MEDIA DIVERSITY AND ONLINE ADVERTISING

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I. INTRODUCTION ................................................................. 665
II. BACKGROUND ........................................................................ 668
     A. Freedom of Press, Media Diversity, and Advertising..... 668
     B. Privacy in Many Forms ............................................... 672
III. ENTER THE INTERNET ...................................................... 677
     A. The Internet Disrupts Press, Increases Diversity ....... 677
     B. The Internet Transforms Privacy .................................. 679
IV. MEDIA DIVERSITY AND PRIVACY ..................................... 686
     A. Advertising, Media, and the Internet Ecosystem ....... 686
     B. Balancing Privacy and Diversity .................................. 691
V. CONCLUDING THOUGHTS .................................................. 695

I. INTRODUCTION

In the midst of a fierce presidential election season, in October 2012, The New York Times revealed that the political campaigns of Barack Obama and Mitt Romney agree on at least one thing.¹ Both are turning to personalized data about voters, such as “shopping histories, gambling tendencies, interest in get-rich-quick schemes, dating preferences and financial problems.”² Campaign workers use this information in their “get out the vote” efforts running up to Election Day.³ They are debating whether to publicly shame people

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² Id. at 18.

³ See id.
into voting through social networks or to use the detailed information to “persuade” unlikely voters to do their civic duty.\textsuperscript{4} The two major parties are buying into big data; together, they spent $13 million on “data acquisition and related services” in 2012.\textsuperscript{5} Even though both campaigns claim to follow the highest ethical standards and industry best practices,\textsuperscript{6} and although the Federal Trade Commission (FTC) and Commerce Department have both emphasized the importance of “notice” to consumers and choice,\textsuperscript{7} it remains unclear whether Americans understand how much information the two presidential campaigns or their consultants have.\textsuperscript{8} Headlines like Forbes’s “The Obama And Romney Campaigns Know If You’ve Visited Porn Sites” suggest much of the public does not yet know these facts.\textsuperscript{9} A member of Romney’s campaign told The New York Times: “You don’t want your analytical efforts to be obvious because voters get creeped out . . . A lot of what we’re doing is behind the scenes.”\textsuperscript{10}

Despite the revelations of such massive information collection of personal information, there has been little uproar—likely because of the countervailing benefits of this activity.\textsuperscript{11} Considering the value of wide participation in a democracy and our nation’s chronically low turnout rates,\textsuperscript{12} anything increasing electoral participation seems like a good thing. In addition, for centuries, political candidates have used information about voters to craft an argument that would persuade a particular voter, from knowing their gender to knowing their union membership.\textsuperscript{13}

Consider a second, seemingly unrelated, example. \textit{Ars Technica} is an online-only publication with millions of readers across the

\textsuperscript{4} Id.
\textsuperscript{6} Duhigg, \textit{supra} note 1, at 18.
\textsuperscript{8} Hill, \textit{supra} note 5.
\textsuperscript{9} Id.
\textsuperscript{10} Duhigg, \textit{supra} note 1, at 18 (internal quotations omitted).
country.\textsuperscript{14} It specializes in technology news and informed analysis.\textsuperscript{15} In March of 2010, the site’s editors experimented with their audience by “blocking” content from readers who visited the site using ad-blocking technology.\textsuperscript{16} The experiment worked, though it angered some of their readers.\textsuperscript{17} Some twenty-five thousand readers responded by whitelisting the site (meaning they removed Ars Technica from the sites whose ads were blocked), while another two hundred readers paid for premium subscriptions.\textsuperscript{18} The following day, the publication explained the “experiment gone wrong,” detailing the importance of advertising to Ars Technica and others outlets like it, and asking readers to consider the real harms to online publications caused by ad blocking, such as staff layoffs and reliance on more advertising “of a truly questionable nature.”\textsuperscript{19} The experiment also surprised the editors; they didn’t realize many people were blocking ads unintentionally, not understanding the harm it caused to the sites they frequent.\textsuperscript{20} From the point of view of a publisher, blocking ads has essentially the same effect as blocking the use of information to generate more revenue from ads.\textsuperscript{21} It is unclear whether Ars Technica runs behavioral advertising, but behavioral advertising often generates more revenue than less targeted advertising, and many sites rely on such advertising in part to sustain themselves.\textsuperscript{22} Moreover, sites like Ars Technica that host ads are paid on a per impression basis, which means ad blocking can have a significant impact on the revenue they earn.\textsuperscript{23} When a user or law reduces the advertising revenue available to the publisher—however legitimate the reasons—the same harms are possible, including staff layoffs.\textsuperscript{24}

These two seemingly disparate stories point to the same general tension between privacy and speech. In the first example, the

\textsuperscript{15} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Laura McGann, How Ars Technica’s “Experiment” with Ad-blocking Readers Built on its Community’s Affection for the Site, NIEMAN JOURNALISM LAB (Mar. 9, 2010), http://www.niemanlab.org/2010/03/how-ars-technica-made-the-ask-of-ad-blocking-readers.
\textsuperscript{19} Fisher, supra note 16.
\textsuperscript{20} Id.
\textsuperscript{21} See id.
\textsuperscript{22} See id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
tension is between the privacy of voters’ personal information and the speech of political campaigns (as well as voter turnout). In the second example, the tension is between privacy and funding the speech of media outlets online, which has a ripple effect on the media diversity available on the internet. This second tension—between privacy of personal information and media diversity—is the subject of this paper. We do not take sides in the abstract, determining that media diversity should outrank privacy or vice versa. Both are important values. Rather, we believe in the benefit of spelling out a tension that often goes overlooked—in principle, at the margin, there must be tradeoffs between increased online privacy protections and online media diversity.

The paper has three parts. First, we explore these competing interests and their role in American society and law. Second, we discuss how the internet altered the landscape in which these values exist, describing how policymakers and courts reconcile these interests in light of changing technology. Finally, we identify the balance that exists between privacy and advertising in the online age, and conclude by offering suggestions for how to maintain that balance while preserving the somewhat overlooked value of media diversity. In essence, we argue greater engagement is needed between the public, the advertising community, publishers, and privacy advocates. The Worldwide Web Consortium, Do Not Track Initiative, and other efforts are a good start and have shown some success, but clearly more must be done in promoting mutual understanding of the benefits of online advertising, the adverse consequences that advertising may have on privacy, and the importance of media diversity online. We hope this paper contributes to that discussion.

II. BACKGROUND

Media diversity and privacy are both important values—recognized as such long before the advent of the internet—that underlie a range of domestic policies and laws.

A. Freedom of Press, Media Diversity, and Advertising

Our Constitution defends the right to a free press and our popular
and legal culture celebrates that right. Indeed, Thomas Jefferson said if he were given the choice “between government without newspapers and newspapers without government, [he] wouldn’t hesitate to choose the latter.” The value of a free press, according to jurists and scholars, includes promoting democratic deliberation, informing citizens’ role as voters, unearthing government misfeasance and malfeasance, ensuring “safety valves” for disagreement, and checking abuses of government power. Our tradition recognizes that we must balance the right to freedom of press against other important rights—for example, defamation of personal reputations and divulging national security secrets. Even in these circumstances, the threshold for overriding freedom of the press is, at least formally, very high.

Our constitutional history regarding freedom of press has also placed a paramount value on diversity. In an often-quoted line, the Supreme Court declared in Associated Press v. United States that the First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” Since that 1945 case, the Court has repeatedly affirmed the importance of this principle, stating that the principle has “long been a basic tenet of national communications policy.” So has Congress, when faced with new technologies. Following the Supreme Court, the FCC has called the promotion of diversity one of its core mandates in

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26 U.S. CONST. amend. I.  
30 Progressive, 467 F. Supp. at 992.  
furthering the public interest.\textsuperscript{34} In a previous article, building on the work of Yochai Benkler, Ed Baker, Zechariah Chafee, and others, Marvin Ammori outlined some of the judicial precedents, congressional statutes, and important agency rules furthering the value of diversity in the media from the early days of newspapers delivered by post through the telegraph, telephone, broadcasting system, cable network, and internet platforms.\textsuperscript{35} Primarily through “must-carry” rules, nondiscrimination rules, and congressional and agency policies against media consolidation and cross-ownership across media industries, the government has sought to advance diversity.\textsuperscript{36}

Unlike some countries that have opted for greater government ownership of media—from authoritarian regimes like China to democracies like the United Kingdom\textsuperscript{37}—the United States has generally chosen a more private-sector approach, coupled with regulation to promote important values like diversity.\textsuperscript{38} That American private media system has been intertwined with \textit{advertising} for well over a century.\textsuperscript{39} Much of the news media is supported at least partly through advertising to sustain production and ideally earn a profit.\textsuperscript{40} This is not a new phenomenon—radio, television, and newspapers were predominantly advertisement supported throughout the twentieth century.\textsuperscript{41} Indeed, the genre of soap operas began with the sponsor Proctor & Gamble—to sell detergents and soaps.\textsuperscript{42} The deep involvement of advertisers in our media system continues to this day.

Advertising plays a significant role in sustaining media outlets, or at least in adding to their revenues.\textsuperscript{43} To the extent those revenues are reinvested to cover expenses, advertising revenue enables them to hire and pay staff, cover a wider range of subjects—in greater


\textsuperscript{36} Id. at 45–50.

\textsuperscript{37} Simeon Djankov et al., \textit{Who Owns the Media?}, 46 J. L. & ECON. 341, 357 (2003).

\textsuperscript{38} Id.

\textsuperscript{39} See, e.g., JOSEPH TUROW, THE DAILY YOU: HOW THE NEW ADVERTISING INDUSTRY IS DEFINING YOUR IDENTITY AND YOUR WORTH 21 (2011) (discussing media advertising since the 1920s).

\textsuperscript{40} Id. at 42–43.

\textsuperscript{41} Id. at 21.


\textsuperscript{43} Id. (noting that Procter & Gamble spends nine billion dollars a year on advertising).
depth than might otherwise be possible—and even expand production, all to the benefit of both the outlet and its audience.\textsuperscript{44}

At the same time, the advertising system is subject to well-known criticisms and tradeoffs. Critics have argued that the advertising-supported media results in content that is more of an innocuous commodity than a piece of substantive information—“designed to put audiences in a buying mood and to attract a broad cross-section of viewers, readers, and listeners without unduly offending any of them.”\textsuperscript{45} Another criticism is that the commercial media system can cause journalists to drop specific stories for fear of offending advertisers, thus depriving the public of newsworthy information or distorting the information the public receives.\textsuperscript{46}

Weighing these benefits and drawbacks, some argue that the advertiser-based system may be the worst way to fund the press—except for all the other ways attempted from time to time.\textsuperscript{47} At the very least, we could have a media system (as we do) that includes a combination of diverse media—some non-commercial, some government-supported, some foundation-supported, and some advertiser-supported.\textsuperscript{48} Professor Neil Netanel evaluated alternatives to the commercial, advertiser-based media model.\textsuperscript{49} One alternative is the political party-financed media system, where political parties sponsor media outlets.\textsuperscript{50} Now less common, this system was prominent during the early 1800s in the United States and following the Second World War in Europe.\textsuperscript{51} The system provided a “more honest” perspective—ideological allegiances were clear, and the system encouraged more robust public involvement.\textsuperscript{52} But this system often resulted in preferential treatment for media outfits aligned with the party in power and negative treatment for opposition outlets, diminishing their effectiveness as a

\textsuperscript{44} Comments of the Newspaper Association of America, \textit{Fed. Trade Comm’n} 17 (Feb. 18, 2011), http://ftc.gov/os/comments/privacyreportframework/00383-58017.pdf; Fisher, \textit{supra} note 16.


\textsuperscript{47} Id. at 325.

\textsuperscript{48} Id. at 323–24.

\textsuperscript{49} Id. at 323–24.

\textsuperscript{50} Id. at 325.

\textsuperscript{51} Id.

\textsuperscript{52} Id.
counterweight and accountability mechanism, while propping up favorable media.\(^\text{53}\) Thus, Netanel concluded that the party-financed media alone should not be viewed as a viable alternative to advertising-based news media.\(^\text{54}\)

Netanel also considered a media system financed through government subsidy.\(^\text{55}\) However, Netanel argued that there is considerable danger of government using subsidies to manipulate the press to suit its own ends, threatening the legitimacy of the press.\(^\text{56}\) He further argued that publicly funded media outlets are also less apt to report on provocative matters or even adopt a stance on such matters.\(^\text{57}\) These reasons make the government-supported media option, for Netanel, an equally untenable alternative to advertising-supported media.\(^\text{58}\)

Regardless of these flaws, however, the two alternatives may help “supplement” the existing commercial system to make up for its shortcomings, according to Netanel.\(^\text{59}\) However, they remain unsuitable as wholesale replacements for the commercial media, and thus, for the foreseeable future, we will continue to have a commercial media system.\(^\text{60}\)

**B. Privacy in Many Forms**

“Privacy” has been valued since Eve noticed she was naked. But privacy may be in the news more than ever before. Whether the story is about paparazzi taking photos of celebrities, criminals stealing medical records from a government database, or (more often) Facebook, Google, or Apple changing their privacy policies, Americans constantly hear about threats to their privacy.\(^\text{61}\) More recently, privacy has been in the news regarding mobile devices—either apps accessing users’ phone books without notice.\(^\text{62}\)

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53 Id. at 325–27.
54 Id. at 327–28.
55 Id. at 328.
56 Id.
57 Id. at 329.
58 Id.
59 Id.
60 Id. at 328–29.
government accessing location information without a warrant, or private sharing of data for behavioral advertising. But we should begin by specifying, to some extent, what scholars (and average citizens) mean when they talk about “privacy.”

Law professor Daniel Solove’s definition (or non-definition) of privacy strikes us as most persuasive. He calls privacy a “plurality of different things that do not share any one element but nevertheless bear a resemblance to one another,” that “involves so many things that it is impossible to reduce them all to one simple idea.” Solove extensively cataloged the differing formulations of privacy, finding that most, if not all are too narrow or too broad and are inadequate for addressing substantive privacy matters. Solove identifies another problem in our conception of privacy: decision-makers often fail to define the precise harms that privacy laws seek to remedy. If one cannot properly understand the malady then one is unlikely to develop a cure.

Indeed, looking at some of the most prominent Supreme Court cases about “privacy” confirms his point. The Court has used privacy in a wide variety of contexts. The only two constants are that privacy is generally a positive attribute and that we sometimes must balance it with other positive attributes.

Consider some varying examples of “privacy.” Most famously, the Court has discussed “privacy” not in terms of informational privacy but in terms of intimacy, family, and certain fundamental individual choices. The essential cases here are Griswold v. Connecticut and Roe v. Wade, which provide constitutional protection for contraception and abortion, respectively. The
Court has also discussed the importance of associational privacy. In the 1958 case *NAACP v. Alabama ex rel. Patterson*, the Supreme Court affirmed the value of privacy as it relates to freedom of association, holding that the Fourteenth Amendment’s Due Process Clause protected NAACP membership information from compelled disclosure because of the members’ rights “to pursue their lawful private interests privately and to associate freely with others in so doing.”

The importance of associational privacy is perhaps one reason why Facebook’s privacy policies generate so much attention—Facebook reveals our associations.

Beyond intimate choices and associations, the Court has valued informational privacy, including privacy’s role in both receiving information and in conveying it. In 1969, the Court held in *Stanley v. Georgia* that a Georgia statute prohibiting the possession of obscene material in the private residence violated the First Amendment. The Court wrote:

> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.

*Stanley* is generally discussed as a “First Amendment” decision rather than a “Fourth Amendment” decision. But the Fourth Amendment also provides protection from unreasonable government searches of our “papers.” Solove has argued that the Fourth Amendment’s limitations reflect free-speech values. In keeping with the right for Americans to read whatever they wish in their homes without the peering eye of a government agent, many have argued for extending the right to read “anonymously” online (from their home or elsewhere), and find support from the

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74 *Id.* at 565.
75 *See* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973).
76 U.S. CONST. amend. IV.
78 Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright
controversies over the right to privacy in books checked out from libraries. Others have made the argument for anonymous reading in the context of newer technologies like the Kindle and iPad, arguing that we should extend Stanley to cyberspace.

These examples pertain to anonymous reading. The Court has also affirmed the importance of maintaining the privacy of one’s identity in speaking and writing. In the 1995 case McIntyre v. Ohio Elections Commission, the Court struck down an Ohio law that forbade the distribution of anonymously written campaign literature. Finding the law violated the First Amendment, the Court held that “an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”

Both Stanley and McIntyre suggest the importance in our democracy of being able to read and write anonymously, to listen and speak without being identified. The exact reasons justifying these rights are somewhat more complex—they turn on the importance of anonymity to personhood and to democratic debate. The unwavering gaze of government (or others in society) may chill the receipt or expression of unpopular, unconventional views, related both to personal decisions and political education and debate.

Evidence of these many privacy conceptions can also be seen by how American lawmakers have passed numerous statutes aimed at protecting and advancing individual privacy. These policy efforts can be split into two general categories: first, protection from government surveillance, and second, protection of specific categories of information against even private sharing of the information. Regarding government, in addition to the limits of the

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82 Id. at 342.

83 See Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that under the First and Fourteenth Amendments, private possession of obscene material may not be criminalized); McIntyre, 514 U.S. at 357 (holding that the distribution of anonymously written campaign literature may not be prohibited under the First Amendment).

84 See McIntyre, 514 U.S. at 341–42.

85 See infra notes 86–95 and accompanying text.
Fourth Amendment, Congress enacted a set of rules that provide guidelines for law enforcement’s collection of private information, including the Wiretap Act and later the Electronic Communications Privacy Act (ECPA), which accounted for changes in technology presented by computers and other devices.\(^86\)

Congress has passed laws aimed at addressing how private entities must protect the privacy of information, though in doing so it adopted legislation in a variety of sectors rather than simply creating a universal privacy standard. These sectors include protecting government records of individuals,\(^87\) health records,\(^88\) financial information,\(^89\) different types of business records,\(^90\) school records and other education information,\(^91\) and information collected from children’s internet activities.\(^92\)

While the Supreme Court has often affirmed the right to privacy, as with freedom of the press, the Court has also not hesitated to note potential tensions between privacy and other core values, balancing the two. In *Planned Parenthood v. Casey*, the Court balanced privacy interests of a woman’s access to abortion services against the state’s interest in the life of an unborn child.\(^93\) In one section of *Citizens United v. Federal Election Commission*, the Court upheld disclosure rules, striking the balance between privacy interests of political donors and the public’s “interest in knowing who is speaking about a candidate shortly before an election.”\(^94\) More recently in *Sorrell v. IMS Health Inc.*, the Court struck a balance between the interest of doctors in the privacy of medical prescription information and the commercial speech rights of pharmaceutical companies to convey that information.\(^95\) As a result, the Court has not only recognized that privacy is not an

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absolute, it has addressed one of the many tensions between privacy and free speech. Some conceptions of privacy, after all, value the ability of one person to stop others from speaking certain things about them, providing a tension with speech.

III. ENTER THE INTERNET

Most observers seem to conclude that the internet has increased speech diversity while putting privacy at risk in different ways.

A. The Internet Disrupts Press, Increases Diversity

The internet dramatically transformed the conventional triad of media: print, television, and radio. These incumbent news mediums are bound by limitations of page space, broadcasting minutes, and channel capacity. They are also constrained by enormous input costs required to print a daily paper or broadcast a nightly news program. Since the advent of online news distribution, print news revenue has diminished, both because of decreased readership and less advertising revenue. Print advertising revenue declined from $48.7 billion in 2000 to $22.8 billion in 2010—cut in half in one decade. This tailspin forced many papers, including The Philadelphia Inquirer and Minneapolis Star Tribune, to declare bankruptcy because they could not afford to repay their loans.

Web properties have seen explosive growth in the market. Online news websites—whether affiliated with a traditional outlet or independent—do not have those aforementioned limitations.

96 See Citizens United, 130 S. Ct. at 914.
98 Id. at 122.
100 WALDMAN, supra note 97, at 39.
101 Id. at 40.
103 WALDMAN, supra note 97, at 119.
They have essentially “newsprint” space and video capacity. They also have much lower costs for distribution, even if they have some similar costs of newsgathering. Such news sites have developed considerably in the web era. Some technologies reduce these distribution costs even further, including free or low-cost publishing technology and online platforms. Such platforms, like WordPress.com, Blogger, and Tumblr, have empowered millions of Americans to become individual publishing houses. WordPress.com, for example, hosts websites for a number of major news organizations like CNN and NBC Sports in addition to over seventy million blogs. These sites serve mainstream and niche audiences, and provide in-depth reporting, greater diversity of views, and promote broader civic engagement in debate through the ease of commenting, all at a much lower cost and quicker pace as compared to traditional news mediums.

This technological sea change has had tangible effects on the consumption of news. In 2010, “more Americans were getting their news online than from traditional printed newspapers,” and young people were using the internet more than both newspapers and television. To use WordPress.com as an example again, sites on their platform have over 385 million people viewing more than 3.8 billion pages each month. Thus, the internet has become a core component of our everyday interaction with news and commentary, and a major platform for news outlets from media giants to lone bloggers.

The diversity offered by these technologies served as a core impetus of the fight over network neutrality, rules which the FCC ordered into effect in December 2010. The network neutrality rules require internet providers to treat all traffic traveling over their networks equally, and not discriminate against particular

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104 See id. (noting the various ways individuals can receive news on the internet: news article, video, audio, transcripts, and expert analysis).
105 Id. at 122.
106 Id. at 116–17.
107 Id. at 118.
108 Id.
110 WALDMAN, supra note 97, at 118–22.
111 Id. at 117.
112 Stats, supra note 109.
types or sources of traffic, except for limited purposes. Part of the drive for these rules was Congress’s recognition, in section 230 of the 1996 Communications Decency Act, of the internet’s capacity to provide “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” The potential for internet providers to threaten this online environment, as demonstrated by Comcast’s throttling of customers’ peer-to-peer traffic in 2007, spurred the FCC to act to preserve the openness of the internet and thereby help to ensure online diversity. The FCC is now defending the rules before the D.C. Circuit in a case brought by Verizon, who argues the FCC has no authority to enact the rules and says the rules will hurt the communications industry. Nevertheless, network neutrality enjoys support from an array of groups, including Facebook and Yahoo!, the ACLU, the Christian Coalition for America, as well as the American Library Association, and will remain a key issue in the years to come.

B. The Internet Transforms Privacy

At the same time that the internet has transformed the news and media landscape, it has also affected our privacy and what we think of privacy. Many young people today have different ideas of personal privacy than those from previous generations. For these “digital natives,” as scholars John Palfrey and Urs Gasser refer to them, much of their daily life now occurs online though it would have previously taken place in person. Because they engage in such actions publicly online, they may be lulled or desensitized to

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116 In re Preserving the Open Internet, Broadband Industry Practices, 25 FCC Rcd. at 17925.
121 Id. at 1.
the privacy concerns that older generations might have. Before, these young people might have met for coffee for a conversation with a friend; now they use Skype or other video chat services. Where they once might write letters or make a phone call to keep in touch, they now send email or Facebook messages, or post an open message on a friend’s wall. Where they might have announced their moods only at dinner or in person, young people can post their moods on Twitter and Facebook to hundreds of followers or friends. Instead of driving out to the local bookstore or clothing shop to buy things, they now point their touchpad to Amazon or one of the many other online retailers to buy things from the comfort of home. And, while a decade ago, they might keep school and work documents in a file cabinet at home, they increasingly rely on cloud storage services to keep that material online, accessible anywhere from every device we own (complicating our reasonable expectation of privacy under the Fourth Amendment, among other things).

Internet technology has enriched society, but our increased digital presence has also raised important questions about the future of individual privacy and how the law should react.

Indeed, according to Palfrey and Gasser, “more information is collected about us, and held in more hands, and accessible to more people, than ever before.” In many ways, it has become difficult for individuals to control the information about them that exists online, let alone know what that information is. At the same time, they continue to voluntarily place more information online, whether on social networks or retailer websites. Palfrey and Gasser argue that society is tackling these complex questions, and assessing the tradeoffs of these benefits against the costs of reduced personal privacy. Despite the more relaxed attitude towards privacy, there is some concern that privacy law has fallen so far

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122 Id. at 54.
123 Id. at 350.
124 Id. at 54.
125 Id. at 112.
126 See id. at 3.
127 Id. at 230; U.S. CONST. amend. IV.
128 PALFREY & GASSER, supra note 120, at 61.
129 Id. at 57.
130 See id. at 56 (“The information that [individuals] reveal[... includes things like [their] cell-phone number[s], [their] home address[es], [their] birthdate[s], and other details... Facebook has also begun to work with outside parties, such as Blockbuster and online retailer Overstock.com, to track purchases elsewhere on the Web and to target advertising based on what users do online.”).
131 Id. at 80.
behind the advances in technology that our privacy is compromised. For many years, academics have argued that the state of privacy is a “horror show” for reasons to which we are all now pretty much desensitized. On the government surveillance aspect, leading consumer groups and technology companies have come together to form the Digital Due Process Coalition, which advocates for ECPA reform. Yet law enforcement authorities often argue for the most minimal standards in the face of these proposals, attempting to avoid the burden of the warrant requirement for accessing information in the “cloud,” in emails, and in mobile phone companies’ logs of our location.

At the same time, private companies and their practices have received considerable concern and attention, now leading to increasing interventions over privacy matters. The reason is that more and more companies are suffering data breaches, with over two hundred breaches taking place in the first half of 2012, with victims that include Yahoo!, LinkedIn, and eHarmony, to name a few. The consequences of breaches may not be known to companies or victims for weeks or months following their occurrence. The insecurity, and in some cases malfeasance of companies that collect massive amounts of data on consumers—marketing company Epsilon and data aggregator ChoicePoint are prominent examples, respectively—has elevated these worries.

One of the main concerns is the use of users’ information for behavioral, rather than contextual, advertising.

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136 Id.
137 See id.
advertising delivers ads to users based on the context of the website a user is visiting.\textsuperscript{140} For example, contextual ads might be related to cookware or Bon Appétit magazine if you’re visiting a recipe blog or other food-related website.\textsuperscript{141} Alternatively, behavioral advertising involves the use of a person’s web browsing history, habits, and interests to deliver ads that are more relevant for a particular person.\textsuperscript{142} So if you frequent culinary websites and by chance visit a literature website, behavioral advertising may result in you seeing ads for cookware or other food-related products on that topically unrelated website.\textsuperscript{143}

The efficacy of the U.S. privacy framework is subject to considerable debate. Many critics claim the current approach to privacy protection is inadequate, and that American corporations fail to place sufficient resources or effort into protecting customer privacy.\textsuperscript{144} Others, like Kenneth Bamberger and Deirdre Mulligan, argue that the conventional narrative does not account for the complexity of the current privacy climate, and of how policymakers and the private sector are doing a great deal to protect consumer privacy in spite of a patchwork legal framework.\textsuperscript{145} In 2011, Bamberger and Mulligan published the results of a survey of chief privacy officers of American corporations.\textsuperscript{146} Their survey found that despite ambiguity in the U.S. privacy regulatory framework and resistance on the part of lawmakers to enact more rigorous privacy laws, companies adopted an increasingly proactive approach to information privacy protection in the period of 1995 to 2010.\textsuperscript{147} The researchers discovered that the FTC’s growing engagement as a consumer privacy enforcer, and the resulting obligations from settlements, has influenced corporate practices in this area in

\textsuperscript{140} Id.  
\textsuperscript{141} See id. (providing an example of contextual advertising for “golf clubs or baseball tickets” on a sports website).  
\textsuperscript{142} See id.  
\textsuperscript{143} Id.  
\textsuperscript{145} Kenneth A. Bamberger & Deirdre K. Mulligan, Privacy on the Books and on the Ground, 63 STAN. L. REV. 247, 249, 253, 304–05 (2011).  
\textsuperscript{146} See id. at 261–63.  
\textsuperscript{147} Id. at 251.
positive ways. Indeed, over the past few years, the FTC has investigated and reached settlements with a number of companies over internet privacy violations, including Google, Facebook, MySpace, and Twitter, among others.

The FTC also promotes Do Not Track, which was first suggested by public interest groups and later advocated by the agency. A Do Not Track mechanism allows web users to control whether information is collected about their browsing activities or how that information is used. In one form, it is a tool in web browsers that enables a user to tell advertising networks to either not track a user’s web activities, or to not send that user ads based on their web activities. Other mechanisms involve the ad networks providing users an opportunity to opt out of behavioral advertising. The FTC argued for the creation and adoption of Do Not Track by the online industry, and called on advertising networks to commit to honor these requests from users.

With the support of the FTC, standards for a browser based mechanism are currently being worked on by a group of stakeholders brought together by the World Wide Web Consortium (W3C), an international standard setting body that works on internet issues. The FTC’s role in this area invited consternation from some members of Congress and advertisers, out of concern over the harmful effects Do Not Track may have on the online

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148 Id. at 273–75, 289–92.
151 See id.
152 See id.
153 See id. For example, the Network Advertising Initiative (NAI) provides a website for users to opt out of receiving behavioral advertising. Consumer Opt-Out, NAI, http://www.networkadvertising.org/choices (last visited Jan. 5, 2013). However, NAI doesn’t provide an opportunity to opt out of tracking altogether. Id.
advertising and publishing communities. However, the agency’s Chairman, Jon Leibowitz, argued that the agency’s Do Not Track policies would be voluntary and that the harm to advertisers and publishers would not be significant.

The proliferation of state data breach laws has also influenced companies. Forty-six states enacted data breach notification laws, and some have taken even more rigorous actions in the name of consumer privacy. In July 2012, California established a Privacy Enforcement and Protection Unit within the state’s Department of Justice. The unit has a far-reaching mandate to enforce privacy protections in an array of areas, including online privacy and data breaches. Given the different notification requirements across states, Congress attempted to provide businesses and consumers with some uniform guidelines. Three bills targeting data breaches passed out of the Senate Judiciary Committee in the summer of 2011, though increased attention to cyber security legislation obscured the focus on breach notification requirements. The legislation also required companies to promptly notify customers whenever breaches occur. The other two bills contained similar provisions, although they differed in their treatment of federal agencies and breach notification requirements.

The FTC and states are not the only actors in this space. The Commerce Department’s National Telecommunications &
Information Administration (NTIA) began a series of multi-stakeholder meetings in July 2012, with the goal of developing a code of conduct to enhance transparency and protection of consumer privacy with regard to mobile applications. NTIA Administrator Lawrence E. Strickling wrote that the code of conduct—to be developed by participating businesses, public interest and privacy advocacy groups, and technology experts—will provide consumers “clearer protections” and businesses “greater certainty.” After three meetings, and disagreements over procedure and substance, however, the likelihood that the NTIA meetings will produce a viable code of conduct is uncertain.  

Beyond American authorities, the other major players in online privacy policy are European institutions. The European Union and its members are known for a more “privacy-protective” regime. Some heap praise upon Europe’s approach to privacy, but the requirements are not without critics. According to a pair of studies, investment in internet advertising companies declined an estimated seventy-three percent in the wake of a 2002 privacy directive, and the effectiveness of online advertisements fell sixty-five percent in countries that had complied with a 2009 privacy directive.

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According to critics, these figures and the prospects of greater regulation on the horizon place the vitality of European member states’ online ecosystems in doubt.171

IV. MEDIA DIVERSITY AND PRIVACY

Despite the benefits of both media diversity and a pro-consumer privacy framework, because of the connections between personal information, online advertising, and online media, there can be a tension between diversity and some privacy regulation.

A. Advertising, Media, and the Internet Ecosystem

Advertising’s contributions to today’s internet and our economy as a whole are significant. Some have tried to quantify that impact. According to a report commissioned by the Interactive Advertising Bureau, an industry association of advertisers, media, and technology companies, “the advertising-supported internet sustains about $300 billion, or approximately 2 percent of the U.S. GDP.”172 Employment generated by the advertising supported internet continues to increase despite a weak economy—growing from 1,015,000 jobs in 2007 to 1,999,000 in 2011.173 And in the internet’s first fourteen years of existence, its advertising growth obliterated the advertising growth seen over the same initial fourteen-year period of both cable and broadcast television.174

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171 Laursen, supra note 170.
future are even more remarkable—spending on internet advertising, which current estimates place at $37 billion, is expected to exceed $55 billion by 2016.175

The internet’s advertising system comprises an array of different actors who rely on one another to achieve their aims. Publishers create content, operating news outlets, blogs, and all sorts of other websites.176 Believing that their audiences would not pay for their content and in order to attract larger audiences, publishers needed and continue to need a way to generate revenue beyond charging high fees to end-users.177 They turned to advertisers, who want to reach large audiences with their products and services and who seek to do so in a way that gives them the most return on their investment.178 These advertisers are often the same ones who supported traditional media outlets like television and newspapers.179 Now they use a different set of tools to get eyes on their messages.

One of the challenges for advertisers is determining how effective the ads are, and whether they could more cost-effectively advertise on cable, broadcast, or print, shifting their budgets away from internet properties.180 The top advertisers for online display ads by number of views include AT&T, Verizon, Google, Microsoft, Netflix, eBay, and Progressive.181 Meanwhile, the top one hundred advertisers of 2011 which include Procter & Gamble, Ford, AT&T, and American Express, spent $4.6 billion on internet marketing, representing 4.5 percent of those companies’ total ad expenditures, compared to spending on television and magazines, which was $36.2 billion and $8.9 billion respectively.182 Generic banner or display ads were the first iteration of online advertising.183

Difficulty in getting accurate data on ad views or “clicks” of those ads spurred the development of new tools.184 The now-ubiquitous

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176 Turow, supra note 39, at 37.
177 Id.
178 Id.
179 Id.
180 See generally id. (discussing how cost-effective internet advertising is compared to other media outlets).
183 Turow, supra note 39, at 37, 44.
184 Id. at 44.
cookie, a text file sent by websites to a person’s computer to store data about the user and their web activity, arose as a way to allow consumers to purchase more than one item at a time during online transactions.\textsuperscript{185} Cookies placed on the user’s computer linked with the actual site a user is visiting are known as first-party cookies, while those placed on a user’s computer that link with another site or platform (like ad networks) are known as third-party cookies.\textsuperscript{186} Social networks have been able to use these first-party cookies to their advantage. If a user has a cookie from Facebook on its computer, then every time the user goes to a site with a Facebook Like button (like CNN.com), Facebook records that visit, even if Facebook did not deploy an additional cookie to that particular site.\textsuperscript{187} Sites also let third-parties place cookies; if a third-party places cookies and gathers information from hundreds of “first-parties,” it can learn a great deal about a user’s web use.\textsuperscript{188}

As a result, cookies allow publishers and advertisers to know how many browsers are visiting a particular site, a valuable metric for evaluating an outlet’s effectiveness as well as for marketing purposes, and can also tell those parties a lot about a user’s web activity.\textsuperscript{189} With this information, ad delivery can be tailored to suit a particular person’s interests or activities, offering the viewer more relevant marketing while also offering the advertiser better chances of attracting the viewer to their site and making a purchase.\textsuperscript{190} Beyond targeting, cookies also allow for increased verification, and help determine the success of online ad campaigns.\textsuperscript{191}

“Ad networks” are collections of sites and advertisers that join together, through partnerships or have preexisting relationships, to share cookie information and advertising.\textsuperscript{192} The largest ad networks include AOL Advertising, the Yahoo! Network, the Google Ad Network, and Microsoft’s Media Network.\textsuperscript{193} Such networks

\textsuperscript{185} Id. at 47–48.
\textsuperscript{188} Busting the Cookies and Privacy Myth, ANANT GARG (Feb. 18, 2012), http://anantgarg.com/2012/02/18/busting-the-cookies-and-privacy-myth.
\textsuperscript{189} TUROW, supra note 39, at 49.
\textsuperscript{190} See generally Amit Rahav, Not All Cookies Are Created Equal -- Some Are Good For You, ADVERTISING AGE (Dec. 20, 2011), http://adage.com/print_article/231650 (discussing the benefits of advertising that is specific to the consumer based on tracking cookies).
\textsuperscript{191} Id.
\textsuperscript{192} TUROW, supra note 39, at 74.
reduce the transaction costs of publishers and advertisers in reaching agreements, and make online advertising much more targeted.\textsuperscript{194} Economic analysis would predict the creation of such networks: advertisers need to achieve “scale” in their marketing efforts—“the ability to purchase huge numbers of individuals who fit their targeting needs without the expensive chore of having to cherry-pick them across thousands of Web publishers.”\textsuperscript{195}

The major players in this advertising space are the usual suspects. Google plays a large role, earning over $15 billion in ad revenue, which amounts to 41.3 percent of all digital advertising revenues for 2012.\textsuperscript{196} When you add Microsoft, Yahoo!, Facebook, and AOL to Google, their combined revenue is $23.9 billion, or about two-thirds of digital advertising spending.\textsuperscript{197} Each of those companies, except for Facebook, has its own ad network that is responsible for much of this revenue.\textsuperscript{198}

Google, for example, is known for two products: AdWords and AdSense. AdWords is Google’s primary advertising mechanism, which allows businesses to advertise in Google search results or on other Google partner sites through the use of keywords selected and bid on by the business.\textsuperscript{199} AdSense is a free advertising tool for sites, which allows publishers to earn money for running targeted ads.\textsuperscript{200} Publishers benefit from AdSense, to the extent that they receive a sixty-eight percent share of the revenue spent by advertisers worldwide.\textsuperscript{201} Facebook, meanwhile, is working on new ways to put its massive base of one billion monthly users to work for advertisers.\textsuperscript{202} Other groups are active as well, with ad networks held by companies like adBrite and ValueClick allowing other small-scale publishers to get some of the ad revenue pie.\textsuperscript{203}

\begin{footnotesize}
\begin{enumerate}
  \item See Turow, supra note 39, at 74.
  \item Id. at 71.
  \item US Digital Ad Spending, supra note 175.
  \item Id.
  \item Turow, supra note 39, at 75.
  \item Turow, supra note 39, at 75.
\end{enumerate}
\end{footnotesize}
But because of the technical difficulty in coordinating ads across sites within a network and collecting data about that ad delivery through cookies alone, an additional tool called a web bug or web beacon is used to deliver more specific information about a browser’s history to ad networks and publishers.\textsuperscript{204} As networks increase in size, publishers are able to earn more money by offering bigger audiences for advertisers. This in turn has led to an increase in the number of businesses built on collecting and analyzing information about internet users.\textsuperscript{205} Ad exchanges are another tool, which allow publishers, advertisers, and networks to “buy and sell the right to reach anonymous individuals” nearly instantaneously.\textsuperscript{206}

In practice with publishers, these marketing tools work in different ways. For example, the progressive news site and blog, Huffington Post, works with advertising networks and pays a small staff of writers and editors who aggregate large amounts of news content.\textsuperscript{207} Huffington Post also relies on hundreds of unpaid bloggers who contribute to the site and to the broader political discourse.\textsuperscript{208} Techdirt, a blog that focuses on government policy, technology and legal issues, has adopted the philosophy that “ads are content,” and works with interested advertisers to develop compelling, interactive marketing that appeals to Techdirt’s large but specialized audience.\textsuperscript{209} Forbes.com is taking a similar approach to Techdirt, offering advertisers a “reputation tracker” which, combined with ad campaigns run on the Forbes website, helps client companies figure out how Forbes’s readers and the public view the company.\textsuperscript{210} There are alternative models for generating revenue and maintaining production, other than advertising, such as purely volunteer based outlets, non-profit

\begin{footnotes}
\footnotetext[204]{Id. at 60–61.}
\footnotetext[205]{Id. at 79–81.}
\footnotetext[206]{Id. at 79; see also Azam Khan, The Inner Workings of Ad Networks and Ad Exchanges, SOCIAL TIMES (Oct. 11, 2011, 9:45 AM), http://socialtimes.com/the-inner-workings-of-ad-networks-and-ad-exchanges_b80672 (detailing how ad exchanges work).}
\footnotetext[207]{Jason Linkins, How the Huffington Post Works (In Case You Were Wondering), HUFFINGTON POST, http://www.huffingtonpost.com/2011/02/10/huffington-post-bloggers_n_821446.html (last updated May 25, 2011); see TURROW, supra note 39, at 75.}
\footnotetext[208]{Linkins, supra note 207.}
\footnotetext[209]{Mike Masnick, Changing How We Handle Advertising and Sponsorships, TECHDIRT (Aug. 23, 2011), http://www.techdirt.com/articles/20110729/01343415309/changing-how-we-handle-advertising-sponsorships.shtml.}
\end{footnotes}
funded outlets, and hybrid models that receive support from a variety of sources.211 Meanwhile, new technologies are presenting publishers with other means of raising revenue, such as mobile apps and premium aggregation tools.212

B. Balancing Privacy and Diversity

At the moment, policy debates continue that pit publishers and advertisers on one side against some privacy advocates and government agencies on the other.213 These debates may have a significant impact on the future of the online ecosystem.214 As a general rule, publishers and advertisers oppose increased regulation and support the status quo—using cookies and other technologies to reach out to audiences and deliver targeted advertising.215 On the other hand, many privacy advocates want to increase consumer privacy protections by restricting the use of those technologies or (more often) providing more information and more control into the hands of consumers.216 They generally argue for more disclosure and choice, claiming that publishers and advertisers make it difficult to know what information is collected and shared—and sometimes harder to opt out of permitting this collection and sharing.217

216 Comments of the Ctr. for Digital Democracy and U.S. PIRG, supra note 213, at 37.
217 Id.; Comments of the Ctr. for Democracy & Tech., supra note 213, at 10–13; Gross, supra note 215.
One may be able to quantify the value of behavioral advertising, or estimate the value a person holds in the privacy of her web browsing activities, but it is much more difficult to place a dollar amount on the value of diversity of views and sources in online publishing. If society considers media diversity a value of the same stature as privacy, the potential consequence of stricter regulation must be carefully considered.

The effect of more rigorous privacy regulation, whether in the form of Do Not Track legislation or other proposals, is effectively to impose a tax on publishers—effectively increasing their costs or reducing their revenues.\textsuperscript{218} Publishers and advertisers argue that wholesale adoption of Do Not Track or other policies that restrict the ability of advertisers to place cookies on users’ computers will reduce online publishers’ value to advertisers.\textsuperscript{219} A study sponsored by the Network Advertising Initiative demonstrated that behavioral advertising is more lucrative for publishers, meaning they’ll likely have less revenue if those methods are curtailed by regulation.\textsuperscript{220}

Advertisers, who rely on the technologies discussed above to deliver relevant advertising to specific segment markets may shift an increasing share of their spending to other platforms, such as television, which can offer them more effective marketing opportunities (and less media diversity for Americans), or shift to less expensive and less accurate online marketing tools.\textsuperscript{221} While it is impossible to predict as an empirical matter, their spending levels on online advertising could possibly remain the same, at full one hundred percent of current spending, with advertisers shifting every cent to purchasing more of the less expensive contextual ads (and other ads) in the face of restrictions on behavioral targeting.\textsuperscript{222}

But, even if no ad spending moved away from online sources to other media, those contextual ad dollars are more likely to follow sites with larger audiences (because of transaction costs) and established reputations (as their readership profile is better known), rather than rushing into the pockets of smaller publishers.\textsuperscript{223}

Such changes will force publishers to find new ways to generate

\textsuperscript{218} See Comments of the Direct Mktg. Ass’n, Inc., to the Fed. Trade Comm’n (Feb. 18, 2010) [hereinafter Comments of the Direct Mktg. Ass’n, Inc.].

\textsuperscript{219} Id. at 18–19.

\textsuperscript{220} BEALES, supra note 214, at 17–18.

\textsuperscript{221} Comments of the Direct Mktg. Ass’n, Inc., supra note 218, at 23.

\textsuperscript{222} See id.

\textsuperscript{223} See generally id. (explaining the value of targeted advertising and its importance).
revenue—for example, through devoting far more space to (less precise) advertising or by charging for content. Some publishers with scale will undoubtedly survive, because of readership revenue from subscriptions, from the less expensive advertising, and from low production costs. These changes are likely to impact consumers negatively. The Online Publishers Association, for example, argued that “rules that prevent fair value exchanges of digital content for user data could harm consumer welfare by” forcing publishers to charge users for their content or produce less content altogether.

On the whole, however, at least some online publishers would simply make less money for the same content, and therefore have less to invest. This will likely reduce the availability of largely free content online because the decline in revenue could lead to a drop in the number of sites or in the number of free sites. That is, on the margin, users will see less diversity. This decline in diversity would reduce what the FCC called the “revolutionary” impact and contribution of blogs to “the provision of news, reporting, and civicly important information.”

As noted above, the advertising networks and exchanges connect advertisers and publishers with users. In doing so, they radically reduce costs for small-scale publishers to reach advertisers and generate revenue that allows publishers to continue operating. Most publishers—like the seventy million blogs that WordPress.com hosts—do not have Facebook’s resources to leverage for advertising purposes, and will face even tougher financial pressure. Often publishers don’t have much knowledge of third-party advertisers’ practices, and they lack the bargaining power necessary to influence those practices in any meaningful way. Although networks and exchanges are not perfect cornucopias for publishers, the sheer

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225 Comments of the Online Publishers Ass’n, supra note 213, at 10.
226 Id.
227 See Hagey, supra note 224 (discussing charging for digital content as an alternative to free content with targeted advertising).
228 WALDMAN, supra note 97, at 118.
229 Khan, supra note 206.
232 Comments of the Online Publishers Ass’n, supra note 213, at 9; TUROW, supra note 39, at 112.
number of publishers and space available for placing advertisements disadvantages publishers by lowering prices—some hope that additional marketing technologies and products can adjust the imbalance.\(^{233}\) Nevertheless, without these networks and marketplaces serving as a facilitator for transactions, small publishers would be unable to bear the high costs of finding and negotiating with advertisers, and would be unlikely to attract high-level marketing firms.

While there have been a range of privacy proposals, some proposals targeting third-party cookies have an added diversity cost.\(^{234}\) Regulating third-party advertising would advantage first-party advertising. This would likely result in consolidation on the publishing side. First, simply for the cost-effective reason of reduced transaction costs, advertisers will go to sites that have large audiences and equally large collections of information about those audiences.\(^{235}\) Next, as that revenue moves from networks and exchanges to larger publishers, smaller sites could be left fighting for loose change, and face the unenviable choice between ceasing to exist, turning to less lucrative advertising, or consolidating with larger publishers.\(^{236}\) This was a point echoed by the Information Technology and Innovation Foundation in their comments to the FTC: Do Not Track mechanisms that permit first-party cookies but overly restrict third-party cookies will favor companies with large databases like Facebook and Amazon at the expense of smaller publishers.\(^{237}\)

We cannot quantify this loss,\(^{238}\) and not everyone agrees that this effect is large.\(^{239}\) As noted, much of this discussion is empirical in nature, and it’s impossible to predict the outcome, however, we believe these outcomes are a reasonable extrapolation based on available research. Nevertheless, the existence of a tradeoff seems fairly clear and we do not believe it can be waved away without


\(^{234}\) Comments of the Ctr. for Digital Democracy and U.S. PIRG, supra note 213, at 19.

\(^{235}\) Kunz, supra note 231.

\(^{236}\) Id.


\(^{238}\) See Blagdon, supra note 230; Goldfarb & Tucker, supra note 237, at 1–2.

\(^{239}\) Comments of Elec. Frontier Found., to the Fed. Trade Comm’n (Feb. 18, 2011) [hereinafter Comments of Elec. Frontier Found.].
some evidence or thought. While aware of the benefits of cookies and other tracking technologies, some consumer advocates argue that third-party tracking of web users, including third-party behavioral advertising, is a grave privacy concern, and that users must be given more control over how their web activity information is collected and shared.240 Some dismiss the arguments of publishers and the advertising community regarding the decline in revenue that will result.241 The Center for Digital Democracy labeled concerns over economic costs of privacy restrictions (along with the studies supporting them, presumably) as “scare tactics.”242

Thus, efforts to protect the privacy of web users, no matter how well intentioned they might be, could have a noticeable effect on the media outlets that those same users rely on for information and interaction in the digital age.

V. CONCLUDING THOUGHTS

The widespread use of online publishing tools for creating and consuming content, and the furor over online advertising and privacy demonstrate that society greatly values both privacy and a vibrant online ecosystem. But, with both advertising representatives and privacy advocates being accused of undermining the W3C process, and Microsoft’s unilateral move of setting Do-Not-Track as the default in its Internet Explorer 10 browser,243 the prospects of a consensus outcome and wide agreement appear dim.244 Nevertheless, in the face of this reality, we believe there could be cause for optimism.

We began this article with two stories—the first, about information collection done in a way that could likely alienate people and “creep them out,” the second, about an experiment that educated both a publication and its readers about the balance between privacy and advertising. Ars Technica explained to readers the great cost it suffered from ad blocking—upon learning this, many agreed to not block ads on the site, and others even became

240 Comments of the Ctr. for Democracy & Tech., supra note 213, at 17.
241 Comments of Elec. Frontier Found., supra note 239, at 12.
We believe this type of dialogue is necessary in order for society to tackle this tension between privacy, advertising, and the diversity it sustains. The Ars Technica example demonstrates that once both sides make known their concerns and interests, people can make an informed choice about their privacy and their access to valuable information. Only when the wider community of publishers, web users, privacy advocates, and advertising industry representatives are able to have a similar conversation will we be able to make progress in this debate. We hope that happens soon and that the level of debate and explanation aims for the thoughtfulness of Ars Technica’s experiment and its aftermath.

In October, the advertising industry unveiled a $1 million marketing/lobbying effort aimed at educating the public about how the industry supports the internet and the sites users visit every day.246 This may be well-needed; advertisers and publishers can do a better job explaining to the public how the internet ecosystem works, why they believe publishers are able to provide free content through advertising, and why behavioral advertising is crucial to sustaining the current model. Likewise, privacy advocates and government officials can and should also make their case to the public for limiting behavioral advertising, addressing some of the concerns of publishers and some of the benefits of sharing and analyzing personal data.

Users could better exercise their choices if both sides do a better job of informing them the costs and benefits of competing policy frameworks. We encourage them to do so.

245 Fisher, supra note 16.
246 Id.