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**The Problematic Application of Economic Discourse to the
Creation and Transfer of Information**

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Creation and Transfer of Information**

by

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Abstract

The Problematic Application of Economic Discourse to the Creation and Transfer of Information

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In *Citizen's United v. FEC* (2010) and *Sorrell v. IMS Health, Inc.* (2011), the Supreme Court of the United States passed down a pair of opinions which clearly show the weaknesses of economic discourse as applied to the creation and transfer of information, itself defined as speech the court's opinion in *Bartnicki v. Vopper* (2001). Foucault described economic discourse in his *Archaeology of Knowledge* (1972) as being particularly exclusive, both in terms of other discourse as well as to the potential participants in the discourse. This paper argues for the need to incorporate alternate modes of discourse that would provide a more complete understanding of the practical, social, ethical and legal parameters surrounding information's creation and transfer.

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The Problem

It is a popularly accepted truism that we now live in an “information economy.” It is an open question, however, whether this new, global information economy will ultimately be more kind to the poor and to other traditionally marginalized populations than the industrial economies that preceded it.

“Information Policy” is understood for the purposes of this paper to be a government’s responses in legislation, litigation and enforcement to problems that surface during the creation and distribution of information. Of particular interest are the interactions involving both information, as the source of new power, and money, which in many cases represents the legacy of historical power.

The aim of this project is to understand why certain arguments seem more successful in the realm of information policy even as other arguments might seem more compelling. To that end, I will examine two Supreme Court cases, one widely discussed and criticized, the other much less well known. I will then attempt to consider and summarize the explicit logic of the cases, as well as the implicit assumptions of the economic models on which the cases seem to depend. Next, I will appeal to discourse analysis for an understanding of why certain types of language and logic seem to dominate even when, in the view of

this observer, the discourse seems too limited to address the relevant concerns.

Finally, some alternate ways of discussing the issues will be briefly considered.

This paper should be regarded as a work in progress, as I attempt to create a sound understanding and an coherent intellectual space from which I may address information policy in relevant ways without necessarily conforming to the prevalent discourse.

Case Studies

CITIZENS UNITED

In 2010, the Supreme Court ruled in *Citizens United vs. Federal Election Commission* that limiting political contributions by corporations or unions is the same as limiting speech because “[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech ...” (*Citizens United v. FEC*, 2010)

The decision of the Court in *Citizens United* has been criticized often and publicly. (Abrams, 2010) The President of the United States even condemned the decision in a State of the Union Address to the Joint Houses of Congress.

(Obama, 2010) Relatively few Supreme Court cases are discussed as widely and as vehemently as *Citizens United*. One may assume from the public commentary

that the majority opinion was somehow alien to the average American's way of thinking, but the case was, in fact, only the most visible of cases where the Supreme Court addressed speech and money.

SORRELL

In a much less well known case, *Sorrell v. IMS Health Inc.* (2011), the Supreme Court refused to make any meaningful distinction between commercial speech and any other speech. The court repeatedly referred to marketing and data-mining for the purpose of marketing as protected expression and declared that any regulation of marketing practices was subject to the same strict scrutiny as a restriction on political speech. The specific matter at hand was whether the state of Vermont could prevent pharmacies and pharmaceutical companies from using doctors' prescription histories to target marketing efforts of specific high end pharmaceuticals to doctors who may be most likely to change their prescription-writing practice to include the newer, more expensive drugs. The state initially claimed a privacy interest, but since the law only limited use of the prescription histories for marketing purposes, the state was forced to argue that medical cost controls were the primary interest served by the law. Public health being a major component of any state budget, the state claimed a substantial interest.

The Court did not approve. In the majority opinion, marketing or any other type of commercial speech is just another type of content and the state may not regulate speech on the basis of content. The majority opinion only once mentioned the precedent set in *Central Hudson Gas and Electric v. Public Service Commission* (1980), and failed to apply the previously upheld “Hudson Rule.”

In *Hudson*, the Supreme Court decided that commercial speech could be regulated in ways inappropriate to other protected speech so long as the state could demonstrate a substantial interest and the regulation in question satisfies that interest with as narrow a regulation as possible. *Hudson* further declared that commercial speech may not be protected under the First Amendment at all if the speech is misleading or does not refer to lawful activity. Similar restrictions do not exist for political speech, so the Court had clearly made a distinction between commercial speech and other types of expression. The distinction made for commercial speech in *Hudson* was not overturned by the majority opinion of *Sorrell*, it was merely ignored.

In *Citizens United* and *Sorrell*, the Supreme Court has created a problematic set of realities: commercial speech is just speech with a particular content, protected as dearly as political speech, and money contributed to fund the wide distribution of speech is equivalent to the speech itself. The problems of

undue influence of the vast pools of money available to some parties, or the potential drowning-out of the voices of under-funded citizenry were ignored in favor of a particular type of logic. The uncomfortable pairing of money and expression is inextricably linked to the application of a certain type of economic discourse to the creation and transfer of information, itself defined in *Bartnicki v. Vopper* (2001) as a speech act.

The particular logic of these cases is based upon a choice of discourse and is not an inevitable feature of our culture or justice system.

THE LOGIC

The majority opinion in *Citizens United* does not contain the phrase "money is speech," nor does it contain any phrase easily interpreted as being equivalent. Rather, it contains a very logical type of argument with a precedent going back at least to the 1976 decision in *Buckley v. Valeo*. The First Amendment guarantee of free speech not only protects literal vocalizations but also mass market distributions of speech. Since those mass distributions cost money, preventing legitimate speakers from spending money is effectively an *a priori* limitation on speech itself: precisely the type of limitation the First Amendment was ostensibly written to prevent.

In *Sorrell*, the Supreme Court seems set the bar for a states "substantial interest" impossibly high. The opinion of the Court may be summarized "[The] State may not burden protected expression in order to tilt public debate in a preferred direction... The State's interest in burdening detailers' speech thus turns on nothing more than a difference of opinion." (Sorrell, 2011) This argument is very compelling when one imagines the state outlawing a particular class of political or religious speech. It is less compelling in the context of marketing. After all, any claim of misleading conduct by marketers will ultimately rest on a "difference of opinion" and the court did not overtly overturn the precedent of *Hudson* that the state may regulate misleading corporate speech. How did the Court fail to make the distinction between commercial and every other type of speech?

On its face, the Court decided on behalf of the consumers' interest. Citing *Bates v. State Bar of Arizona*, (1977), "A 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.'" (Sorrel, 2011) If the value to the consumer is comparable to political speech, then surely the protections ought also to be the same. "Value to the consumer" in this context is an economic concept that is blind to the specific content or class of speech or to its social, cultural or moral value.

The Assumptions

The application of this variety of distinctly western, free-market economic thought makes some assumptions that may prove untenable. Free market understandings of commerce presume the excludability, rivalry and transparency of the goods in question. (DeLong & Froomkin, 2000) I will first address the issue of rivalry and then discuss the conflict between excludability and transparency when one is considering information goods. I will then discuss the some additional problems with the economic models applied to information.

RIVALRY

Rivalry refers to the characteristic that if one person possesses an object, then another may not. If one person purchases a particular rivalrous good, such as a banana or an automobile, then no other person may acquire that particular instance of the good without depriving the purchaser of its use. The market value of a rivalrous good can be determined as the highest price a potential user is willing to pay for that instance of the good. Furthermore, the theft of a rivalrous good creates real and perceptible harm by actively diminishing the wealth of the victim.

In a world where the cost of reproducing and distributing information is near zero, it is difficult to maintain that information goods have the characteristic

of being rivalrous. (DeLong, 14) In the words of Thomas Jefferson, ideas possessed the “peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine.” (Jefferson, 1813) Information goods on the Internet have this same characteristic replicability, as is evidenced by file sharing and open source software.

In 2002, Jack Valenti, Chairman of the Motion Picture Association of America (MPAA) testified before the House Appropriations Committee concerning the threat of digital “piracy.” Valenti argued that every unauthorized digital copy was directly comparable to the theft of a rivalrous good, and resulted in real economic losses equivalent to theft of the good at full market value. This real harm, according to Valenti, would surely ruin all the “content industries.” The Stop Piracy in NYC campaign, funded by the MPAA states, “Content theft robs U.S. workers of wages for residuals and pensions, too. \$5 billion so far.” (Stop Piracy in NYC, 2012) The Recording Industry Association of America claims that peer-to-peer file sharing has results in annual losses of 12.5 billion dollars to the economy of the United States and the loss of 70,000 jobs. (RIAA, 2012)

File sharers disagree. Cenite et al (2009), researching file sharing in Singapore, found that many of the illegal downloads that occur in Asia are copies of products are not legally available in that market at all. (211-212) Oberholzer-Gee and Strumpf, researching in the United States, found illegal music downloads to “have an effect on sales that is statistically indistinguishable from zero.” (2007, 1) File sharers may argue, then, that illegal downloads do not constitute the same kind of real and perceptible harm as the theft of a rivalrous good. There are still many ethical considerations surrounding a user’s gaining access to a creative work without compensating the creator, but economic discourse, with its assumptions of rivalry, is ill-suited to that discussion.

The open-source software community is another example of a context that takes advantage of the non-rivalrous nature of information goods. Members of the open source community, rather than protecting their proprietary code as an economic good, provide the code for others to alter or improve as they see fit. Instead of market competition, open source coders participate in a cooperative effort to create sophisticated bodies of software that better serve everyone in the community. (Weber, 2004)

EXCLUDABILITY VS. RIVALRY

The characteristics of excludability and transparency are, in the case of information goods, mutually exclusive. Excludability means that the possessor can prevent others from partaking, but transparency implies the free availability of information about the product. Goods in a physical marketplace may have both characteristics. A fishmonger may prevent a customer from taking a fish even as the customer gathers relevant information concerning its size, quality and freshness. If the fishmonger finds some way to obscure or hide the relevant information, then they will not be viewed as a trusted vendor and risk losing customers.

When information is the product, the product cannot be both exclusive and transparent. The consumer's access to information about an information product is necessarily and severely limited by any protections on the product itself. If a potential user is excluded from accessing a particular data set, then that user cannot meaningfully evaluate the data and must rely on trusted reports or reviewers. The more complete and useful the relevant reports and reviews are, the less excluded the user is from the data itself, as the report must contain useful information about the information.

Cenite found that one of the major motivations for the illegal downloading of entertainment goods is the sampling of the good before purchase. (2009, 212) In this case the excluding of the product by making downloads impossible would actually prevent sales as potential purchasers will not choose to buy products they know nothing about. So many entertainment goods are available that potential purchasers cannot make informed decisions without first having some access to the product.

CONTEXT DIFFERENTIATION

Information goods are also distinguished from commodities by their extreme differentiation according to context. Two ten dollar bills possessed by different people have the same market value. Crude oil of a particular grade from Canada has the same market value as crude of that grade that is pumped in Saudi Arabia. The same cannot be said for information. A data set derived from the internet search histories of an affluent demographic may have a very different use, and thus a different value, from the internet search histories of a demographic that might be less affluent. The same might be said for information on the activities of populations with different levels of political involvement. In these instances, some part of the value of the information is not contained in the data itself, but in the identities of the data's subjects.

It may be acceptable to think of trading in commodity corn as being equivalent to trading money. The same may not be said for unique information products whose value is derived from the humanity of the subject or creator of the product. Nevertheless, in modern economic discourse, where value is assigned by the free market, this distinction is not possible.

MONOPOLY OR CROWDING OUT

The economic models being applied to information in *Citizens United* and *Sorrell* seem not to include any notion of the possibility of monopoly or crowding out. Discussions of the Freedom of Speech have included analogies to the “Marketplace of Ideas” since Oliver Wendell Holmes, Jr.’s dissent in *Abrams v. United States* (1919). (Napoli, 1999) The Court opinions in *Citizens United* and *Sorrell* fail to address the possibility that the marketplace of ideas may be flooded by a few speakers able to outbid their competitors for the most powerful and wide distributions of speech. The particular economic discourse used in those cases seems to include the notion of an infinite marketplace, but the models failed to account for the limited attention of real human beings.

Choices of Discourse

The choice to discuss the creation and transfer of information as an economic good necessarily excludes other ways of thinking. (Foucault, 1972)

Litman, in her book, *Digital Copyright*, chronicles the long series of closed-door discussions on copyright policy that have informed current copyright law. (2001)

She notes that consumers were consistently and conspicuously un-represented in those discussions. This is consistent with Foucault's observation that "economic discourse has never been a common discourse." (1972, 68) That is, economic discourse not only excludes other potential modes of discourse, it also severely limits the number of participants.

The Supreme Court's opinion in *Citizen's United* has been criticized on many fronts. (Abrams, 2010) Foucault's arguments on discourse suggest, however, that as long as that case's critics fail to present persuasive counter-arguments within the same economic discourse in which the opinion of the court is presented, they are left with the nearly impossible task of arguing across parallel, but mutually exclusive, discourses.

Economic discourse on information (or pseudo-economic discourse, since it fails to conform to the assumptions or rigor of economics) is so tempting and so exclusive largely due to the appearance of objectivity and authority it creates.

The free market can quantify what would otherwise be intangible value. It is difficult to question the discourse without seeming to question the market itself, which in the United States represents a cultural and political heterodoxy.

But economic discourse does not allow for some of the more interesting questions. In particular, this type of economic discourse excludes discussions of ethical considerations other than crimes against property or discussions of any values information might possess separate from its quantifiable market value. Privacy that people expect but are not willing to pay for is not an economic good and has no economic value. In a world where enormous quantities of speech, or where the same speech on a continuous loop, may be bought as an economic good on the open market, to be distributed through the most effective and authoritative media, there is a non-trivial risk that less well funded speech will be drowned out. Underfunded speech will not lose in the fair “marketplace of ideas” but in a market distorted by economic power amassed through other means. Every citizen may be afforded the right to speak, but if money is equivalent to speech and its unlimited use is protected as speech, then none but the wealthiest citizen is afforded the guarantee to be heard.

Other ways of thinking

Discourse on market economics is both powerful and useful, but it is not the only way to discuss the creation, exchange and use of information.

INFORMATION AS A COMMONS

Some information is already regarded as existing within the information commons or the public domain. Since the United States adopted the Berne Convention in 1989, all expression fixed in a tangible medium are immediately considered property, and thus as economic goods. Prior to 1989, expressions that had not been specifically registered and marked as copyrighted entered the public domain and were not considered to be economic goods. This was the context for the Supreme Court's decision in *Hudson*, where commercial speech could be regulated, because the vast majority of "free" speech was not considered to be an economic good, while commercial speech was. Public information policy might in the future contain a greater awareness and allowance for newly created information to enter the public domain rather than the economic market. (Boyle, 2008) Information that enters the commons could not be so easily converted into money as information in the free market, thus creating an easy distinction between commercial expression and non-commercial

free speech, warranting certain restrictions as well as economic protections for the former.

INFORMATION EXCHANGE WITHIN A GIFT ECONOMY

Closely tied to the expansion of the public domain the idea of gift-economies, where wealth is transferred through gifting rather than through commerce. (Mauss, 1925/2002) This much more closely models the actual practice of human speech, where one does not generally consider ones words as an economic good, but as a social exchange. Social expectations for reciprocity within gift economies may limit the application of these models to information transfer, which is often a unidirectional transaction, (Goulder, 1960) but many have used the notion of the gift economy as a model for the open source community, which creates tremendously valuable software and gives the code away, to be modified, enhanced and regifted by someone else (Weber, 2004, Geisler, 2006) and by Wikipedia, where experts and laypeople contribute their knowledge and expertise freely and collaboratively without any traditional economic motive.

INFORMATION AND HUMAN RIGHTS

Finally, some information may be better regarded as an aspect of personhood rather than as an economic good. A person's vital statistics, internet search history, school records, etc. may be tremendously valuable (at least in aggregate), but that value is derived from the personhood of the information's subject, not the effort or creativity of the information's collector. Information regarding these personal topics may be best informed by some meaningful discussion of privacy rights rather than through a discussion of the data as a product on the open market. (Nissenbaum, 2010, Solve, 2008) Many people would not be able to compete on the open market for data regarding their own person, even if they choose to. The average person is bound to lose the economic competition. In a discussion of intrinsic human rights, however, some control of personal data may be afforded to individuals despite their inability to pay.

Typical pseudo-economic discourse does not allow for a sensible discussion of information in any of these alternate contexts, as they all suggest value as derived from something strikingly different than a market evaluation of worth. A discourse which allows for these alternate perspectives on information would most likely result in a different logical conclusion than those at which the Supreme Court arrived in *Sorrell* and *Citizen's United*.

Conclusion

As information and information goods become progressively more important to the global culture and economy, it will become essential that discussions of information and information policy not be limited to one exclusive context or field of discourse. As long as the prevailing discourse in information policy is economic, then statements concerning human rights, justice and fairness of access as relates to information are meaningless. (Foucault, 1972) That is, arguments to those ends may be proposed, and even widely agreed upon in some circles, but policy will continue to advance according to the prevailing economic logic, which itself has a strong tendency to bolster already existing power structures.

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