of $960 million, 69 percent of which is controlled by multinational companies.[159] Although the country has enacted the Generics Law of 1998, a majority of doctors still continue to prescribe branded drugs without indicating the generic name, effectively preventing Filipinos from purchasing a cheaper brand.

The main reason of the pharmaceutical companies for respecting patent rights and keeping drug prices high is the promotion of research, development, and innovation.[160] Commentators have noted that stronger patent protection does not always result in innovation for drugs essentially needed by developing and least-developed countries.[161] It has also been shown that there is a strong link between the expansion of profit opportunities and increase in research and development investments.[162] These divergent points of view reveal the balancing act that the government must face in order to respond to the interests of affected parties.

It must be emphasized that Members can adopt measures necessary to protect public health and nutrition as long as these measures are consistent with the TRIPS Agreement. It has also been recognized that the TRIPS Agreement provide flexibility and its interpretation and implementation should be supportive of the Member's right to protect public health and promote access to medicines.[163] Thus, in deliberating over the Roxas Amendment, legislators must be aware of these basic principles and flexibilities, and utilize them to create a regime that sufficiently addresses the needs of the Filipino people.

159. *Philippines: A tight fight with titans Thursday*, PHARMABIZ.COM, Apr. 22, 2004, *available at* http://www.pharmabiz.com/article/detnews.asp?articleid=21492&sectionid=50&z=y (last accessed Oct. 9, 2006).

160. *See Pfizer sues PITC*, *supra* note 10.

161. Ruth Mayne, *The TRIPS Agreement and Access to Medicines: an NGO Perspective*, *in* THE WTO AND DEVELOPING COUNTRIES 155 (Homi Katrak & Roger Strange, eds., 2004).

162. WHO-WTO Study, *supra* note 121, Box 14.

163. Doha Declaration, *supra* note 15, ¶ 4.

Propertization of Personal Information: A Means of Privacy Protection for the Modern Individual

*Carissa Agnes L. Olmedo**

Now that intellectual production has become a key economic sector, people have finally begun to realize that information, like time, is money. When they consider the claims of law enforcers, creditors, insurers, direct marketers and other information-intensive industries, they are no longer weighing an amorphous "feel good" interest in privacy against efficiency, savings, jobs, and investment-backed expectations. Now there is hard cash on both sides of the equation and that alters the political calculus. The populace may, in fact, now be ready to press for a new order.

– Rochelle Cooper Dreyfuss[1]

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1. Rochelle Cooper Dreyfuss, *Warren and Brandeis Redux: Finding (More) Privacy Protection in Intellectual Property Lore*, 1999 STAN. TECH. LAW REV. VS 8 (1999).

I. INTRODUCTION

In the 1980s, world-renowned singer Madonna, popularized the song "Material Girl." The song became a big hit and was received with good humor, with people thinking how appropriate it was considering the quirkiness of the singer. The song was interpreted by many simply as the story of a girl with an insatiable desire for consumer goods. Now, more than two decades later, the song is no longer as amusing, yet it still rings true. The globe has become a commercial world where everything is traded as commodities—including personal information.

Skeptics may reject the idea that personal information is being commercialized, but a person need only peruse his mail to see numerous advertisements of products directed at catering to his preferences, mysteriously interspersed with bills requiring payment. The fact is data about individuals are being collected by different persons everyday, either for their own business purposes or for purposes of sale to another company.

In a person's daily activities, there are many examples of unwanted collection of personal information which go unnoticed. One such instance is the collection of contact information gathered when a person contracts for the subscription of products or services. In July 1997, newspapers all over the United States reported that America Online had contracted to sell the telephone numbers of its 8.5 million subscribers to telemarketers. Although America Online had posted notice earlier advising subscribers of its upcoming change in policy, many subscribers understood the import of the change only after they read the papers. America Online subsequently abandoned its plans after receiving adverse reactions from its subscribers.[2] Another example is the collection of information in medical-related transactions. In February 1998, the Washington Post reported that the Consumer Value Stores (CVS) Pharmacy chain was sending collected confidential prescription information to Lenses, a Massachusetts computer database marketing company. Lenses tracked down patients and sent them letters on CVS Pharmacy letterheads to remind them to refill their prescriptions or to recommend new products appropriate for their respective medical conditions. While in the beginning the scheme gave the impression of good service, customers' reactions indicated otherwise. Consumers were outraged and the incident became a public relations disaster.[3] In 1999, the New York Times published a letter to the editor written by a woman whose

2. Jessica Litman, *Information Privacy/Information Property*, 52 STAN. LAW REV. 1283 (2000).

3. *Id.*

husband was working for a baby formula company. According to the letter, the company bought the names of prospective consumers (that is, pregnant women) from doctor's offices; these doctors even believed that they were doing their patients a favor by releasing the latter's personal information.[4]

There are also examples of the collection of personal information which are initially authorized but later become unsolicited because they are subsequently divulged to unauthorized third parties. This type of collection is prevalent in the field of technology. Specific examples of these are the VeriChip and the wOzNet. The VeriChip is a microchip implantable in the body which stores six lines of text and functions as a personal identification number. It emits a 125-kilohertz radio signal to a special receiver which can decipher the text. According to its developers, the purpose of the VeriChip is to allow the person carrying the implanted chip to relay information about himself non-verbally and passively. The use of VeriChip is particularly advantageous in the medical field. It can be linked to computers to provide physicians rapid access to information regarding medical histories of patients in emergency situations where patients are physically unable to communicate and the injury requires a treatment where time is of the essence. The VeriChip also presents advantages in the field of commerce where the chip can be used to prevent fraud in financial systems such as in the withdrawal of money through automated teller machines.[5] The second example, wOzNet, is similar to VeriChip in many respects. It is also a microchip which stores personal information. However, instead of being implantable, it is a wearable device. It uses the global positioning satellite system and forms a wireless data network which has the potential to track objects far beyond the reach of any individual's base station, giving it a wider area coverage than the VeriChip.[6]

These new technologies do not seem to pose any problem because of their beneficial uses. However, this is because we are operating under the premise that the microchip in question is in the hands of the individual to whom the information pertains. The facts become more problematic when the microchip falls into the hands of a third person because there is no way of ensuring that the information contained therein will be used by the possessor judiciously, even granting that he has a right to use it in the first place. It becomes even more complicated when the acquisition of the microchip is through purchase because ownership of both the tangible microchip and the intangible information stored therein need to be determined. Is the manufacturer of the microchip also the owner of the

4. *Id.* (citing Jillayne Arena, *Letter to the Editor*, N.Y. TIMES G5 (Nov. 25, 1999)).

5. Paul M. Schwartz, *Privacy and Personal Data*, 111 HARV. L. REV. 2055 (2004).

6. *Id.* at 2062-64.

information stored within it (even if the information does not pertain to him), consequently giving him the right to sell it? Does a third person acquire ownership of both the microchip and the information if he purchases it from the manufacturer? What are the respective rights of the manufacturer, the individual to whom the information pertains, and the purchaser?

The last and most prevalent example of collection of personal information is market research conducted by marketing firms. This type of collection is very common both in the United States and in the Philippines. Information is gathered from individuals through focus group discussions or surveys and sold to companies sometimes in its raw form but, more often, as processed data, like consumer demographics.

It is evident from the above examples that personal information is becoming an important commodity. Due to this, it has become significant to point out that the collection and divulgence of personal information is inextricably linked to how much an individual values his right to privacy. Theoretically, a person who highly values his privacy is less likely to disclose personal information voluntarily as compared to those who value their privacy less. However, this may not necessarily be true when other factors are included in the equation, such as when benefits are granted to persons who share their personal information. According to a survey in the United States, 86% of Americans are willing to disclose personal data to businesses and to allow the latter to use these data as long as they obtain a discernible benefit from such disclosure, such as money, free products, or services.[7] While no similar data exists about Filipinos, it is highly probable that Filipinos espouse the same attitude.

Ople v. Torres[8] proves that Filipinos value the right to privacy highly, particularly privacy with regard to personal information. However, the current legal system leaves a void as to how this sacred right may be sufficiently protected, considering current usage. Personal information is being treated as a commodity, giving opportunities for the violation of privacy rights, yet it does not enjoy the protection of other similar commodities considered as property. Legislators always have the option of creating new laws to effectively address this problem; but creating regulatory laws necessarily entail the creation of regulatory bodies to oversee implementation. Such a solution may prove to be more burdensome than helpful to our society considering current government fiscal crises.

7. Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. LAW REV. 1125 (2000) (citing *Web Privacy? Let's Make a Deal*, Palm Beach Post (Aug. 26, 1999)).

8. Ople v. Torres, 293 SCRA 141 (1998).

This Essay aims to fill the legal void by suggesting that personal information possess the attributes of property rights and, thus, should be treated as such. Part II of this Essay discusses the recognition of personal information as a constitutionally-protected zone of privacy. It also discusses the insufficiency of current privacy statutes in fulfilling the constitutional mandate. Part III introduces a property rights solution to the protection of personal information and illustrates the nexus between property and privacy rights. Part IV discusses three models of personal information as property rights. Lastly, Part V concludes the Essay.

II. PERSONAL INFORMATION AND THE RIGHT TO PRIVACY

A. The Constitutional Right to Privacy

In the 1968 case of *Morfe v. Mutuc*,[9] the Philippine Supreme Court adopted the ruling in the American case, *Griswold v. Connecticut*,[10] that there is a constitutional right to privacy: "[t]he right of privacy as such is accorded recognition independently of its identification with liberty; in itself. It is fully deserving of constitutional protection."[11] This doctrine of protection of privacy was further reinforced in the 1987 Constitution which contains explicit provisions enshrining a person's right to privacy, such as: the due process clause — which only allows deprivation of life, liberty, or property if done with due process,[12] the provision protecting the privacy of communication and correspondence, and the exclusionary rule,[13] the provisions against unreasonable searches and seizures,[14] the right against self-incrimination,[15] and the right of association.[16]

While the entitlement to Constitutional protection of the right to privacy is settled and undeniable, there is difficulty in determining the nature of the right protected and the scope of protection. This is due to the vague and somewhat incomprehensible definition of the right to privacy and the different zones of privacy to which the protection extends.

9. Morfe v. Mutuc, 22 SCRA 424 (1968).

10. Griswold v. Connecticut, 381 U.S. 479, 14 L. ed. 2d 510 (1965).

11. *Morfe*, 22 SCRA at 444-45.

12. PHIL. CONST. art III, § 1.

13. PHIL. CONST. art III, § 3.

14. PHIL. CONST. art III, § 2.

15. PHIL. CONST. art III, § 17.

16. PHIL. CONST. art III, § 4.

1. The Right to Privacy in General

Privacy, defined as "the right to be let alone," was first used by Thomas Cooley in his treatise in tort law.[17] According to Clinton Rossiter, privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, in defiance of all pressure of modern society.[18]

> [It] seeks to erect an unbreachable wall of dignity and reserve against the whole world. The free man is a private man, the man who still keeps some of his thoughts and judgments entirely to himself, who feels no overriding compulsion to share everything of value with others, even to those he loves and trusts.[19]

In the words of Justice Isagani Cruz, the right to privacy is the guarantee of man to "have full rein to all his natural attributes, to expand the horizons of his mind, to widen the reach of his capabilities, to enhance those moral and spiritual values that can make his life more meaningful and rewarding."[20] In *Pavesich v. New England Life Insurance Co.*,[21] the Court stated that the right to privacy had its foundations in the instincts of nature. The right was said to be embraced in the Roman concept of justice, which had put emphasis on free volition, characterized as "immutable" such that no authority can either change or abolish it.

Not all acts of individuals are covered by the right to privacy. In *Bowers v. Hardwick*,[22] where the United States Supreme Court held that homosexual acts are not among the acts included in the right to privacy, the dissent of Justice Blackmun which was adopted as the acceptable doctrine in later rulings is worth noting. Justice Blackmun said that contrary to the general view, privacy rights are protected "not because they contribute in a direct and material way, to the general public welfare, but because they form so central a part of an individual's life. The concept of privacy embodies the moral fact that a person belongs to himself, and not others nor society as a whole."[23] The implication of this is that the scope of the right to privacy is

17. IRENE R. CORTES, THE CONSTITUTIONAL FOUNDATIONS OF PRIVACY 15 (1970).
18. *Id.* at 2.
19. *Id.*
20. ISAGANI CRUZ, CONSTITUTIONAL LAW 99-100 (1991).
21. Pavesich v. New England Life Insurance Company, 122 GA 190 (1905).
22. Bowers v. Hardwick, 478 U.S. 186 (1986).
23. *Id.* Blackmun, J., dissenting, 478 U.S. 199, 204 (1986).

limited to matters which contribute to an individual's right to self-definition. The right to privacy is a concept formulated in order to accommodate a person's right to make choices and decisions autonomously and at the same time, balance the power of the State to provide laws which limit such autonomy of the individual to preserve similar autonomy for all members in society.

2. Personal Information as a Constitutionally-Protected Zone of Privacy

Since the right to privacy does not encompass all matters, it is important to determine whether personal information is considered as one of the zones of privacy. Surely, personal information involves an individual's right to self-definition, however, a definitive ruling on the matter is in order.

In *Ople v. Torres*,[24] the question of whether personal information is a part of the constitutionally-protected right to privacy was answered by the Supreme Court definitively. The case involved an administrative order issued by the President providing for a national identification system which entailed the collection of personal information and the employment of biometrics for government use. The Supreme Court held (by a vote of 7-6) that Administrative Order 308 is violative of the Constitution mainly for two reasons: (1) the President cannot infringe on the power of the Legislature by enacting a law in the guise of an administrative order, and, more importantly, (2) the administrative order in question facially violates a person's right to privacy.[25] The Supreme Court derived the right to the protection of personal information from Constitutional provisions mentioned earlier as well as statutory provisions — specifically, sections under the Rules of Court on privileged communications — which have the force and effect of law.[26] The Court likewise held that while data may be gathered for gainful and useful government purposes, the existence of this vast reservoir of personal information constitutes a covert invitation for misuse which should be avoided.[27]

Even as early as 1977, the right to have personal information protected as part and parcel of the right to privacy was already recognized in *Whalen v. Roe*.[28] This case involved a New York statute which provided for the

24. Ople v. Torres, 293 SCRA 141 (1998).
25. *Id.* at 153.
26. *Id.* at 158.
27. *Id.* at 161.
28. Whalen v. Roe, 429 U.S. 589, 51 L.ed. 2d 64 (1977).

collection of personal information from people who obtained drugs pursuant to a doctor's prescription. The data collected was stored in a centralized computer record. While the Court ruled that the collection of personal data is valid, it did not, however, hold that personal data should not be protected. In arriving at its decision, the Court stated that *an individual has an interest in avoiding disclosure of personal matter because it is an aspect of the right to privacy.* The Court justified its decision in favor of the validity of the statute by saying that while the right to privacy should be protected, the statute in controversy did not violate the Constitution because ample safeguards were provided in the statute itself: (1) the statute was the product of an orderly and rational legislative decision; (2) it was narrowly-drawn and contained numerous safeguards against indiscriminate disclosure; (3) it laid down the procedure for the gathering, storage, and retrieval of information; (4) it enumerated who were authorized to access the data; and (5) it prohibited public disclosure of the data by imposing penalties for its violation.[29]

B. Insufficiency of Current Privacy Statutes for the Protection of Personal Information

The right to privacy and its protection is not only found in the Constitution, it also has international bases and local statutory foundations. In the international sphere, Article 17 of the Covenant on Civil and Political Rights[30] provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy." The Universal Declaration of Human Rights[31] contains a similar provision. In addition to these international treaties, foreign legislations have also recognized the right to privacy and, in particular, the privacy of personal information. At the forefront are the Council of Europe's 1981 Convention for the Protection of Individuals with Regard to the Automatic Processing of Personal Data, and the Organization for Economic Cooperation and Development Guidelines on the Protection

29. *Id.*

30. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 (signed for the Philippines on Dec. 19, 1966. Ratified by the Philippines on Oct. 23, 1986). Article 17 provides:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> Everyone has the right to the protection of the law against such interference or attacks.

31. Universal Declaration of Human Rights, G.A. Res. 217 A (III), Dec. 10, 1948. (1948).

of Privacy and Transborder Flows of Personal Data. Other statutes include Hong Kong's Data Ordinance, Quebec's Act Respecting the Protection of Personal Information in the Private Sector, the United States Electronic Communications Privacy Act of 1986, United States Video Privacy Act of 1994, and the United States Driver's Privacy Protection Act of 1994.

In the local sphere, *Ople v. Torres* gives an enumeration of statutes pertaining to the right to privacy in general as well as several statutes specific to personal information. The Revised Penal Code[32] contains provisions protecting the right to privacy in general, and sometimes, incidentally, the zone of personal information as well. Examples of such provisions are: the violation of secrets by an officer,[33] the revelation of trade secrets,[34] and trespass to dwelling.[35] Not mentioned in the case but also worth mentioning are the provisions on the violation of domicile,[36] the malicious obtention of search warrants,[37] the search of domicile without witnesses,[38] the revelation of the secrets of a private individual by a public officer,[39] the opening of closed documents,[40] the breaking of the seal of public documents by an officer,[41] and libel.[42]

There are also special laws with the same purpose of protecting different spheres of privacy rights, such as the Anti-Wiretapping Act,[43] the Secrecy of Bank Deposits Act,[44] and the Intellectual Property Code.[45] Certain sections

32. An Act Revising the Penal Code and Other Penal Laws (1932) [REVISED PENAL CODE].

33. *Id.* art. 299.

34. *Id.* art. 292.

35. *Id.* art. 280.

36. *Id.* art. 128.

37. *Id.* art. 129.

38. REVISED PENAL CODE, art. 130.

39. *Id.* art. 230.

40. *Id.* art. 228.

41. *Id.* art. 227.

42. *Id.* art. 353.

43. An Act to Prohibit and Penalize Wire Tapping and Other Related Violations, and for Other Purposes, Republic Act No. 4200 (1965).

44. An Act Prohibiting Disclosure Of or Inquiry Into, Deposits with Any Banking Institution and Providing Penalty Therefor, Republic Act No. 1405 (1955).

45. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for

in the Rules of Court likewise recognize the privacy of certain information.[46] With regard to statutes specific to personal information, Commonwealth Act No. 591 penalizes with imprisonment and fine the disclosure by any person of data furnished by the individual to the National Statistics Office.[47] Republic Act No. 1161 likewise prohibits public disclosure of Social Security Service employment records and reports.[48]

From the foregoing, it is evident that there is a glaring absence of a single comprehensive law dealing with the protection of the privacy of personal information. This absence is further emphasized by the Court in its *Ople v. Torres* ruling by stating that "our present laws [do not] provide adequate safeguards for a reasonable expectation of privacy."[49] The Court explained that while there are provisions of laws specific to personal information, these provisions apply only to records and data with the National Statistics Office and the Social Security Services Office; it is not clear whether they may be applied to data kept by other government agencies.[50] Moreover, the protection under these laws as well as under the provisions which may be found in the Constitution under the Bill of Rights, extends only to violations and abuses committed by the government; it does not cover those committed by private individuals.

The law probably closest to addressing the problem regarding the insufficiency of the protection of informational privacy is the Civil Code,[51] in Articles 26, 32, and 19 thereof, specifically. Article 26 provides:

> Every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief:
>
> 1. Prying into the privacy of another's residence;

Other Purposes [INTELLECTUAL PROPERTY CODE], Republic Act No. 8293 (1988).

46. Rules of Court, Revised Rules on Evidence, Rule 130 (C), § 24 (1997).

47. An Act to Create A Bureau of the Census and Statistics to Consolidate Statistical Activities of the Government Therein, Commonwealth Act No. 591, § 4 (1940).

48. Social Security Law, Republic Act No. 1161, as amended, § 24 (c) and § 28 (e) (1954).

49. Ople v. Torres, 293 SCRA 141; 165 (1998).

50. *Id.*

51. An Act to Ordain and Institute the Civil Code of the Philippines [NEW CIVIL CODE], Republic Act No. 386 (1950).

> 2. Meddling with or disturbing the private life or family relations of another;
>
> 3. Intriguing to cause another to be alienated from his friends;
>
> 4. Vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition.

At first glance, Article 26 seems to provide ample protection. Nevertheless, a closer look at the provision shows that the law only applies, first, to the protection of a person's dwelling, second, to family relations and acts in one's private life, third, to acts causing alienation from friends, and lastly, to acts which mock a person's condition or status. While the article answers the problem of the lack of safeguards against a private individual, it does not contemplate protection outside of the enumerated context; it certainly does not contemplate the current scenario where personal information often finds itself—a situation where personal information is used in a commercial context or for profit.

On the other hand, Article 32 provides:

> Any public officer or employee, or any private individual, who directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs any of the following rights and liberties of another person shall be liable to the latter for damages:
>
> x x x
>
> 9. The right to be secure in one's person, house, papers, and effects against unreasonable searches and seizures;
>
> x x x
>
> 10. The privacy of communication and correspondence;
>
> x x x

In any of the cases referred to in this article, whether or not the defendant's act or omission constitutes a criminal offense, the aggrieved party has a right to commence an entirely separate and distinct civil action for damages and other relief. Such civil action shall proceed independently of any criminal prosecution (if the latter be instituted) and may be proved by a preponderance of evidence.[52] The indemnity shall include moral damages.[53] Exemplary damages may also be adjudicated, however, the responsibility

52. Rules of Court, Revised Rules of Criminal Procedure, Rule 111, § 3 (2000).

53. NEW CIVIL CODE, art. 32.

herein set forth is not demandable from a judge unless his act or omission constitutes a violation of the Penal Code or other penal statute.[54]

This article provides protection against abuses committed by both private individuals as well as public officers. It makes violators liable for damages and allows the filing of an independent civil action even if the violators are also liable under penal laws. However, the criticism against Article 32 is that it only effectively protects physical and corporeal objects (that is, the person, house, paper and effects, and the letter containing the correspondence) and does not include personal information, which is intangible.

Because of the inadequacy of Article 26 and Article 32, relief is often sought through the principle against abuse of rights embodied in Article 19. This Article provides that:

> Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.

While Article 19 certainly covers the protection of personal information, very few people are comforted due to the vagueness of the terms "justice," "due," and "good faith." There is no hard and fast rule in determining what constitutes justice and good faith, as well as what is due a person. The definition of a violation is left to the discretion of the Court and the effect is that people have to file a judicial action first before they can be sure that there is actually a violation of their right.

The absence of a specific privacy statute regarding personal information has been a dilemma, not only for the Philippines, but for other countries as well. In fact, the United States Congress has been active in making legislation to protect the privacy of their citizens with regard to personal information.[55] It has included as part of ordinary legislation the commercial context of personal information. The U.S. Video Privacy Act, for example, was enacted as a response to the outrage following a U.S. case where a congressional candidate's video rental preferences were publicized without his consent. Their Driver's Privacy Protection Act, on the other hand, was promulgated in recognition of the involuntary nature of data collection for

54. *Id.*

55. *See generally* U.S. Congress deliberations prior to enacting the following statutes: US Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 (1986); Video Privacy Protection Act, 18 USC § 2710 (1994); Driver's Privacy Protection Act of 1994, 18 USC § 2721 (1994).

driver's licenses and the negative consequences arising from widespread market availability of such data.[56]

Information is the "lifeblood that sustains political, social, and business decisions as the institutions administer to the needs of a widely divergent society."[57] It is very important for the smooth flow of different transactions in the society. Since information provides many benefits, it is prone to unwanted collection, misuse, and abuse. It then logically follows that if personal information regarding an individual is collected, such individual should be given adequate protection for violations of his informational privacy rights. There is protection when the individual is given control to determine what, how much, to whom, and when information about him shall be disclosed.[58] Unfortunately, in a commercial context, this control over personal information is very limited and is still susceptible to abuse in a variety of ways.

On the theoretical level, there are two ways by which injury may be inflicted on an individual. The first is by disseminating information regarding one's present or past actions or associations to a wider audience than originally anticipated (deprivation of access and control). The second is by introducing factual contextual inaccuracies which create an erroneous impression of the individual's actual conduct or achievements in the minds of people to whom such information is exposed (deprivation of accuracy control).[59] These evils call for legal safeguards to protect personal information.

Different jurisdictions have different views and suggestions on how personal information may be best protected. One approach is to enact legislation prohibiting the collection of certain classes of data. Another calls for the creation of an independent agency with authority to regulate the classes of information which may be recorded and stored and to enforce a congressional standard for ensuring accuracy of stored information.[60] However, despite these suggestions, there seems to be no single viable solution for the Philippines because the subject matter covered by

56. *Id.*

57. ANNE BRANSCOMB, WHO OWNS INFORMATION? FROM PRIVATE TO PUBLIC ACCESS 44 (1994).

58. CORTES, *supra* note 17, at 7.

59. *Id.* (citing Arthur Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information Oriented Society*, 67 MICH. LAW REV. 1089 [1969]).

60. *Id.* at 15.

informational privacy is too broad — it includes breaches of technology as well as issues on behavioral researches or statistical surveys. Problems arise even in the simplest act of answering survey questionnaires when the individual's anonymity is divulged and the information obtained is used for purposes other than that which he had contemplated and to which he had consented.[61] In such instance, it becomes very evident that the privacy problem is real.

III. The Property Rights Solution

A. Introduction of a Property Rights Regime over Personal Information

Presently, personal information about individuals is being collected and introduced into the world of commerce. The market incentive for firms to collect and process personal data is very high. Data about users are not only useful in assessing how a firm might improve service for its customers but it has also become a *key commercial asset*, which firms use both for internal marketing purposes and for licensing to third parties.[62] At first glance, nothing seems to be amiss with this current practice. The problem arises once the incentives for acquisition of personal information are taken into the equation. When a company collects personal data, the company gains full benefit of using the information in its own marketing efforts or in the fee it receives when it sells the information to third parties. The company, however, does not suffer losses from the disclosure of private information.

> Because customers often will not learn of [the fact] of disclosure, they may not be able to discipline the company effectively. In economic terms, the company internalizes the gains from using the information but is able to externalize some of the losses [giving it] a systematic incentive to overuse it.[63]

Although this problem may be effectively addressed by regulatory approaches or by the creation of specific legislation,[64] there is difficulty in coming up with a single comprehensive law dealing with all the privacy issues.

61. *Id.* at 10.

62. Samuelson, *supra* note 7, at 1126.

63. *Id.* at 1127 (citing PETER SWIRE & ROBERT LITAN, NONE OF YOUR BUSINESS: WORLD DATA FLOWS, ELECTRONIC COMMERCE, AND THE EUROPEAN PRIVACY DIRECTIVE [1998]).

64. This is actually the current trend in Europe. Most countries are already adopting the OECD Guidelines in forming their local laws regarding the matter.

The author of this Essay therefore posits that personal information be recognized and considered a property right to which the laws on property apply.

1. In Brief, the Concept of Property

In order to determine whether personal information may be considered a property right, it is important to determine the nature of property. Property, as a narrow concept, denotes a group of rights inhering in a citizen's relation to physical things — as a right to possess, use and dispose of it.[65] The present usage of the term "property," however, has evolved to encompass everything which is peculiar or proper to any person — that which belongs to one. It is an aggregate of things or rights which are protected by the government[66] and extends to every species of valuable right or interest.[67] More specifically, the broad concept denotes ownership — the unrestricted and exclusive right to a thing, the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it (note that ownership is considered as the highest right a man can have to anything and refers to rights which in no way depend on another man's courtesy.).[68] The word "property" is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal. It includes everything that has an exchangeable value or goes to make up wealth for the estate. It extends to every valuable right and interest and includes every action of one's property rights damaged by actionable wrong.[69] According to Jeremy Waldron, property should be viewed as a "system of rules governing access to and control of material resources."[70] In a world of scarce resources, property rules help (and Hobbes would say property rules are necessary to) determine how material resources are allocated.[71]

65. Cereghino v. State By and Through State Highway Commission, 230 Or. 439, 370 P.2d 694, 697 (1962).

66. BLACK'S LAW DICTIONARY 1216 (citing Fulton Light, Heat and Power Co. v. State of New York, 200 N.Y. 400 [1911]).

67. *Id.*

68. *Id.*

69. *Id.*

70. JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 1 (1998).

71. *Id.*

To a private individual, the essence of property is private ownership. The enjoyment of property is premised on the fact that the property is exclusively owned, giving the owner a right to enforce actions necessary for the use and enjoyment of such property. The current trend in different jurisdictions is to give persons the right to own a vast array of private property as long as sufficient protection is given to the concomitant interest of the State and other members of the community.

In this regard, market economies forward four competing justifications for private property ownership. The first justification is John Locke's natural rights theory which states that one owns property in resources when he has mixed his labor with nature. According to Locke, though the earth and all inferior creatures are common to all men, *every man has a property in his own person*. This is something that nobody has any right to but himself. The labor of his body and the work of his hands are his. Whatever he removes out of the state that nature has provided and mixes with his labor is joined into something that is his own and thereby makes it his property.[72] The second theory is Georg Wilhelm Friedrich Hegel's idea of necessity—private property rights over some resources are necessary to ensure proper development as a person.[73] Another theory is related to John Rawls' notion of distributive justice: the community has obligations to individuals which require the fair disbursement of common advantages (thus private ownership) and sharing of common burdens.[74] The last justification is found in the principles of utilitarianism.[75]

2. Constitutional Protection to Property

The 1987 Constitution contains several provisions regarding the use and protection of property and property rights. It emphasizes the social and economic functions of property, which are the *raisons d'etre* for protecting property rights. According to the fundamental law, "[t]he maintenance of peace and order, the protection of life, liberty, and property, and promotion of the general welfare are essential for the enjoyment by all the people of the blessings of democracy."[76]

72. *Id.* at 3.
73. *Id.*
74. BLACK'S LAW DICTIONARY 864.
75. *Id.*
76. PHIL. CONST. art II, § 5.

> The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.[77]

The Constitution also mentions that the State shall regulate the acquisition, use, and disposition of property and its increments to enhance human dignity.[78]

Because property and property rights bear a direct link to a person's economic and social well-being, the Constitution in its Bill of Rights provides that "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."[79] Protection is not limited to tangible property but extends to intellectual property, as can be seen in Article XIV, Section 13, which states that, the "State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law."[80]

3. Benefits of a Property Regime

It is essential to consider personal information as a property right because there are many benefits which can be derived from such a model. Firstly, a property regime can offer protection to personal data without requiring the establishment of substantial government bureaucracy to oversee data protection. This results in lower costs for the government.[81] Secondly, a property rights model will force companies to internalize the social costs of widespread collection and use of personal data presently borne by others.[82] More importantly, propertization of personal information will give individuals effective control over the use and enjoyment of personal information by giving them control in the determination of whom, when, and for what purposes their information will be disclosed. Propertization of personal information will also establish a right in individuals to sell their

77. PHIL. CONST. art XII, § 6.
78. PHIL. CONST. art XIII, § 1.
79. PHIL. CONST. art III, § 1.
80. PHIL. CONST. art XIV, § 13.
81. Samuelson, *supra* note 7, at 1135.
82. *Id.* at 1128.

personal data, to capture some of the value their data have in the marketplace.[83] It will permit individuals to negotiate with firms regarding the use of their personal data and will force businesses to internalize a higher proportion of the societal costs of data processing,[84] encouraging firms to collect or process less personal data than they currently do. Lastly, a property rights regime will encourage firms to make less wasteful investments in personal data and persuade them to develop higher quality databases to ensure individual consent of those who wish to sell information. These better quality databases will in turn remove the latter's motivation to lie to protect their privacy, thereby contributing further to the quality of the databases.[85] The net effect of a property regime over personal information would be better protection of a person's right to privacy.

B. The Nexus Between the Right to Privacy and Property Rights

Initially, a property rights solution may seem to have only a remote connection to the protection of privacy rights with regard to personal information, making it difficult to accept a property rights solution. However, it is not very hard to establish the nexus between property rights and the right to privacy. Once this link is apparent, a property rights solution is not as unimaginable as one may originally consider.

Historically speaking, the right to privacy originated from the right to property. This is clearly illustrated in England where privacy was initially considered not as a distinct personal right, but an element of the right to property. The right to privacy was one of the main features — and was not independent — of the right to property. In fact, the right to privacy was actually never recognized as having a sphere of its own until 1890.[86] The first measures intended to protect the right to privacy related to protection of a person's property, such as mail, letters, the home, and other personal paraphernalia. An example of this is England's Postal Act, enacted in 1710 to prohibit the opening of mails and other means of communications except upon lawful warrant.[87] English jurisprudence is also replete with examples of the protection of privacy rights through the protection of property rights.

83. *Id.* at 1128.

84. *Id.* at 1125.

85. *Id.* at 1133.

86. Mary Chlopecki, *The Property Rights Origins of Privacy Rights*, http://www.libertyhaven.com/personalfreedomissues/privacyorencryption/originsprivacy.html (last accessed Sep. 5, 2006).

87. *Id.*

The first high-profile case on the matter occurred in 1741, *Pope v. Curl*.[88] In this case, the English high court held that the writer of a letter has a property right in what he has written and relinquishes a special right to the receiver—possibly the property of the paper. But this does not imply unlimited license to the recipient to publish the contents of the letters for, at most, he has only a joint property interest with the writer. This same reasoning was used in deciding the subsequent case of *Prince Albert v. Strange and Others*,[89] which involved paintings and drawings made by an English Royal couple, Queen Victoria and the Prince Consort. A publisher in London obtained impressions of these paintings and printed a catalogue describing the drawings. In arguing the case, the English Solicitor-General cited the case of *Miller v. Taylor*[90] where Justice Yates held that an unpublished manuscript is "peculiar property," saying that,

> It is certain every man has the right to keep his own sentiments, if he pleases: he has a right to judge whether he will make them public or commit them only to the sight of his friends. In that sense the manuscript is in every way his peculiar property; and no man can take it from him, or make any use of it which he has not authorized, without being guilty of a violation of his property.[91]

In these above cases, there is, at best, a blurred distinction between the right to privacy and property. The right to privacy was viewed not as a separate right from property but simply as an aspect thereof, indicating that while the right to privacy was recognized to a certain degree, the then unnamed right to privacy was protected under the statutes regulating the right to property.[92]

In the United States, the right to privacy was also considered as intimately connected to the right to own property. This was clearly explained in the article *The Right to Privacy* by Samuel Warren and Louis Brandeis.[93] In the article, the authors stated that the formulation of privacy legislation started from the recognition that changes in the society necessitated changes in current laws. The first step in this evolution was the inclusion in the concept of property corporeal as well as incorporeal rights

88. Pope v. Curl, 2 Atk. 342 (1741).

89. Prince Albert v. Strange and Others, 41 E.R. 1171 (1894).

90. Miller v. Taylor, 4 Burr 2303 (1769).

91. *Id.*

92. CORTES, *supra* note 17, at 21.

93. Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

issuing from it, thus opening the realm of intangible property. This realm included products and processes of the mind such as works of literature and art, good-will, trade secrets, and trade-marks.[94] The development was credited to the fact that, "[t]he intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to man that only a part of the pain, pleasure, and profit of life lay in physical things."[95]

In trying to define the right to privacy, Warren and Brandeis, using the context of created literary works and manuscripts, likened the right to privacy with the right to own property by saying that both rights were granted for the purpose of preventing unconsented publication of manuscripts or works of art. Moreover, the right to property as well as the right to privacy possessed many similar attributes such as transferability, pecuniary value, and the right to use such pecuniary value by reproduction or publication of a work from which the value is realized.[96] They said that the right to property and the right to privacy both have the same quality of being owned or possessed. Both are rights against the whole world and both emphasize the right to exclude others. To distinguish the right to privacy from the right to property, Warren and Brandeis stated, however, that these two rights also have a considerable difference. A literary work of an author is independent of its pecuniary value, its intrinsic merits, or of any intention to publish the same. It is wholly independent of the material, upon which, or the mode in which, the thought or sentiment is expressed, thus requiring a different kind of protection. While the right to property sufficiently protects the material upon which the literary work is created by virtue of trust or contract, the content is not covered by such protection.[97] Warren and Brandeis concluded that because of this unique attribute of literary work independent of the right to property, the possibility of future profits and unconsented publication cannot be ascribed to the right of property to which the law ordinarily attaches; rather they pertain to another right—the right to privacy or the right to be protected from publicity that is obnoxious to him, that right which protects personal relations and an inviolate personality.[98]

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98 . *Id.*

Despite this distinction between the right to property and the right to privacy, the link between the two rights is undeniable. This is illustrated by early court decisions with doctrines confusing the two rights. The divergence has also extended from literary works and manuscripts to other matters such as an individual's "image and likeness." A review of jurisprudence shows that Courts have sometimes denied remedy to claims involving privacy rights on the ground that no property rights exist, prescinding from the premise that the right to privacy exists only in conjunction with the right to property. At other times, courts have recognized the independent existence of the right to privacy.

In *Pollard v. Photographic Co.*,[99] a photographer who had taken a lady's photograph was restrained from exhibiting it and from selling copies thereof, on the ground that it was a breach of an implied term in the contract, and that it was also a breach of confidence. Counsel for the defendant argued that a person has no property right in his own features and, short of doing what is libelous or otherwise illegal, there is no restriction on the photographer's use of his negative. The Court, in ruling for the plaintiff, rested its decision on the fact the plaintiff had a property right in her own image and likeness. Two important points may be gathered from this case. Firstly, the right to use a person's image and likeness, recently considered as more closely linked with the right to privacy, was earlier considered not as such but as a property right. Secondly, the property right recognized still retains some privacy right aspect, as implied from defendant's allegation that a right different from property exists to protect a person from libel.

In *Roberson v. Rochester Folding Box Co.*,[100] a company engaged in milling, manufacture, and sale of flour used the picture of Abigail Roberson in its advertisements without her consent or that of her parents. In denying remedy to the claim of Abigail, the Court held that to recognize the right to privacy "would necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd."[101] This was because there was no property to be protected. The Court further held that the remedy in such cases lay with the legislature and not with the courts. Similar to *Pollard*, *Roberson* illustrated that a person's image and likeness was considered a property right. The latter case went further by adding that the right to privacy only exists when there is a right to property to be protected.

99. Pollard v. Photographic Co., 40 Ch. Div. 345 (1888).
100. Roberson v. Rochester Folding Box Co., F171 N.Y. 538 (1902).
101. *Id.*

In the subsequent case of *Pavesich v. New England Life Insurance Co.*,[102] which also involved the use of a portrait for advertising purposes without the subject's consent, the Court upheld the independent existence of the right to privacy and emphasized the right to be one derived not from property but from natural law.

The contemporary case of *Spahn v. Messner*[103] is perhaps the best case to settle the matter of whether a person's image and likeness is a property right or a privacy right. This case involved a well-known baseball player whose fictionalized biography was published without his consent. In this case, the Court awarded damages to the plaintiff, claiming that a person has "exclusive property interest in one's name, portraiture and picture." The decision hinged on a newly developed property right — the right of publicity. This property right arose by reason of the pecuniary interest involved in the commercial use of a person's image and likeness. While recognizing that image and likeness are entitled to protection because of the privacy rights involved, this new property right suggests that the entry of a new factor — a commercial context — may warrant the protection of privacy rights via a property rights approach.

Similar to Warren and Brandeis, the author of this Essay does not discount the important distinction between the right to privacy and the right to property. However, like the two authorities, the author of this Essay concedes that the right to property in its widest sense (including all possession and all rights and privileges) embraces the right to an inviolate personality and alone affords that broad basis upon which the protection that an individual demands can be rested.[104] With this in mind, the author posits that a property rights approach is a good solution to current privacy problems regarding personal information.

IV. MODELS OF PERSONAL INFORMATION AS PROPERTY RIGHTS

A. First Model: The Civil Code Approach

When one thinks of property or property rights, the first law that comes to mind is the New Civil Code. This statute considers "property" as an economic concept, meaning "a mass of *things or objects useful to human activity*

102. Pavesich v. New England Life Insurance Company, 122 G.A. 190 (1905).

103. Spahn v. Messner, 250 N.Y.S. 2d 529 (1964).

104. Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

which are [sic] necessary to life, for which reason they may in one way or another be organized and distributed, but always for the use of man."[105] The Spanish *Codigo Civil*, from whence the New Civil Code was derived,[106] while it does not explicitly define "property," provides in Article 333 thereof that, "All *things* which *are or may be susceptible to appropriation* are considered as personal or real property."[107] This provision is repeated in Article 414 of the New Civil Code,[108] indicating that property under the Civil Code possesses two elements, namely: (1) it must be considered a thing; and (2) it must be subject to appropriation.

1. Justifications for the Civil Code Model

a. Civil Law Concept of Property

According to Roman Law, which bears strong influence on the Philippine Civil Code,[109] the word "thing" or "*res*" had two meanings. First, it meant physical objects in space, and second, economic interests (that is, rights having pecuniary value and protected by law).[110] In the classification of laws made by Justinian and Gaius, it was not always easy to determine in which sense the word *res* was used. At times reference to the word clearly pertained only to physical objects and the rights came with them;[111] in other instances the word *res* was used in its broader sense to include both physical objects and intangible rights. But not all intangible rights were considered *res*. Since

105. 2 ARTURO M. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 1 (1992) (emphasis supplied).

106. The first Civil Code took effect on July 31, 1889, after Queen Regent Maria Cristina promulgated a decree extending the application of the Spanish Civil Code to the Philippine Islands. The New Civil Code took effect on Aug. 1, 1950. For a more intensive discussion regarding the origins of the Philippine Civil Code *see* RUBEN F. BALANE, THE SPANISH ANTECEDENTS OF THE PHILIPPINE CIVIL CODE (1979).

107. F. C. FISHER, CIVIL CODE OF SPAIN WITH NOTES AND REFERENCES (5th ed., 1947) (emphasis supplied).

108. NEW CIVIL CODE, art. 414 ("[a]ll things which are or may be the subject of appropriation are considered either: (1) immovable or real property; or (2) movable or personal property.").

109. *See generally* RUBEN F. BALANE, THE SPANISH ANTECEDENTS OF THE PHILIPPINE CIVIL CODE (1979).

110. ATHANASSIOS YIANNOPOULOS, PROPERTY: THE LAW OF THINGS, REAL RIGHTS, REAL ACTIONS 22 (1966).

111. *Id.*

res referred solely to rights pecuniary in nature, the word did not apply to rights governed by the law of persons—for example, personal liberty and paternal authority were not considered *res*.[112] Tangible rights obtain only pecuniary value as a consequence of its being subject to appropriation.

The Louisiana Civil Code,[113] similar in many respects to the Philippine Civil Code because of the Roman Law influences, defines the concept of "things" as one which embraces those which are incorporeal, which are not manifest to the senses, and which are conceived only by understanding. Property laws under this Code considered energies as "objects of riches or fortune" which enjoy full proprietary protection as things.[114] That intangible objects and rights are considered as "things" is bolstered by the presence of specific provisions in the Louisiana Civil Code which apply only to incorporeal things.[115]

Following the Roman Law concept of property, the New Civil Code does not confine the definition of property to things with substance or physical things but encompasses even intangible things. Considered as incorporeal things are rights or fixed relations in which men stand as to things or as to other men, relations giving them power over things or claims against persons.[116] Examples of incorporeal rights are inheritance, usufruct, use, or obligations in whatever way contracted.[117] The right to walk over another man's land is said to be an incorporeal thing for which he may have a claim exactly as if the land belonged to him and, strictly speaking, the ownership of a field is just as much incorporeal as the ownership of the right of way over a field in reference to incorporeal rights.[118] That the definition of "things" embraces incorporeal rights is an argument showing that personal information may be viewed as a property right since personal information is an intangible right and man has the inherent right to use his own personal data.

Yet another argument for considering personal information as property or a property right under the Civil Code is the fact that personal information is susceptible of being appropriated, as gleaned from earlier examples of

112. *Id.* at 23.

113. The Louisiana Civil Code follows the French Civil Code interpretations in most respects and was likewise largely influenced by Roman law.

114. YIANNOPOULOS, *supra* note 110, at 35.

115. *Id.*

116. ERNST LEVY, WEST ROMAN VULGAR LAW 155 (1951).

117. *Id.* at 186.

118. *Id.* at 185.

exchange of personal information for pecuniary benefit. Personal information has utility or the capacity to satisfy human wants. Among other uses, personal information is used as a means of identification. Personal information has individuality in the sense that it is capable of being identified as belonging to a specific person or individual. True to the nature of incorporeal property, personal information does not have substance. However, it may be collected and stored in paper, in discs, and in other media and shared with others.

b. Pecuniary Value in Property

Another argument to support the proposition is the emphasis put by Roman law or the Philippine Civil Code in the aspect of pecuniary value. As mentioned earlier, pecuniary value is a consequence of a "thing's" being subject to appropriation. A look at the Civil Code of other countries indicates that while not all civil law jurisdictions bearing strong Roman law influences recognize incorporeal property as things, the pecuniary value of such intangible rights provides sufficient reason either to consider these intangibles as property, or to afford them through some other legislation the same protection given to property rights.

Under the German Civil Code, things are distinguished from objects. A thing or *sache* is a corporeal object of impersonal nature susceptible of appropriation. An object or *gegendstand*, on the other hand, is a generic concept, which includes anything that can be the subject matter of a legal relationship, with the exception of strictly personal relations. An object may be corporeal or incorporeal. In classifying objects as corporeal or incorporeal, prevailing notions in society rather than physics are determinative. Natural forces and energies, since they are not visible to the naked eye, are considered incorporeal, and, therefore, are not considered as things within the meaning of the German Code. Rights, universalities, and aggregates of things are incorporeal and are therefore not things.[119] Nevertheless, objects, while not things, are provided protection as properties.

The Greek Civil Code essentially follows the German Civil Code concept. In the Greek Civil Code, things are individual corporeal objects which are susceptible to appropriation. An object, on the other hand, is anything—whether corporeal or incorporeal—having a pecuniary value. The Greek law on property covers only "things" and not objects. Fluids and gases, however, are considered corporeal as soon as they acquire the mark of individual existence and thus become things. While the Greek Civil Code

119. YIANNOPOULOS, *supra* note 110, at 25.

generally does not consider incorporeal objects as property, it considers natural forces and energies, though incorporeal, as things in accordance with legal fiction by virtue of their pecuniary value.[120]

The foregoing discussion indicates that matters which are not technically considered property may still be given protection similar to property based on its pecuniary value attribute, an attribute inherent in the right to property. Personal information as used in a commercial context has this pecuniary value attribute, entitling it to protection similar to property.

2. Special Concerns with the Civil Code Approach

While it may be argued that personal information may be considered as property falling under the Civil Code definition of property, such notion has many limitations. According to the Civil Code, "[the] owner has the right to enjoy and dispose of a thing, without limitations other than those established by law"[121] and "the owner or lawful possessor of a thing has the right to exclude any person from the enjoyment and disposal thereof."[122] Property, in this sense, gives the owner the right to alienate property and exclude others from its use or enjoyment. However, personal information, by its very nature, gives a strong presumption against continued alienability. While an individual has the right to exercise dominion and full-ownership over his personal information, allowing him to sell information or disclose it in exchange for other benefits, once this information has been communicated, its further transfer is discouraged to protect privacy rights. Likewise questionable is whether personal information may be considered as falling within the commerce of man. The Civil Code definition of property embraces only things which are within the commerce of man. There is jurisprudence saying that a name, which is part and parcel of personal information, is outside the commerce of man.[123]

Another area of concern under the Civil Code Approach is the question of ownership and possession. The Civil Code provides that "Possession is acquired by the material occupation of a thing or the exercise of a right, or by the fact that it is subject to the action of our will, or by proper acts and legal formalities established for acquiring such right."[124] If an individual sells

120. 1940 GREEK CIVIL CODE, art. 942 (2).

121. NEW CIVIL CODE, art. 428.

122. *Id.* at art. 429.

123. In Re: Petition for Change of Name of Lin Wang v. Cebu Civil Registrar, 454 SCRA 166 (2005).

124. NEW CIVIL CODE, art. 531.

his personal information, who will be the owner and the possessor? While there are instances when possession may be vested in a person other than an owner, under the Civil Code framework, the nature of personal information will not preclude a possessor who is not the owner from exercising complete acts of dominion over the personal data.

Another issue meriting consideration is the topic of acquisitive prescription. Generally, property may be acquired through prescription.[125] However, in the case of personal information, the application of acquisitive prescription gives rise to an absurd situation. While it is possible for another to use the personal information unbeknownst to the person to whom the information pertains, it would be incongruous to say that the latter can no longer assert his right over his personal information and that he is excluded from its use and enjoyment, specially since it is his right which is sought to be protected in the first place. Yet another problem area is that regarding eminent domain. Property under the Civil Code is subject to eminent domain. For eminent domain to be possible, the element of "taking" needs to be present.[126] Personal information cannot be taken from an individual because the right to personal information is not inherently attached to a tangible object. Even if information is stored in other media and given to a different person, the owner will not be deprived of its use or enjoyment. Rather, the person to whom the information is given will have the opportunity to exploit the use of such like the owner. Lastly, the Civil Code definition adheres to the *numerus clausus principle* where the law enforces as property only those interests which conform to a limited number of standard forms.[127]

B. Second Model: The Constitutional Approach

1. Creation of Property Rights

Personal information is important to individuals. Because it pertains to them and is related to their identity, they generally have the legal right to exclude other people from accessing information about them. This notion often gives individuals a sense that they have a property right in the data as well as a

125. *Id.* at art. 712.

126. Republic v. Viuda de Castelvi, 58 SCRA 336 (1974).

127. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L. J. 1, 3 (2000).

legal right to restrict access to it.[128] Even when personal data are in the hands of others, individuals may perceive themselves to have continuing interests in such data. Because the law will sometimes protect these kinds of information from unauthorized use and disclosure, a sense of ownership in personal data is reinforced.[129] It cannot be said, however, that the idea of property rights in personal information springs purely from the sense of ownership an individual has over his personal information. Government, arguably, has the power to create property rights regardless of the feelings of ownership of individuals in order to cure or ameliorate market failure problems,[130] or as a form of regulating certain industries.[131] In reality, creating property rights in informational assets is remarkably common, as exemplified by the gradual development of intellectual property law. Intellectual property law grants exclusive rights in information-based creations in order to promote the development of a thriving marketplace.[132]

a. Standard for Protected Property in Philippine Jurisprudence

Philippine jurisprudence is replete with examples where the Government "created" property rights in order to protect individual and State interests and to encourage growth of the economy. Of course, in these instances, the Government, unlike seasoned conjurers, did not create property rights out of nothing (that is, without basis). As a general rule, property and property rights are created strictly through legislation. The Supreme Court, however, has not detracted from recognizing property rights in many instances when laws were found to be incomplete. A survey of jurisprudence will show that there is, in fact, a standard which courts use in declaring something as a property right entitled to protection.

Protected property under Section 1, Article III of the Constitution includes vested rights such as a perfected mining claim, a perfected

128. Samuelson, *supra* note 7, at 1130 (citing Board of Regents of State Colleges v. Roth 408 U.S 562, 569 [1997] (holding that property interests are created not by the United States Constitution but by state law.)).

129. *Id.*

130. *See* Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509, 514-18 (1996), discussing the utilitarian criteria for creating property rights.

131. An example of this is the creation of property rights to allow emissions of pollutants up to certain levels as a way to achieve environmental goals as provided in the U.S. Clean Air Act Amendment of 1990, 42 USC §§ 7401, 7651-7651 (1994); this is also exhibited in the creation of government franchises.

132. Radin, *supra* note 130, at 514-18.

homestead, or a final judgment.[133] It also includes the right to work and earn a living, one's profession, employment, trade or calling,[134] some government franchises, as well a person's right to publicity. In the determination of the Court's standards in recognizing property rights, due to time and resource constraints, the author limits the discussion to the following forms of protected property: (1) labor, (2) government franchises, (3) the right to and against publicity, and (4) goodwill.

i. Right to Labor

The right to labor is probably the most discussed of all property rights; it is protected by the Constitution because of its special nature. There are a multitude of court decisions upholding the right of an individual not to be deprived of his labor because it is considered a property right.[135] But the rationale for considering it a property right is unclear. Locke's natural theory may be considered as one basis for this property right. As mentioned earlier, his theory involves entitlement of the individual to his labor by virtue of the fact that in working, his efforts and personality are mixed with labor.[136] The case of *Philippine Movie Pictures Workers Association v. Premiere Productions, Inc.*[137] supports this theory. This case involved a petition for review of an order granted by the lower court to the respondent, giving it authority to lay off forty-four workers on the basis of an ocular inspection, without receiving full evidence to determine the cause or motive of such lay off.[138] Petitioners contended that the procedure allowing the lay off was unfair to the labor union because it deprived the workers of the opportunity to disprove representations made in court regarding the ocular inspection.[139] It was further contended that the Court should have ordered a full-dress investigation or, at the very least, a formal hearing where the parties are

133. JOAQUIN G. BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 101 (1996).

134. *Id.*

135. *See* Callanta v. Carnation Phils., Inc., 145 SCRA 268 (1986); Crespo v. Provincial Board, 160 SCRA 66 (1988); Century Textile Mills, Inc. v. National Labor Relations Commission, 161 SCRA 528 (1988).

136. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (ed. C.B. Macpherson, 1980).

137. Philippine Movie Pictures Workers Association v. Premiere Productions, Inc., 92 SCRA 844 (1953).

138. *Id.* at 846.

139. *Id.* at 847.

given time to present evidence before arriving at a decision.[140] In ruling for petitioner labor union, the Court held that given the ambiguity of the decision of the lower court and the absence of a clear reason for the termination of the employees, it is "inclined to resolve the doubt in favor of labor considering the spirit of the Constitution."[141] It further stated that,

> The right to labor is a constitutional as well as a statutory right. Every man has a natural right to the fruits of his own industry. *A man who has been employed to undertake certain labor and has put into it his time and effort is entitled to be protected.* The *right of a person to his labor is deemed to be property* within the meaning of constitutional guarantees. *That is his means of livelihood.* He cannot be deprived of his work without due process of law.[142]

Labor is protected, therefore, because it provides a person with a means of livelihood. Because of labor, a person earns a living, allowing him to provide sustenance for him and his family.

ii. Government Franchises

There are two kinds of government franchises: first, the kind where the government grants licenses or gives permits for the exercise of certain privileges; and, second, the kind where the government grants a franchise considered as a vested property right. To determine what kind of franchise falls under the second category, a review of several decisions is necessary.

The case of *Tan v. Director of Forestry*[143] involved a dispute regarding a timber license signed by the Director without authority and, hence, considered *void ab initio*. In this case, petitioner contended that even if the license was considered void, he cannot be deprived of such without due process since it was a property right. In rejecting petitioner's contention, the Court held that upon looking at the rules and regulations included in the ordinary timber license,[144] it is evident that:

> A timber license is an instrument by which the State regulates the utilization and disposition of forest resources to the end that public welfare is promoted. A timber license is not a contract within the purview of the due process clause; it is only a license or a privilege, which can be validly withdrawn whenever dictated by public interest or public welfare as in this case.[145]

140. *Id.*

141. *Id.* at 848.

142. *Id.* (emphasis supplied).

143. Tan v. Director of Forestry, 125 SCRA 301 (1983).

144. *Id.* at 318 (citing The Timber License Rules and Regulations, ¶ 27 ("[t]he terms and conditions of this license are subject to change at the discretion of the Director of Forestry, and that this license may be made to expire at an earlier date, when public interest so require.")).

It further held that a license is merely a permit to do what would otherwise be unlawful and is not a contract between the government and the person to whom it is granted. It does not create vested or irrevocable rights, neither is it considered property or a property right.[146] It may be revoked by the Government whenever public interest so requires.[147] Similarly, in *Chavez v. Executive Secretary*,[148] where the President of the Philippines, through verbal declaration, imposed a gun ban canceling existing permits allowing guns to be carried outside residences, the Court held that petitioner has no property right to carry firearms. In this case, the Court held that, "the bulk of jurisprudence is that a license authorizing a certain person to enjoy a privilege is neither property nor a property right.[149] The Court likewise cited the case of *Erdelyi v. O'Brien*[150] which held that:

> Property interests protected by the Due Process Clause of the Fourteenth Amendment do not arise only whenever a person has an 'abstract need or desire for,' or 'unilateral expectation of a benefit.' xxx Rather, they arise from 'legitimate claims of entitlement... defined by existing rules that stem from an independent source.[151]

On the other side of the coin is the case of *Raymundo v. Luneta Motor Co.*[152] This case involved the question of whether a certificate of public convenience, like any other property, may be subject to execution in a final judgment. Ruling in the affirmative, the Supreme Court ratiocinated that the Code of Civil Procedure established a rule that all property and proprietary rights, save those exempted by law, are subject to attachment and execution. Since statutory exemptions do not provide for certificates of public convenience, the latter is subject to execution.[153] The case further held that "the test by which to determine whether or not property can be attached and sold upon execution is whether the judgment debtor has such a

145. *Tan*, 125 SCRA at 325.

146. *Id.* (citing People v. Ong Tin, 54 O.G. 7576 [1958]).

147. *Id.*

148. Chavez v. Executive Secretary, 431 SCRA 534 (2004).

149. *Id.* at 560.

150. Erdelyi v. O' Brien, 680 F.2d 61 (1982).

151. *Chavez*, 431 SCRA at 534 (citing Erdelyi v. O'Brien, 680 F.2d 61 (1982)).

152. Raymundo v. Luneta Motor Co., 58 Phil 889 (1933).

153. *Id.* at 892.

beneficial interest therein that he can sell or otherwise dispose of it for value."[154] Since the holder of a certificate of public convenience can sell it voluntarily, especially since it has considerable material value and is considered a valuable asset, there is no reason why it cannot be subject to execution.[155] Furthermore, the Court held that the "United States Supreme Court considers a franchise granted in consideration of the performance of public service as constituting property within the protection of the Fourteenth Amendment to the United States Constitution."[156] Finally, in *Cagayan Electric Power and Light Company, Inc. v. National Power Corporation*,[157] which involved a dispute regarding the right of the petitioner to have priority in selling electricity pursuant to a legislative franchise, the Court held that the "franchise operator's right to due process or priority to be heard on such direct contracts cannot be denied. Like certificates of public conveyance (sic), legislative or municipal franchises for the operation of a public utility are properties and therefore guaranteed the due process protection of the Constitution."[158]

The abovementioned cases indicate that *government licenses or franchises will be considered as property entitled to protection under the due process clause so long as it is evident that the franchise or license has some relation to the person's livelihood or business*. In addition, the test to be used is whether the franchise has material value to the holder as well as to other people. However, there will be instances when, despite the franchise having material value or being related to an individual's livelihood, it will not be considered as under the sweeping notion of property. When public policy and interest so requires, it will not be considered property but merely a privilege granted to the holder.

154. *Id.* (citing Reyes v. Grey, 21 Phil 73 (1911)).

155. *Raymundo*, 58 Phil at 893.

156. *Id.* at 894. The Court also cited the case of *Willis v. Buck*, 81 Mont. 472 (1928) in this case and stated that:

> In at least one State, the certificate of the railroad commission permitting the operation of a bus line has been held to be included in the term "property" in the broad sense of the term. If this is true, the certificate under our law, considered as a species of property, would be liable to execution.
>
> *Id.*

157. Cagayan Electric Power and Light Company Inc. v. National Power Corporation, 180 SCRA 629 (1989).

158. *Id.* at 632.

iii. Right to Publicity and Right Against Publicity

The right to publicity is that which gives individuals some rights to control the commercial exploitation of their names, likeness, and other indicia of the commercial value of their person. Unlike the right to privacy which protects one from publicity, the right of publicity owes its existence to its owner's exploitation of his public persona.[159] The specific contour of the right to publicity is uncertain due to the recent development of the doctrine. It is suggested, however, that there are two basic elements for a cause of action regarding the right to publicity to ensue. First, the plaintiff in the action must have developed some sort of celebrity or public persona in which he has a *pecuniary interest*. Second, there must have occurred some *trading on that identity*.[160] It is evident from the two elements that, although a public persona is required so that a person may have the right to publicity, the emphasis is not really on the public persona but on the person's pecuniary interest over his own image and likeness. Public persona becomes an element only by virtue of the view that, in the ordinary course of things, nobody would be interested in exploiting the image and likeness of someone who is unknown and not influential. The emphasis on the right to publicity is really the person's pecuniary interest over the commercial exploitation of his name, image, and likeness. It is likewise suggested that there is considerable overlap between the right to publicity and the law on trademark and unfair competition as they all relate to the trading of the reputation of others.[161]

Under the right to publicity, ownership belongs to celebrities and the right to use a celebrity's name, image, and likeness may be licensed permitting others to exploit it.[162] An illustration of this right occurs when famous actors, celebrities, and athletes are asked to use their influence and fame to endorse products for consumer companies.

The right to publicity is strongly associated with the right against publicity. While the former allows a celebrity to sell his image, likeness, and identity, the latter is essentially a privacy right which precludes others from exploiting another's image, likeness, and identity because it is not part of the individual's public persona. This right is illustrated in *Lagunzad v. Soto Vda. de Gonzales*.[163] In this case, petitioner Manuel Lagunzad sought to have the

159. PETER A. ALCES & HAROLD F. SEE, THE COMMERCIAL LAW OF INTELLECTUAL PROPERTY 240 (1992).

160. *Id.* at 24.

161. *Id.*

162. *Id.*

163. Lagunzad v. Soto Vda. de Gonzales, 92 SCRA 476 (1979).

Court annul a Licensing Agreement he entered into with Maria Soto Vda. de Gonzales, claiming that it was entered into under duress, intimidation, and undue influence. He further contended that having bought a novel portraying the life of Moises Padilla, he had rights to the story and no longer needed the consent of Maria. In the reply of petitioner, he posited that the "episodes in the life of Moises Padilla depicted in the movie were matters of public knowledge and occurred at or about the same time that the deceased was a public figure and the private respondent has no property rights over those incidents."[164] In ruling for respondent, the Court held that

> While it is true that petitioner had purchased the rights to the book entitled, "The Moises Padilla Story," that did not dispense with the need for *prior consent and authority* from the deceased heirs to portray publicly episodes in said deceased's life, the life of his mother, and other members of his family.[165]

In this case, the Court recognized that:

> Being a public figure does not automatically destroy *in toto* a person's right to privacy. The right to invade a person's privacy to disseminate public information does not automatically extend to a fictional or novelized representation of a person, no matter how public a figure he or she may be.[166]

In another case, *Ayer Productions Pty. Ltd. v. Capulong*,[167] the Court held that Juan Ponce Enrile, being a public figure, lost his right to privacy insofar as the public sphere of his life is concerned. The Court stated that, "A *limited intrusion* into a person's privacy has long been regarded as permissible where that person is a public figure and the information sought to be elicited from him or to be published about him constitutes matters of public character."[168] The Court likewise held that "The interest sought to be protected by the right of privacy is the right to be free from unwarranted publicity, from the wrongful publicizing of the private affairs and activities of an individual which are outside the realm of legitimate public concern."[169] Thus, intrusion cannot be allowed when it comes to the private life of a public figure. Such intrusion may only be allowed when the person involved gives his consent or assent. The Court, in *Ayer Productions*, also cited *Lagunzad*, recognizing

164. *Id.* at 483.

165. *Id.* at 486 (emphasis supplied).

166. *Id.* at 487.

167. Ayer Productions Pty. Ltd. v. Capulong, 160 SCRA 861 (1988).

168. *Id.* at 870 (emphasis supplied).

169. *Id.*

that *while a public figure may have no property right with regard to the public aspect of his life, the same is not true for the private sphere of his life, which is entitled to positive protection.*

It appears therefore that with regard to the right to publicity, the property right is founded in the public persona only because the public persona gives the individual pecuniary interest over his identity, entitling him to protection. On the other hand, the right against publicity gives a public figure a property right over the private sphere of his life because he has a right to keep that area of his life private, hence, giving him an interest entitled to protection.

iv. Goodwill

Goodwill is the least controversial property right among the examples in this Essay. This is because its value is clear and may be reflected in the accounting books of a corporation. Goodwill is the ability of the business to generate income in excess of the normal rate on assets—often due to superior managerial skills, market position, new product technology, a well-respected business name, and other similar factors.[170]

In *Converse Rubber Corp. v. Jacinto Rubber & Plastic Co., Inc.*,[171] which involved a licensing agreement between petitioner and respondent that did not materialize, the Court ruled for the petitioner, saying that respondent is not entitled to identify his goods with that of petitioner's because it would violate the petitioner's goodwill and entitle the respondent to unjustly appropriate a benefit which it did not earn. The Court quoted with approval the contention of petitioner's counsel saying that the statute on unfair competition extends protection to the goodwill of a manufacturer or dealer. In plain language, the Court declared that a person has a property right entitled to protection whenever he has identified to the public goods he manufactures, or his business or services, from those of others, whether or not a right in the goodwill over said goods was established in a competitive situation.[172]

> [A] person who has identified in the mind of the public the goods he manufactures or deals in, his business or services from those of others, has a property right in the goodwill of the said goods, business or services so

170. BLACK'S LAW DICTIONARY 694.

171. Converse Rubber Corp. v. Jacinto Rubber and Plastic Co., Inc., 97 SCRA 158 (1990).

172. *Id.* at 171.

identified, which will be protected in the same manner as other property rights.[173]

b. Emerging Formula

From the foregoing discussion, it can be gleaned that not all interests may be considered as a property right entitled to protection. Oftentimes, the Court looks into the nature of the right to be protected and grants protection only if certain standards are successfully met. Although the Supreme Court has not expressly stated that material value or pecuniary interest is a standard by which it considers a person's interest as a property right, it nevertheless considers something as a property right whenever that thing possesses material value coupled with some other interest. For example, with regard to the right to labor, the standard is a person's natural right to the fruits of his labor mixed with his personality as well as his pecuniary interest because it affects his livelihood. Government franchises use the same standard—instead of referring to labor, however, the subject is a business operation. For the right to publicity, the standard used is pecuniary interest in public persona as well as tradability of name, image, and likeness. For the right against publicity, the standard is unclear. The Supreme Court has ruled that the private aspect of life is a property right because it is entitled to protection. Lastly, with regard to goodwill, the basis for being considered a property right is the ability to generate more income due to the good reputation of a business, as identified from that of its competitors.

Based on this discussion, it is apparent that there is an emerging formula used in considering something as a property right entitled to constitutional protection. The formula is a combination of two standards, namely, pecuniary value plus some other interest.

Formula Used by Courts to Consider an Interest a Property Right

Jurisprudential Example	Basis for Considering it a Property Right		
Right to Labor	Means of livelihood (pecuniary interest)	+	Natural Law
Government Franchises	Material value (pecuniary interest)	+	Grant of Government
Right to Publicity	Pecuniary interest in public persona	+	Trading on Identity
Right Against Publicity	Gray area. Courts have held that it is considered a property right because a person's private life is entitled to protection.		
Goodwill	Ability to earn greater income (pecuniary interest)	+	Identification of goods from that of competitor
Emerging Standard:	Pecuniary Value + Legal entitlement by virtue or Formula of an independent source		

173. *Id.* at 172. *See also* Howell v. Bowden, Tex. Civ. App., 368 S.W.2d 842, 848 (1963).

Applying the formula to personal information used in a commercial context, it is clear that personal information may be considered a property right. Similar to other property rights, it has a pecuniary value. Moreover, privacy implications of exploiting personal information provide an independent interest requiring legal entitlement to protection. Personal information already falls under the standards under which courts have declared other subjects as property rights. Under this approach, all that is required is for the Court to recognize personal information as such; there is no need for specific legislation.

2. Concerns with the Constitutional Approach

a. Limits to Alienability and Transfer

A strong argument as to why personal information should not be considered as property is the limitation put on the right to transfer it. While it is true that a person may sell personal information and allow others to use it, the person to whom information is sold is not encouraged to re-sell it. While this is a legitimate concern, it must be borne in mind that the essence of a property right protected under the Constitution is the right to exclude others from the use or enjoyment of such property and not the right to alienate it. In fact, it is not difficult to imagine examples of property rights where sale is discouraged, illegal, or impossible. One such example is a communal or state-controlled property system basic in market economies where the right to transfer and alienate does not exist with respect to significant resources.[174] Another example involves instances when the government wishes to regulate an industry by making "a too plentiful resource" scarce. In the United States, the government enacted the Clean Air Act, granting companies a property

174. DWYER & MENELL, *supra* note 70, at 1.

right over the level to which it is entitled emit pollutants in the course of business, as a way to achieve environmental goals.[175]

Closer to home, a good example of a property right where owners are permitted to exercise acts of ownership but are not allowed to sell or transfer the property is found in the Indigenous Peoples Rights Act (IPRA).[176] IPRA is a unique piece of legislation which provides indigenous people a claim of ownership over ancestral domains.[177] The Act respects the indigenous concept of ownership which sustains the view that ancestral domains and all resources found therein serve as the material bases of cultural integrity. The indigenous concept of ownership generally holds that ancestral domains are the indigenous cultural communities' or peoples' private but communal property belonging to all generations. Therefore, it cannot be sold, disposed of, or destroyed.

Another example is the right to publicity which contemplates a situation where an individual may permit another to use his image and likeness but the person to whom such right is sold cannot further transfer the license to a third party. This is true for the case of models and product endorsers. The last example is the right to labor, which is a personal right inherent in the person who creates the work. Though it is considered a property right, it may not be sold.

b. Libertarian Anxiety: The Hierarchy of Rights

Another major concern for a property rights regime over personal information under the Constitutional Approach is that the right to privacy, which in the hierarchy of rights holds a preferred status,[178] seems to be downplayed. If the right to privacy is considered a higher right, why provide

175. Clean Air Act Amendment of 1990, 42 USC §§ 7401, 7651-7651n (1994); Carol M. Rose, *The Several Future of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 164-80 (1998).

176. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor and for Other Purposes, Republic Act No. 8371 (1997).

177. Cruz v. Secretary of Department of Energy and Natural Resources, 347 SCRA 128 (2000).

178. Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co. Inc., 51 SCRA 189, 202-03 (1973) (explaining that while the Bill of Rights also protects property rights, the primacy of human rights over property rights is recognized. Because these freedoms are 'delicate and vulnerable, as well as supremely precious in our society.).

a solution which denigrates it to a property right? This Essay does not suggest that personal information be simplified into a property right forgetting its privacy implications. Rather, it suggests that personal information, recognizing the strong link between the right to privacy and the right to property, be treated as a property right while retaining its privacy rights characteristics.

C. Advantages of the Civil Code and Constitutional Property Rights Approach

A property rights regime for personal information gains significance when remedies afforded individuals for violations of privacy rights are contrasted with remedies provided for property rights.

Under the due process clause of the Constitution, both privacy rights and property rights are safeguarded. Privacy rights are protected by ensuring that, "no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the things to be seized."[179] Should information be acquired in violation of this, the exclusionary rule[180] will ensure that such information will not be used as evidence against the person in any proceeding. Taking a look at the nature of personal information, it appears that the privacy aspect of the due process clause does not afford personal information adequate protection because: (1) the Bill of Rights applies only against intrusive actions of the government and not against private individuals, and (2) the Constitution does not contemplate the context in which personal information is used — that is, in commercial transactions — it only contemplates proceedings before courts or tribunals.

With regard to property, due process means that a person shall not be deprived of property without the twin requirements of notice and hearing. These two requirements are mandatory in all cases of deprivation regardless of the kind of property involved. Moreover, these requirements are enforceable against both the government and private individuals. For example, if the government wishes to expropriate land, the owner of the land is entitled to notice and hearing; if a private employer wishes to terminate an employee, the employee is entitled to notice and hearing.

179. PHIL. CONST. art III, § 2.

180. PHIL. CONST. art III, § 3, ¶ 2.

If personal information is considered a property right requiring notice and hearing in case of its deprivation, the owner of such personal information will be amply protected because the party who wishes to use his information will be obliged to inform such owner of this intent prior to the use of information.[181] This provides the owner with effective control over the use of his personal information.

Another remedy common to both privacy and property is an injunction. A preliminary injunction is "an order granted at any stage of an action or proceeding prior to the judgment or final order requiring a party, or a court, agency or person to refrain from a particular acts or acts,"[182] granted only on specified grounds.[183] If the right to injunction is shown to exist, courts may grant perpetual injunction. Under property rights, the owner is entitled to complete dominion over the property. Thus, every instance where property is used without the consent of the owner is easily identified as a violation, consequently making it easier to prove the necessity of an injunction. On the other hand, the determination of violations of the use and exploitation of personal information is more difficult if the injunction is sought on the basis of privacy rights. This is because there is no specific law granting protection to personal information on the basis of privacy rights.

181. This is, of course, subject to the qualification that the State may, in the exercise of its police power, still compel disclosure of personal information to be used and kept for government purposes, but only for clearly stated purposes and within narrowly-defined limits as may be provided by law, as held in *Ople v. Torres*.

182. Rules of Court, Rules on Civil Procedure, Rule 58, § 1 (1997).

183. *Id.* Rule 58, § 3 provides the grounds when a preliminary injunction may be granted. They are as follows:

> The applicant is entitled to the relief demanded, and the whole or part of such relief consists in restraining the commission or continuance of the act or acts complained of, or in requiring the performance of an act or acts, either for a limited period or perpetually;
>
> That the commission, continuance or non-performance of the act or acts complained of during the litigation would probably work injustice to the applicant, or
>
> That a party, court, agency or a person is doing, threatening, or is attempting to do, or is procuring or is suffering to be done, some act or acts probably in violation of the rights of the applicant respecting the subject of the action or proceeding, and tending to render the judgment ineffectual.

Remedy for violations of privacy rights or property rights may also be found in the field of torts. While under both privacy and property rights a person may have a cause of action for moral damages,[184] only violations of property rights may give rise to actual or compensatory damages. According to the Civil Code, "[e]xcept as provided by law or by stipulation, one is entitled to an adequate compensation only for such pecuniary loss suffered by him as he has duly proved."[185] If personal information is considered a property right, unpermitted use may give rise to actual damages. Such is not true for violations of a privacy right.

Aside from these shared remedies, there are attributes peculiar only to property rights which afford a person better protection. A property right is considered a right *in rem* enforceable against the whole world, whether it involves real or personal property. By virtue of the right of dominion and ownership, the individual will be permitted to exercise more effective and meaningful control over his personal information by giving him the sole right to use and enjoy his property and obtain benefits therefrom. Lastly, a property rights regime permits an individual to avail of remedies provided in existing property laws insofar as they are not inconsistent with the nature of personal information.

D. Third Model: Intellectual Property Approach

1. Personal Information as a *Sui Generis* Form of Intellectual Property

a. Nature and Classifications of Intellectual Property

The most important feature of property is that its owner or proprietor may use it as he wishes without interference from others, save only for certain exceptions. In the modern world, there is an innovative classification of property denominated as intellectual property. The usual objects of intellectual property are creations of the human mind. This, of course, is subject to certain exceptions. In its most narrow sense, intellectual property relates to pieces of information which can be incorporated in tangible objects and, at the same time, in an unlimited number of copies at different locations anywhere in the world. The property is not in those copies but in the information reflected in those copies.[186] Similar to movable and immovable

184. *See generally* NEW CIVIL CODE, arts. 2217-20.

185. NEW CIVIL CODE, art. 2199.

186. BACKGROUND READING MATERIAL ON INTELLECTUAL PROPERTY, WIPO 3 (1988).

property, intellectual property is also characterized by certain limitations, such as limited duration in the case of copyrights and patents.[187]

Intellectual property is generally divided into two branches, namely "industrial property" and "copyrights." The Convention Establishing the World Intellectual Property Organization (WIPO Convention)[188] provides that intellectual property shall include rights relating to: (1) literary, artistic, and scientific works; (2) performances of performing artists, phonograms, and broadcasts; (3) inventions in the fields of human endeavor, (4) scientific discoveries; (5) industrial designs, (6) trademarks, service marks, and commercial names and designations; (7) protection against unfair competition; and (8) all other rights resulting from intellectual activity in the industrial, scientific, literary, or artistic fields.[189] It is evident from this enumeration that not all forms of intellectual property fall under the two branches. Scientific discoveries for example, neither fall under copyrights nor industrial designs.[190] Similarly, the right to publicity, a right originating from the United States, created under state common law, does not fall under the major classification or sub-types.[191]

b. Personal Information: Kin of Intellectual Property?

Historically, the concept of intellectual property was invented and developed as a solution to specific problems in developing countries, especially in the advent of technological advancements and scientific discoveries.[192] "Since many developing countries are rich in traditional art and folklore, which is often the basis of interesting and unique creations of local craftsmanship and textile designing, they aim at encouraging and gaining maximum economic benefit from such indigenous creations."[193]

In the Philippines, intellectual property is protected by the Constitution by securing rights to holders of intellectual property particularly when

187. *Id.*

188. The Convention Establishing the World Intellectual Property Organization (WIPO Convention), concluded in Stockholm, July 14 1967.

189. BACKGROUND READING MATERIAL ON INTELLECTUAL PROPERTY, *supra* note 181, at 4.

190. *Id.*

191. ALCES & SEE, *supra* note 159, at 26.

192. BACKGROUND READING MATERIAL ON INTELLECTUAL PROPERTY, *supra* note 186, at 27.

193. *Id.*

beneficial to the people.[194] Though fairly recent in application, intellectual property has long been a part of Philippine laws.[195] Protection of intellectual property is done mainly for two reasons: first, countries have laws to protect intellectual property to give statutory expression to the *moral* and *economic* rights of creators in their creation, and second, to promote, as a deliberate act of government policy, creativity and the dissemination and application of its results to encourage fair trading and to promote social and economic development.[196]

It has been held that a person has "*protected pecuniary interest in the commercial exploitation of his own identity.*"[197] Given the present scenario of sale and trade of personal information, personal information should be protected by the government to adequately safeguard an individual's moral as well as economic interests.

Personal information is akin to intellectual property in certain respects. The creation of personal information is somewhat analogous to intellectual property in the sense that the owner of personal information has invested some effort in the creation of such or has come up with unique ideas entitled to protection. For example, an individual gets a driver's license, the driver's license number pertains to or is indicative of the identity of the individual. Although it is a mere number assigned to him by the government, he would not acquire it without investing some effort, such as applying for a license and passing all the tests required. The similarity between intellectual creations and personal information may also be illustrated as thus: when a person gives another a letter, a distinction must be made between the letter (ideas and thoughts) and the letter (paper with words). The first belongs to the sender and the latter belongs to the recipient. Accordingly, the recipient may burn the letter and cannot be compelled to return them to the sender.

194. PHIL. CONST. art XIV, § 13.

195. As early as May 5, 1887, Spanish laws on intellectual property have been extended to the Philippines. Laws on intellectual property have been shaped and reshaped until its culmination in the Intellectual Property Code.

196. BACKGROUND READING MATERIAL ON INTELLECTUAL PROPERTY, *supra* note 186, at 28 (emphasis supplied).

197. Carson v. Here's Johnny Portable Toilets, 698 F. 2d 831, 835, 6th Cir. (1983) (stating that a celebrity or public personality has the right to publicity. The right to publicity has two basic elements: (1) the plaintiff has developed some sort of public persona or celebrity, and (2) there must have occurred some trading on that identity. While with regard to personal information there is no public persona created, the present scenario indicates that personal information is being traded and the owner therefore has a pecuniary interest over it.).

The sender may publish the letter even without the recipient's consent.[198] The recipient cannot publish or disseminate the letter unless: (1) the writer or his heirs consent, or (2) the public good or the interest so requires. In this example, the content of the letter, which is the intellectual creation, is considered a property right allowing the owner to extend acts of dominion over it. Personal information, due to its nature, is akin to the contents of letters. Inherently, it belongs to the individual to whom the information pertains. Another person does not have any right to appropriate such information without the consent of the former or unless public interest so requires.

At this juncture, it must be admitted that not all personal information are intellectual creations. Weight, height, and age for example, are data which exist not by virtue of human effort. Nevertheless, there is no bar against Congress creating intellectual property through legislation based on its policy of protecting personal information.

2. Personal Information as a Moral Right

a. The Exceptional Attribute of Intellectual Property: Moral Rights

While a Civil Code or Constitutional property rights approach is a good solution to the problem of insufficiency of protection afforded to an individual's personal information, another alternative may be found — that of treating personal information as a *sui generis* form of intellectual property possessing the attributes of moral rights. This idea was first introduced by Pamela Samuelson in her article, *Privacy as Intellectual Property*.[199]

The term "moral rights" was first recognized in France. It comes from the word "*droit moral*" which means *the ability of authors to control the eventual fate and outcome of their works*, as distinguished from the common understanding of the word "morals" which possess religious connotations.[200] The emphasis on moral rights in France is the pre-eminence traditionally afforded authors, granting these authors rights with regard to their work.[201] The concept of moral right relies on the connection between an author and his creation. *Moral rights protect personal and reputational value, rather than the*

198. EDGARDO L. PARAS, CIVIL CODE ANNOTATED 684 (1989).

199. Samuelson, *supra* note 7, at 52.

200. Betsy Rosenblatt, *Moral Rights Basics*, http://cyber.law.harvard.edu/property/library/moralprimer.html (last accessed Sep. 6, 2006).

201. GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST 173 (2d ed. 2002).

purely monetary value of a creator's work.[202] Moral rights spring from the belief that an artist, in the process of creation, injects his spirit into the work. Thus, an artist's personality, as well as the integrity of the work, should be protected.[203] The "*author's rights perspective*" from which the notion of moral rights is derived, embodies the Romantic notion of the creator of the work as "author," whose personality is exemplified in his work. The work is considered an extension of his being. In a sense — *the work is the author.*[204]

The scope of a creator's moral rights is unclear. It differs with cultural conceptions of authorship and ownership. However, it may include the creator's right to receive or decline credit for his work, to prevent his work from being altered without his permission, to control who owns the work, to dictate whether, and in what way, the work should be displayed, and/or to receive resale royalties.[205] Moral rights are considered property rights emanating from a special kind of intellectual property, which, by virtue of its unique character, requires a different kind of regulation.[206] The concept focuses on the person of the author and is considered by many to find its justification in natural law.[207]

An essential characteristic of moral rights is that it is only applicable with respect to intellectual property. Moral rights are often provided for in copyright laws. Those jurisdictions which include moral rights in their copyright statutes are called *droit d'auteur* states, which literally means "right of the author."[208] Other forms of intellectual property, however, may also be the subject of moral rights. In the United States for example, moral rights are granted to authors of literary, dramatic, musical, and artistic works,[209] and film directors.[210] There are also certain forms of intellectual property where these rights do not apply. Examples of these are computer programs, works where ownership is originally vested in the author's employer, and works

202. Rosenblatt, *supra* note 200.

203. VICENTE AMADOR, COPYRIGHT UNDER THE INTELLECTUAL PROPERTY CODE 569 (2001).

204. *Id.*

205. DAVIES, *supra* note 201, at 173.

206. *Id.* at 150.

207. *Id.* at 173.

208. *Moral Rights*, *at* http://en.wikipedia.org/wiki/Moral_rights (last accessed Sep. 6, 2006).

209. United States Visual Artists Rights Act, 17 U.S.C. § 106 A (1991).

210. *What are Moral Rights?*, http://www.intellectual-property.gov.uk/faq/copyright/moral_rights.htm (last accessed Sep. 6, 2006).

where materials from newspapers, magazines, encyclopedias, and dictionaries are used.[211] Moral rights, therefore, are not limited in application to copyrights. States may discriminate which intellectual property should be granted moral rights based on its policy on protection of private pecuniary interests.

Since moral rights allow an author to control the fate of his work, adopting a moral rights approach over personal information may allow an individual to have a measure of control over the fate of his personal information and better protect his privacy interests. Similar to the moral rights of authors, granting moral rights to an individual's personal data may protect personality based interests, ensuring that the admixture of personal and economic interests are correctly reflected. [212]

b. The Berne Convention

The Berne Convention is the premiere treaty governing international copyright relations.[213] The Convention derives its influence from French interpretations on moral rights and almost every major developed country has signed this treaty. This massive "meeting of the minds" demonstrates the importance of moral rights in Article 6b which mandates international respect vis-à-vis domestic recognition and legislation, of the moral rights philosophy.[214] Article 6b of the Berne Convention provides in part that:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[215]

This provision associates the Berne Convention with the philosophy of the "author's rights perspective" with regard to transfer of artistic works.[216]

211. *Id.*

212. Samuelson, *supra* note 7, at 1148.

213. Berne Convention of 1928 (Rome). The Philippines is a signatory to this Convention.

214. Sheri Lyn Falco, Esq., *The Moral Rights of* Droit Moral*: France's Example of Art as the Physical Manifestation of the Artist*, http://www.ibslaw.com/melon/archive/206_moral.html (last accessed Jul. 15, 2005).

215. Berne Convention, art. 6b.

216. Falco, *supra* note 214.

The Berne Convention requires its signatories to provide authors with moral rights possessing two attributes, namely: (1) the *right of integrity* which prohibits mutilation or distortion of a work which would prejudice the author's honor or reputation, and (2) the *right of attribution* which allows the true author the right to have his name on the work and to preclude the name of non-authors from being attached to such work.[217] Though not provided for in the Berne Convention, most countries in their local legislation also include the following attributes to moral rights: (1) the *right of disclosure* which gives the author the final decision on when and where to publish the work, and (2) the *right to withdraw or retract* which allows the author, when his view changes, to purchase at wholesale price all remaining copies of his work and prevent the printing of more copies.[218]

c. Civil Law Roots of Moral Rights

One of the arguments why moral rights should be granted to personal information is that the concept of moral rights is civil law in origin recognized in most (if not all) civil law jurisdictions. The concept of moral rights originated in France in the last quarter of the nineteenth century,[219] and has since then gained recognition and become an international standard in the Berne Convention.[220] Since moral rights are civil law in origin, the concept is consistent with the general legal framework of the Philippines and gives emphasis on the same set of values.

Jean Matthyssens, a renowned French authority, describes moral rights as being "the right for the writer and the artist to create and to have his work respected."[221] The concept began in 1825, when a committee was set up, under the chairmanship of the Vicomte de la Rochefoucault, following the orders of the king because "[t]he King insisted that this Committee should make every effort to reconcile the interests of authors and artists, and equally those of [the] public and trade."[222] Civil law France acknowledges that the fact that a person has received benefits (such as money) in exchange for transferring economic rights over intellectual property does not eliminate the

217. *See* Berne Convention of 1928.

218. Rosenblatt, *supra* note 200.

219. DAVIES, *supra* note 201, at 144.

220. Falco, *supra* note 214.

221. DAVIES, *supra* note 201, at 142.

222. *Id.* at 145.

moral rights the person has against the transferee.[223] It acknowledges that moral rights exist independently of economic rights.

There is dispute in opinion as to the basis of moral rights:

> [s]ome consider it to be the very heart of the right of the author, others see in it only one aspect of that right; others distinguish it from the right of reproduction and give it a different basis, arguing that it is derived from the right that every man has to [have others] respect his personality.[224]

However, one thing is certain. *It was trade and commercialization of intellectual property*, specifically that of the works of authors, *which gave rise to moral rights.* There was recognition by the king that in the commercialization of certain works, the author's individuality should be protected given the context in which his works were proliferated. Desbois describes the development of moral rights in France prior to 1957 as follows,

> In a word, on first publication, the work enters the community and a fortiori, the national heritage, but the economic exploitation thereof will be submitted to the influence or rather the supremacy of the moral right: the exercise of the latter will temper the effect of the transfer, in order to ensure respect for the links which unite the work to the personality of the creator.[225]

Presently, many common law countries have already incorporated moral rights in their intellectual property law. However, their emphasis is different from that of civil law countries. Common law countries, in line with the general rationale for intellectual property, stress the importance of the protection of an author's work to encourage authors to create and disseminate their works. Civil law countries, on the other hand, place importance to moral rights because of the recognition that the author's work is, first and foremost, an extension of the author's personality—giving the author the right of control, independent of his economic rights.[226] Nevertheless, though civil law and common law countries differ in their emphasis, these differences should not be amplified because there is a lot of common ground in historical and present-day justifications for such variance.[227]

223. *Id.*

224. *Id.*

225. *Id.* at 144-45.

226. *Id.* at 17.

227. DAVIES, *supra* note 201.

d. Rationale for the Grant of Moral Rights

A perusal of the history of intellectual property shows that the concept of moral rights was invented and developed as a solution to specific problems in developing countries, especially in the advent of technological advancements. Since many developing countries were rich in traditional art and folklore, often the basis of interesting and unique creations of local craftsmanship, these countries created laws so that they can gain maximum economic benefit from such creations.[228] Presently, intellectual property is protected mainly for two reasons: first, to give statutory expression to the moral and economic rights of creators in their creation; and second, to promote, as a deliberate act of government policy, creativity and dissemination, as well as the application of a work's results to encourage fair trading and promote socio-economic development.[229]

Moral rights, in particular, were introduced to assert the eminent dignity of the human person.[230] "It is the creation, [the] intellectual manifestation of the personality, that invests the author with a number of rights, without[,] in as much, enduring public interest."[231] The concept of moral rights is rooted from a belief that artistic and literary creations are emanations of the author's personality. It gives emphasis on the author's individuality.[232] The concept of moral rights encourages the view that the author of a work of the mind is entitled to enjoy, in that work, by the mere fact of its creation, an exclusive incorporeal property right which is enforceable against all persons.

The legislator does not intervene to attribute to the writer, the artist, the composer, an arbitrary monopoly influenced by considerations of expediency in order to stimulate the activity of men of letters and artists in the interest of the collectivity; the author's rights exist independently of the legislator's intervention.[233]

> Moral rights exist in legal systems which view creative work as an extension of the author's personality. This is because accurate attribution of authorship or creation establishes both the true value of a work and the

228. *Id.* at 27.

229. *Id.* at 28.

230. *Id.* at 151.

231. *Id.* at 152.

232. Samuelson, *supra* note 7, at 1146.

233. DAVIES, *supra* note 201, at 153.

reputation of its creator, and performs a trademark-like function in identifying both the source of a work and the qualities of a work.[234]

The United States Congress, in its initial refusal to sign the Berne Convention, held that even prior to specific legislation regarding moral rights, the attributes to which moral rights pertain (for example, the *right to attribution* and the *right to integrity*) were already protected in the country by other legislations, such as libel laws and trademark laws, specifically, the Lanham Act.[235] According to the U.S. Congress, the primary role of a trademark is to distinguish the holder's goods and services from that of others and to identify for the relevant public the origin of such goods and/or services "even if that source is unknown." A trademark also serves to inform the public of certain attributes of goods and/or services connected to the mark, such as status, quality, reliability, and resale value.[236] Since trademarks possess the ability to identify both the source and attributes (good or bad) of the goods/services, proper and accurate use of trademarks and source indicators is important.[237] Trademark law protects two distinctly different groups: it protects commercial entities or companies that use the trademark for advertising and selling goods/services, and it also protects the public by preventing confusion or deception resulting from the use of a similar mark that is inconsistent with the quality and nature of the goods associated with the original mark.[238] The U.S. Congress ratiocinated that since trademark laws and moral rights have very similar objectives behind them (that is, to protect both the originator and the public by ensuring that the proper attributes are ascribed to the proper source), there is no reason to legislate on moral rights.[239] Notwithstanding its initial opposition, the U.S. Congress

234. Michael Landau, *Dastar v. Twentieth Century Fox, the Need for the Stronger Protection of the Attribution Rights in the United States*, http://www.nyu.edu/pubs/annualsurvey/articles/61%20N.Y.U.%20Ann.%20Surv.%20Am.%20L.%20273%20(2005).pdf#search=%22Michael%20Landau%20Dastar%20v.%20Twentieth%20Century%20Fox%2C%20the%20Need%20for%20the%20Stronger%20Protection%20of%20the%20Attribution%20Rights%20in%20the%20United%20States%22 (last accessed Sep. 6, 2006).

235. Lanham Act, 15 U.S.C. §§ 1051-1141n (2000 & Supp. 2004), *available at* U.S. Patent & Trademark Office, http://www.uspto.gov/web/offices/tac/tmlaw2.html (last accessed Sep. 6, 2006).

236. Landau, *supra* note 229.

237. *Id.*

238. *Id.*

239. Congressional debates regarding the enactment of the Visual Artists Rights Act of 1991.

later acceded to the Berne Convention, admitting that attribution rights needed better protection in its jurisdiction.

Bearing in mind the purpose of the creation of moral rights in the works of authors, the author of this Essay believes that an individual should be given moral rights in his personal information. This is suggested for several reasons. First, the nature of personal information is akin to intellectual property in the sense that it is created and belongs to the person to whom the information pertains. It will not be difficult for Congress to create a new variant of intellectual property as part of current laws as personal information already possesses attributes similar to other incorporeal, intellectual creations. Second, a grant of moral rights gives credence to and emphasis on an individual's personality-based interests, consistent with the nature of personal information and the requirements of privacy rights. Third, a moral rights framework allows the introduction of personal information as a commodity but, at the same time, provides the individual with adequate protection by ensuring that only correct traits or information are ascribed to him. It allows the individual to seek remedy in current laws on moral rights in order to protect his interest in case of abuse in the use of his information. The moral rights approach correctly reflects both a person's economic as well as moral interests.

3. Moral Rights in Current Philippine Law

The provisions on moral rights in the Philippines are found in Chapter X, under the subdivision on Copyrights, of the Intellectual Property Code.[240] Section 193 provides:

> Sec. 193. Scope of Moral Rights. — The author of a work shall, independently of the economic rights in Section 177 or the grant of an assignment or license with respect to such right, have the right:
>
> 193.1. To require that the authorship of the works be attributed to him, in particular, the right that his name, as far as practicable, be indicated in a prominent way on the copies, and in connection with the public use of his work;
>
> 193.2. To make any alterations of his work prior to, or to withhold it from publication;
>
> 193.3. To object to any distortion, mutilation or other modification of, or other derogatory action in relation to, his work which would be prejudicial to his honor or reputation; and

240. INTELLECTUAL PROPERTY CODE, §§ 193-99.

> 193.4. To restrain the use of his name with respect to any work not of his own creation or in a distorted version of his work.[241]

From the above provision, it can be seen that Philippine law recognizes moral rights as characterized by: (1) the right of attribution or paternity,[242] (2) right of withdrawal or retraction,[243] and (3) the right of integrity.[244]

a. Right of Attribution

Attribution is the requirement that an author be given credit for his work in any context in which the work is used. The *right of attribution* grants the author the ability to secure his name to a work which has been falsely attributed to another artist.[245] It is often considered the most basic requirement in a license as it allows an author to accumulate a positive reputation that partially repays his work and prevents others from fraudulently claiming to have produced the work.[246] Typically, the only way a person may copy content without providing proper attribution is to ask for explicit permission.[247] Since moral rights are concerned with protecting the personality and reputation of authors, the right to be identified for intellectual creation cannot be exercised unless it has been asserted by the author.[248] Once asserted, however, others cannot use the property without the express agreement of the owner.

The Philippines lack jurisprudence upholding the *right of attribution* because this issue is rarely raised in intellectual property cases. Foreign jurisprudence, however, is illustrative. The first case in point is *Clemens v. Belford, Clark & Co.*[249] which involved a situation where Clemens, an author, sued a publisher for unauthorized reprinting of his works. Clemens did not copyright his works. Thus, although he was the owner of the work,

241. *Id.* § 193. This section is derived from Decree on Protection of Intellectual Property, Presidential Decree No. 49, § 34 (1972).

242. *Id.* § 193.1.

243. *Id.* § 193.2.

244. *Id.* § 193.3-193.4.

245. Falco, *supra* note 214.

246. *Attribution*, *at* http://en.wikipedia.org/wiki/attribution (last accessed Sep. 6, 2006).

247. *Id.*

248. *What are moral rights?*, http://www.intellectual-property.gov.uk/faq/copyright/moral_rights.htm (last accessed Sep. 6, 2006).

249. Clemens v. Belford, Clark and Co., 14 F. 728 (C.C.N.D.Ill. 1883).

it was considered part of the public domain which could be reprinted. Clemens asserted that the publisher had infringed his common law trademark, "Mark Twain." The court rejected the theory on the basis that the work was not copyrighted. However, by way of *dictum*, the court held that:

> *no person has the right to hold another out to the world as the author of literary matter which he never wrote...* Any other rule would permit writers of inferior merit to put their compositions before the public under names of writers of high standing and authority, thereby *perpetrating a fraud not only on the writer whose name is used, but also on the public.*[250]

In *Gershwin v. Ethical Pub. Co. Inc.*,[251] the plaintiff was falsely attributed to by a magazine and was able to recover damages under libel laws. In *Granz v. Harris*,[252] which dealt with the sale of an abridged recording that was attributed to the performer, the court said that it was a violation of laws against unfair competition to pass off an abridged version of a performance and describe it as the performer's work.[253]

It is evident from these cases that the purpose of granting the *right of attribution* is to prevent fraud on the part of the author as well as the public by ensuring that: (1) a person's work is properly attributed to him, and (2) *only* his work is attributed to him. If personal information is granted moral rights, specifically the *right of attribution*, an individual would have additional protection over what libel laws currently provide. It would enhance a person's liberty to disclose personal information about himself because disclosure comes with the assurance of the law that should the private information come into the wrong hands, such information will still be kept in its pure and accurate form. Otherwise, the person making false attribution may be held liable.

b. Right of Withdrawal

The *right of withdrawal or retraction* grants the author the ability to modify or withdraw his work from the public eye. This right essentially creates a continual right of disclosure, such that the artist, even after transfer of the work has occurred, has the right to decide if the public should continue to have the "privilege" of viewing his work.[254] It most certainly reflects a

250. *Id.* at 730-31 (emphasis supplied).

251. Gershwin v. Ethical Pub. Co. Inc., 1 N.Y.S.2d 904 (1937) .

252. Granz v. Harris, 198 F.2d 585 (2d Cir. 1952).

253. *Id.* at 588.

254. Falco, *supra* note 214.

concept of the artist's work as an exemplification of his personality, because when his personality changes and he no longer feels that the previous work adequately represents his current reality, he has the right to discontinue that former representation.[255] French courts have interpreted the right of disclosure to mean that the artist alone has the right to decide if and when his work should be disclosed to the public. This implicitly means that only the artist has the right to determine when the work is completed; and hence, he is the only person able to determine whether the work should be offered to public scrutiny.[256] The *right of withdrawal* allows an individual to control what information to divulge, to whom it should be divulged, and under what circumstances it may be disclosed.[257]

The application of the *right of withdrawal* to individuals who introduce their personal information into the world of commerce presents numerous benefits. It acts like a default opt-out clause for the individual and provides him with a remedy in instances where his preference has changed or when he has determined that there has been abuse in the use of the information he provided. This prevents the individual from being estopped by allowing him to withdraw the information once there is a change in circumstances, thus preventing forced consent to continued use of his information because of an initial agreement of assent. This, in effect, gives the individual wider discretion in determining which information to keep in circulation and which information to withdraw from trade. It also allows him to preclude, at any point, the "buyer" of his information from further use or sale of such information.

c. Right of Integrity

The most controversial and litigated aspect of moral rights is the *right of integrity*. In France, the *right of integrity* guarantees the character of the author's creation. This right gives the author the ability to ensure that the work is continuously a true representation of his personality by forbidding any unconsented alteration or modification of his work.[258] French courts have recognized that when a work is being adapted from one medium to another, some modifications are inevitably going to happen. Courts have tried to mitigate any damage to the artist's reputation and personality which might occur as a result of these adaptations by holding that the *right of*

255. *Id.*

256. *Id.*

257. Samuelson, *supra* note 7, at 1147.

258. Falco, *supra* note 209.

integrity ensures that modifications will not distort the spirit of the original work.[259] The *right of integrity* also ensures that the author's right not to have the work subjected to derogatory treatment or to a manner prejudicial to the author's honor or reputation is protected. This includes anything resulting in a material distortion or mutilation or a material alteration of the work, or doing anything else in relation to the work prejudicial to the author.[260] United States courts recognize that the moral *right to integrity*, although generally focused on personal and reputational interests of authors, have underlying economic considerations. "This is because 'mutilation' of an author's work can tarnish the author's reputation in ways that may be difficult to measure, akin to the harm to goodwill when trademarks are disparaged or tarnished."[261] This allows the author to recover damages from the person who mutilated his work.

One of the problems regarding the *right of integrity* is determining what is prejudicial to the author's honor or reputation. This is because of the subjective nature of the words "prejudice" and "honor." To answer this concern, the author of this Essay suggests that the Philippines adopt the test used in Australia in applying their Copyright Amendment (Moral Rights) Act.[262] It uses the test of "reasonableness" to serve as a guide in disputes involving attribution and integrity.

> Reasonableness includes the nature of the work, the purpose for which it is used, the manner in which it is used, the context in which it is used, practice in the industry in which the work is used (including voluntary codes), and whether the work was made in the course of employment or under contract.[263]

The most famous case regarding the *right to integrity* is the Canadian case of *Snow v. The Eaton Centre Limited*,[264] which involved a sculpture in Eaton Centre. The sculpture was altered and modified in such a way that the sculptor felt it was detrimental to his interests, so he sued. The Canadian High Court of Justice held that the sculptor can assert his moral *right of*

259. *Id.*

260. *Moral Rights*, http://www.caslon.com.au/ipguide17.htm (last accessed Sep. 6, 2006).

261. Samuelson, *supra* note 7, at 1148 (citing the case of Société Le Chant du Monde v. Société Fox Europe, 1 Gazette du Palais 191 [1953]).

262. Passed by the Australian Parliament on the first week of Dec. 2000 and came into effect with Royal Assent on Dec. 21 of that same year.

263. *Moral Rights*, *supra* note 260.

264. Snow v. The Eaton Centre Limited, 70 C.P.R. 2d 105 (1988).

integrity in the work and obtain injunctive relief to require restoration of the original. Another case is *Shostakovich v. 20th Century-Fox*,[265] which involved an action by three composers in the Soviet Union to prevent their uncopyrighted compositions from being used in a movie with an anti-Soviet theme. The alleged wrong was the use of plaintiffs' music in a movie the theme of which was objectionable to them because it was unsympathetic to their political ideology. There was no charge of distortion of the compositions nor any claim that the same were not faithfully reproduced. In denying the injunction, the United States court said that there was no legislation protecting such moral right therefore no rights were considered violated. (Remember that the U.S. initially rejected the idea of moral rights on the ground that trademark laws already perform similar functions as moral rights. This was perhaps one of the cases where they realized that the adoption of moral rights is needed). A sequel to this case is *Société Le Chant du Monde v. Société Fox Europe*,[266] which involved the same parties but was litigated not in the U.S. but in France. In this case, the French court held that there was a violation of the plaintiff's moral rights. The favorable decision in the latter case is credited to France's highly elaborate law and jurisprudence regarding moral rights. In another case, *Buffet v. Fersing*, also litigated in France, the artist Bernard Buffet incurred damages from a buyer who had disassembled one of his works. Buffet executed a painting on six panels of a single refrigerator, signing only one panel. The court held that the single signature was evidence of the intention that the work was to be understood as a whole. Buffet was able to recover damages for the violation of his integrity right when the owner of the refrigerator sold each panel separately.[267] In 1992, a French court also held a theatrical director liable for infringement of Samuel Beckett's *right of integrity* by staging *Waiting For Godot* with the two lead roles played by women instead of men, contrary to Beckett's stage directions. It commented that the exercise of a moral right with respect to a performance was justified because from the audience's point of view "the work and the performance became one."[268] Lastly, in 2004, the Cour d'Appel de Paris imposed a symbolic fine of €1 on the publisher of a sequel to the play *Les Miserables*, ruling that the work infringed

265. Shostakovich v. 20th Century-Fox, 80 N.Y.S.2d 575, *aff'd*, 87 N.Y.S.2d 430 (1949).

266. Société Le Chant de Monde v. Société Fox Europe, 1 Gazette du Palais 191 (13 Jan. 1953), *aff'd*, D.A. Jur. 16, 80 Cour d'appel de Paris.

267. *Moral Rights*, *supra* note 260 (citing Buffet v. Fersing, D. Jur. 570 [1962]).

268. *Id.*

on the moral rights of Victor Hugo, who would not have permitted a third person to write a continuation of the novel.[269]

The *right to integrity* is important with regard to protection of personal information because an individual has an integrity interest in the accuracy and other qualitative aspects of personal data, even when these data are in the hands of third parties. Moreover, a moral rights-like approach will allow the individual to ascertain his rights against persons beyond those with whom he has contracted.[270]

d. Other Features of Philippine Moral Rights

Aside from the *right of attribution*, the *right of withdrawal*, and the *right of integrity*, there are other features of moral rights in the Philippines which may be applied to personal information. First, moral rights may be waived through a written instrument.[271] By waiving moral rights, the right to use and enjoy the work may be assigned including the moral rights pertaining to it. Nevertheless, while waiver of moral rights may permit the assignee to use and enjoy the rights of the owner, such waiver does not permit the assignee to: (1) use the name of the author or the title of his work, or otherwise make use of his reputation, with respect to any version or adaptation of the work which, because of alterations therein, would substantially tend to injure the reputation of the author, or (2) use the name of the author with respect to a work he did not create.[272]

If applied to personal information, waiver will allow another party to use the individual's information but still adequately protect the latter because of the restrictions provided in the Intellectual Property Code.

With respect to moral rights, the Intellectual Property Code likewise provides that:

> In the absence of a special contract at the time a creator licenses or permits another to use his work, the necessary editing, arranging or adaptation of such work for publication, broadcast, use in motion picture, dramatization or mechanical or electrical reproduction in accordance with the reasonable and customary standards or requirements of the medium in which the work is to be used, shall not be deemed to contravene the creator's rights secured

269. *Id.*

270. Samuelson, *supra* note 7, at 1149.

271. INTELLECTUAL PROPERTY CODE, § 195.

272. *Id.*

> by this chapter. Nor shall complete destruction of the work unconditionally transferred by the creator be deemed to violate such rights.[273]

While this provision is not squarely in point with the nature of personal information as used in the commercial context, the provision nevertheless highlights the importance given to the consent and intent of the owner with regard to use of intellectual property by ensuring that in the absence of a special contract or a licensing agreement, the owner's rights shall not be violated. The application of this provision is illustrated in *Rey v. Lafferty*,[274] which involved a contract whereby plaintiff allowed respondents to televise 104 animated episodes featuring a character, "Curious George," she created. Respondents, aside from doing the television episodes, also produced videocassettes of the film. The Court, in ruling for plaintiff and disallowing the production of videocassettes, held that the form of video technology used by respondents was not in existence at the time the rights were granted under the agreement and could not have been contemplated as part of the agreement.[275] It was not part of the intent of the creator in their arrangement. Courts take great care in ensuring that only the rights consented to by the owner and agreed upon are granted.

The last important feature of moral rights is that remedies for violations of copyrights are made available to violations of a person's moral rights. It is specifically provided for in Section 199 of the Intellectual Property Code, "[v]iolation of any of the rights conferred by this chapter [that is, the chapter on moral rights] shall entitle those charged with their enforcement to the same rights and remedies available to a copyright owner. In addition, damages which may be availed of under the Civil Code may also be recovered."[276]

V. CONCLUSION

The commercial context people currently live in has forced consumer companies to find ways to obtain and use personal information as part of their business strategies. It is not difficult to imagine instances in one's personal life where personal information was used to advance the cause of commerce. While a number of people find this practice acceptable, others feel it as an intrusion to their privacy from which they should be given protection.

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273. *Id.* at § 197.

274. AMADOR, *supra* note 198, at 580 (citing Rey v. Lafferty, 990 F. 2d 1379 [1993]).

275. *Id.*

276. INTELLECTUAL PROPERTY CODE, § 199.

The use of personal information is a recognized zone of privacy. As a privacy right, it is entitled to constitutional protection. Privacy provisions of the fundamental law, however, only protect an individual from violations made by the government. It does not provide a remedy for violations made by private individuals. Redress for such cases is oftentimes sought in statutes which deal only with specific subject matters. To date, there is no single law protecting a person's privacy right with regard to personal information either in the general sense or in a specific commercial context.

In filling the void created by the absence of a privacy law regarding personal information, Congress may create privacy statutes enforcing an individual's rights against other private individuals. The problem with this kind of legislation is that it often entails the creation of a regulatory body for its enforcement. This translates to greater financial burden for the government as well as decreased control of the owner over personal information because control is relegated to a government agency rather than the individual himself. The author responds to this dilemma by proposing that a property rights regime be used to protect privacy interests regarding the use of personal information.

A property rights regime may be adopted based on three models: the Civil Code Approach, the Constitutional Approach, and the Intellectual Property Right Approach. Of the three models, the author believes that the last two may be easily adopted considering the present Philippine legal framework. The author discourages the use of the Civil Code concept of property because of its strong emphasis on alienability, strict rules on ownership and possession, and the inapplicability of its numerous provisions to the nature of personal information. The author instead advances the Constitutional Approach and the Intellectual Property Approach. This is because the former may be easily adopted in the sense that all it requires is judicial recognition because the standards (pecuniary value plus independent source of entitlement to protection) are inherent in the nature of personal information and are already set in place by prior jurisprudence—there is no need to make new legislation. With regard to the latter, moral rights in intellectual property may be easily adopted by simply amending one provision of the Intellectual Property Code without going through the intricacies of creating a whole new piece of legislation. Section 175 of the Intellectual Property Code which reads:

> Sec. 175. *Unprotected Subject Matter.* - Notwithstanding the provisions of Sections 172 and 173, no protection shall extend, under this law, to any idea, procedure, system method or operation, concept, principle, discovery or mere data as such, even if they are expressed, explained, illustrated or embodied in a work; news of the day and other miscellaneous facts having the character of mere items of press information; or any official text of a

> legislative, administrative or legal nature, as well as any official translation thereof.

may be amended by merely adding a new sentence after the provision to wit: "The immediately preceding paragraph or other provisions of this law to the contrary notwithstanding, personal information of a natural person is an intellectual property possessing the attributes of moral rights found in Part IV, Chapter X of this Code."

Without a doubt, the increasing trend of using personal information as a commodity has necessitated a unique means of protecting personal information (along with its privacy implications). While the current Philippine legal framework leaves a void by failing to provide for this requirement, all need not be in vain. A property rights regime may be adopted by our legislators and our courts to provide for this evolving need of the modern individual.

The Dichotomy in Reparation and Lack of Particularity: The Registered Owner Rule and the Compulsory Motor Vehicle Liability Insurance

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