may be analyzed may be so. Hence, one can take this preference to be the 'labour' exerted by the consumer and apply the natural rights theory to justify proprietary rights in the PII that may inhere in the said consumer.

However, the proprietary right in PII would neither fall under the category of copyright not under trademark. Vide Section 13 of the Indian Copyright Act, 1957; copyright protection is conferred on literary works, dramatic works, musical works, artistic works, cinematograph films and sound recordings. Copyright law in India is meant to protect the expression

58 MANU/DE/2043/2010
59 447 F Supp 723
60 *DM Entertainment Pvt. Ltd. v. Baby Gift House,* Supra n. 54, ¶ 13.
61 Stacy L. Dogan& Mark A. Lemly, *Supra* n. 15, 1167.
62 *Supra* n. 6.

of an idea rather than an idea itself[63]. PII, in all probability, would not find expression the way copyrightable works under the Copyright Act, 1957 would; thus making it difficult to bring proprietary rights in PII within the fold of copyright law. Similarly, it is difficult to challenge a violation of the proprietary right in PII on the basis of the consumer confusion rationale, which remains central to trademark law[64]. All the same, there is a need for recognizing this property right. Hence, the authors advocate the creation of a new species of statutorily intellectual property rights aimed at protecting the property rights in personal information.

The Canadian PIPEDA is a good source to draw inspiration from with regard to a statutorily protected right of personal information. It defines 'personal information' as "information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization"[65]. Thus, it recognizes that 'personal information' need not necessarily be sensitive, private or confidential information. [66] Property rights in personal information in Canada are understood to mean the right of individuals "to determine what information about them is disclosed to others, and encompasses the collection, maintenance and use of identifiable information". Hence, a lot of importance has been given to the right of an individual to control his personal information and the access to it. Except where it is unreasonable to require or otherwise inappropriate, it is always considered important to obtain the knowledge and consent of an individual whose personal information is required for the collection, use or disclosure of her personal information.[67]

The Canadian focus on control as key to property rights in information would have been deficient had it not been able to protect the sanctity of the consent of an individual to the use of his or her personal information. Frequently, internet users volunteer personal information to

63 *Idea-Expression Dichotomy in judgment reporting in India,* available online at http://airwebworld.com/articles/index.php?article=925 (last viewed August 30th, 2012).

64 Stacy L. Dogan& Mark A. Lemly, *Supra* n. 15, 1192.

65 Personal Information Protection and Electronic Documents Act, S.C. 2000, ch.5, §2 (Can.).

66 Jeannette Teh, *Supra* n. 12, 8.

67 Jennifer Barrigar et al., *Let's not get psyched out of privacy: Reflections on withdrawing consent to the collection, use and disclosure of personal information,* 44 Can. Bus. L.J. 54, 56 2006-2007.

websites just to gain access to more information. Considering this to be 'informed consent' may just prove problematic. Recognizing this, PIPEDA allows the information subject to withdraw consent at any time, subject to legal and contractual restrictions and reasonable notice.[68] This would go a long way in protecting the right of privacy of many internet users.

That the Canadian approach to personal information is based on control of an individual over one's PII would be a valuable import for a law seeking to protect an individual's proprietary interest in PII, primarily because control is the essence of a proprietary interest. While many inconsistencies and loopholes have been pointed out in the PIPEDA[69], the authors emphasize that it would be very helpful in guiding policy makers and legislators in developing a framework for intellectual property rights in personal information.

V. Conclusion

As already established, India is a country where privacy is considered to be of paramount importance. With more and more people from India becoming technologically oriented, it is high time privacy and information rights have been brought to the forefront of the debate. As the authors have already suggested, Indian policy makers and law makers can take a leaf out of Canada's legislation. The Canadian approach to personal information is based on control of an individual over one's PII, and such a concept would be a valuable import for a law seeking to protect an individual's proprietary interest in PII, primarily because control is the essence of a proprietary interest. While many inconsistencies and loopholes have been pointed out in the PIPEDA[70], the authors emphasize that it would be very helpful in guiding policy makers and legislators in developing a framework for intellectual property rights in personal information.

At the end of the day, this paper has sought to find a solution to the growing problem of privacy, access to information and information

68 Personal Information Protection and Electronic Documents Act, S.C. 2000, Schedule I, §4.3.8 (Can.).

69 Lisa M. Austin, *Reviewing PIPEDA: Control, privacy and the limits of Fair Information Practices,* 44 Can. Bus. L.J. 21 2006-2007; Jeannette Teh, *Supra* n. 12.

70 Lisa M. Austin, 'Reviewing PIPEDA: Control, privacy and the limits of Fair Information Practices', 44 Can. Bus. L.J. 21 2006-2007; Jeannette Teh, *Supra* n. 12.

exchange efficiency. Facebook recently hit the one billion membership mark and every day more and more smart phones are being released into the market. This only means that more and more people will find more and more ways to exchange information, either voluntarily or involuntarily, and what this paper has done, at its core, is try to argue in favour informational efficiency by granting property rights in personal information to individuals.

The authors have tried to provide pragmatic and cogent arguments in support of establishing property rights in personal information. These arguments may also be useful tools which law makers, judges, academicians and the like can use in matters that deal with privacy protection and information exchange. The concept of free market of information seems like a noble and achievable idea, however what is required is greater discourse and deliberation for enabling of the concept.