

The Meaning of “Intellectual Privacy”

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Neil Richards has provided us with a new way of looking at certain types of intrusions into privacy.¹ Building on innuendo in a few Fourth and First Amendment opinions, as well as suggestions in recent scholarship, he argues that government efforts (and perhaps even nongovernmental efforts) to obtain certain types of information or invade certain types of spaces infringe on “intellectual privacy,” which is entitled to constitutional protection. He makes a strong case for the proposition that this protection extends to activities associated with freedom of thought and freedom to explore ideas, as well as the private space and confidential relationships necessary to exercise these freedoms.

The small difficulties I have with his argument are not conceptual but pragmatic, in two related ways. First is an administrability problem. Although Richards says that intellectual privacy impinges on only a “fraction” of the issues connected with privacy,² in fact, virtually all of our activities can be said to enhance freedom of thought and intellectual exploration. Richards focuses on what he calls “intellectual records” such as lists of Web sites visited, books owned, and terms entered into search engines, differentiating these activities from purchases of consumer goods.³ But if the latter purchases consist of religious foods, war video games, or certain brand names, or if information about all of an individual’s purchases are aggregated, that person’s belief system might be revealed just as clearly as if all of her Internet travels were accessed. (Perhaps more so, since beliefs are probably more closely correlated with what one is willing to buy than with what one views). Thus, as Stan Karas has noted, companies use consumer-purchase databases to divide individuals into categories such as “blue-blood estates,” “bohemian mix,” and “shotguns and pickups,” or to label us as “first time credit card holders,” “grown but still at home,” “hi-tech seniors,” “status spenders,” and “waist watchers.”⁴

Conversely, many types of sources that Richards considers *prima facie* “intellectual” in nature may not be. Many Web site lists consist entirely of URLs for commercial companies, the books on one’s shelves may all be

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1. Neil Richards, *Intellectual Privacy*, 87 TEXAS L. REV. 387 (2008).

2. *Id.* at 391.

3. *Id.* at 436.

4. Stan Karas, *Privacy, Identity, Databases*, 52 AM. U. L. REV. 393, 437 (2002).

mysteries, and the national security letters that Richards believes are anathema to intellectual privacy are usually aimed solely at obtaining financial information. Perhaps we could come up with categories of intellectual privacy, organize them into a hierarchy of privacy, and apply the hierarchy *ex ante*, but *ex post* we are likely to find that we have been both under- and over-inclusive.

That, of course, is a familiar problem for lawyers and the law, but one that is not easily solved based on what Richards gives us in his Article. Moreover, this administrability difficulty blends into the second pragmatic inquiry I have about his project: how does his First Amendment entitlement add to Fourth Amendment jurisprudence and scholarship, which is already designed to protect the expectations of privacy that “society is prepared to recognize as reasonable,”⁵ and has already wrestled with the same conundrums?⁶ Assuming people *do* have more “intellectual privacy” in the content of their phone calls or the type of information that can be obtained through national security letters than they do in their weekly food purchases, either Fourth Amendment jurisprudence or its statutory analogues already recognize, at least in a general sense, these kinds of distinctions.⁷

To the extent that this body of law does *not* recognize them, Richards’s analysis—and particularly his arguments in favor of spatial privacy and confidentiality—can provide a basis for change. But his arguments can also easily be fit into current Fourth Amendment debates about the merits of public anonymity, the Supreme Court’s third party doctrine, and so on. As I have stated elsewhere in a closely related context, “ambiguities in the political–commercial distinction, as well as the fact that business records can contain political information and individual records often contain nothing remotely political, make the First Amendment paradigm far less certain and much harder to administer than the rejuvenated Fourth/Fifth Amendment approach [that I have proposed] to determining the extent to which government ought to have access to records.”⁸ And as for the non-state-action cases that Richards mentions, Fourth Amendment “values” can infuse debates over the private sector’s authority to obtain personal information just as easily as (or with no more difficulty than) First Amendment values.

These complaints are overly grumpy, however. Richards’s Article makes a substantial contribution by irrefutably showing that the First Amendment protects privacy, too. His well-reasoned position puts a First

5. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan J., concurring).

6. *See, e.g.*, Susan Freiwald & Patricia L. Bellia, *The Fourth Amendment Status of Stored E-Mail: The Law Professors’ Brief in Warshak v. United States*, 41 U.S.F. L. Rev. 559 (2007).

7. *See, e.g.*, *Berger v. New York*, 388 U.S. 41 (1967) (requiring a warrant for nonconsensual interception of phone conversations); Electronic Communications Privacy Act, 18 U.S.C. § 3121 (drawing distinctions, *inter alia*, between phone numbers dialed, routing information, content in e-mails, and stored e-mails).

8. CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 166 (2007).

Amendment thumb on the scale when it comes to balancing individual interests against government (or commercial) interests. Given the Supreme Court's current nonchalance toward the types of individual interests Richards discusses, that side of the balance needs all the help it can get.