

# Appendix H

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## Mailing Lists

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*I would to God thou and I knew where a commodity of good names  
were to be bought.*

—Falstaff

*Henry IV, Part I, I, ii.*

If Falstaff had waited five hundred years, he would have had no difficulty at all in buying all the names he wanted, for names, like any other commodity, are bought, sold, rented, and traded in the lively, mercurial industry of direct-mail advertising. Probably no other application of electronic data processing has had a broader effect upon so large a population as the headlong computerization of the mailing list. The United States Postal Service handles slightly more than one piece of mail per day for every man, woman, and child in the country. About a quarter of the volume moves as third-class matter; i.e., printed material that is neither a periodical nor a book. In practice, nearly all third-class mail is advertising or appeals for funds.

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Since its origin a century ago, the direct-mail industry has grown to represent an advertising expenditure of about \$3 billion per year, or about one-seventh of the total national advertising volume. Mail advertising moves about \$50 billion annually in goods and services, or roughly 5 percent of the Gross National Product. Divided among the 260,000 holders of Postal Service bulk third-class permits, this represents an average annual volume of business of about \$200,000 per holder. A Department of Commerce estimate that only a tenth of all permit holders have more than 100 employees, and only half have more than 10, supports the industry's contention that it is dominated, numerically at least, by small firms operating locally. The largest single class of mailings, accounting for slightly less than 10 percent of the total, is magazine subscription offers.

Although direct-mail advertising is one of the more common experiences of everyday life, public attitudes toward it are studded with inconsistencies and contradictions, likely reflecting the fact that few people give it much thought one way or the other until they are asked a specific question by an interviewer. Even then, the dissonance of being intruded upon by a survey on privacy may well distort the replies. In privacy-minded Britain, for example, only about 2 percent of the respondents in the Younger Committee's survey spontaneously mentioned that their privacy had been invaded through the mail, and much of that response was apparently prompted by recent (1970) saturation mailings advertising sex manuals and the *Reader's Digest* (in separate mailings, of course).<sup>1</sup> In the United States, a Nielson survey found that 87 percent had no objection to being addressed as "occupant".<sup>2</sup> In a survey on behalf of the American Federation of Information Processing Societies (AFIPS), however, 63 percent of the respondents voted for a decrease in "using computers to send mail advertisements to the home," and 84 percent felt that the Government should be concerned with that use.<sup>3</sup>

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<sup>1</sup> *Report of the Committee on Privacy*, Rt. Hon. Kenneth Younger, Chairman, (London: H. M. Stationery Office), 1972, pp. 123, 125-127.

<sup>2</sup> *Factsheet: Direct Mail Advertising* (New York: Direct Mail Advertising Association), 1973, p. 2.

<sup>3</sup> American Federation of Information Processing Societies and TIME magazine, *A National Survey of the Public's Attitudes Toward Computers* (New York: AFIPS-TIME, Inc.), 1971. The summary is discussed in Alan F. Westin and Michael A. Baker, *Databanks in a Free Society* (New York: Quadrangle Books), 1972, pp. 481-484.

Since privacy, like happiness, is essentially a subjective state, it is not easy to frame the arguments against direct-mail advertising in legal or procedural terms. The arrival of the mail itself is scarcely an intrusion, since one is free to throw it away unread. The argument on the simple ground of annoyance has not been upheld by the courts.

The mail box, however noxious its advertising contents often seem to judges as well as other people, is hardly the kind of enclave that requires constitutional defense to protect "the privacies of life!"<sup>4</sup>

Iago's claim of "He that filches from me my good name Robs me of that which not enriches him And makes me poor indeed,"<sup>5</sup> is popular but fails on the grounds that one's name is not ordinarily damaged by use in a mailing list and that the use does indeed enrich the lister.

In those exceptional cases in which the name does suffer damage because the character of the mailing holds the addressee in a false light, as when sexually oriented matter fails to arrive in a plain brown wrapper, the common law does afford the addressee the same rights of action as in any other case of defamation. A Federal statute furthermore allows a person to specify in advance of any intrusion that he does not wish to receive sexually oriented advertisements through the mail.<sup>6</sup>

An individual who desires to avoid receiving sexually oriented mail advertising fills out and submits a Postal Service Form 2201. Each adult of 19 or over must submit a separate form, but a parent may list up to four children on his own form. These forms are processed at Postal Service headquarters and prepared in list format as both magnetic tape and printed copy. The lists are made available for sale to firms that carry on sexually oriented advertising. The law provides a penalty for mailing such advertising to any person who has been on the Postal Service list for more than 30 days. (Note that this service would be practically impossible to administer without the use of a computer to compile the list and keep it up to

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<sup>4</sup> *Lamont v. Commissioner of Motor Vehicles*, 269 Fed. Supp. 880, 883 (S.D.N.Y. 1967).

<sup>5</sup> *Othello*, III, iii.

<sup>6</sup> 39 U.S.C. 3010-11.

date.) The onus of deciding whether a given advertisement is sexually oriented is put on the advertiser, who, if he has any doubt at all, is unlikely to risk a mailing when he knows that the chance of a sale is practically nil, and that he risks criminal prosecution if a recipient whose name is listed considers the advertisement objectionable.

Another, earlier, statute provides a means for an individual addressee to obtain a Postal Service order (i) prohibiting any particular mailer from sending him advertisements that the addressee, in his sole discretion, believes to be "erotically arousing or sexually provocative," (ii) directing the mailer to delete the addressee's name from all mailing lists owned or controlled by the mailer, and (iii) prohibiting the mailer from the sale, rental, exchange, or other transaction involving mailing lists bearing the addressee's name.<sup>7</sup>

The Direct Mail Advertising Association, Inc., the industry's largest trade organization, also makes a list of people who want to be removed from mailing lists. Since the Association excludes mailers of sexually oriented material from membership, its de-listing service is meant to affect ordinary commercial and charitable lists. Forms for taking advantage of the Association's "Mail Preference Service" are available from its headquarters at 230 Park Avenue, New York, New York 10017. According to the DMAA, a consolidated listing of those who "wish to get out of the mail mainstream" is distributed monthly to its approximately 1,600 members. Although the Association points out that no particular sanctions apply to the Mail Preference Service listings, most advertisers are glad to remove nonproductive names, since "cleaning" increases the trading and rental value of their lists. In fact, most mailers will cheerfully remove a name from a list, if the list they are using happens to be under their own control and not merely rented from a broker. Most mailers, DMAA members and independents both, find that requests to be removed from the lists average 3 or 4 persons per 10 thousand addressees per year.

If getting off a list takes initiative and a degree of sophistication, getting on the list in the first place is so easy as to be practically inevitable for most people. To begin with, both the Direct Mail Advertising Association and a number of independent brokers oper-

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<sup>7</sup> 39 U.S.C. 3008.

ate enlisting services. The Association's operation lends a symmetry to the Mail Preference Service by providing a form to get *on* mailing lists in any of 22 different categories. The independents usually place modest classified ads in popular magazines: "Receive BIG mails. Your name on 50 lists, 50 cents". As one might expect, lists compiled from this source include mostly curious teen-agers. Most persons join the lists through more indirect, but nonetheless effective, paths.

Almost any action that puts a name and its associated address into the hands of a commercial or service organization will put that name on a mailing list—subscribing to a magazine, buying an item by mail from a magazine advertisement, buying air-travel insurance at an airport, joining a professional or scientific society, donating to a charity or a political campaign, returning the warranty card from a purchase, holding a credit card, or taking out a mortgage. In many cases, registering a car, getting born or married, going to school (public or private), being in the telephone directory, or qualifying for a license as a driver, pilot, or riverboat master will provide all the record an entrepreneur needs to add a name to his list.<sup>8</sup>

It is this industry practice of compiling lists from official records that seems to generate the most consistent opposition to the mailing-list industry. However, since administrative records are presumed to be public unless otherwise designated, and since openness of records serves well-recognized democratic ends, it seems an unnecessarily Procrustean solution to restrict access to public records merely to make life more complicated for advertisers. In fact, competitive pressure often forces commercial list agencies to abandon public records as too outdated and to develop other sources for the same data. Birth records in many jurisdictions, for example, often lag as much as 60 days, so that the psychological edge of a fine-honed mailing to sell insurance to the new father, for instance, would be badly dulled. Most commercial birth lists are compiled from private agreements with hospitals (or with hospital employees), newspaper birth announcements, or from orders with diaper services or dairies. Some of the larger lists, particularly for

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<sup>8</sup> See *Sale or Distribution of Mailing Lists by Federal Agencies*, Hearings before the Subcommittee on Foreign Operations and Government Information of the Committee on Government Operations, U.S. House of Representatives, 92nd Congress, 2d Session, June 13 and 15, 1972 (Washington, D.C.: U.S. Government Printing Office), 1972.

urban areas, are derived from city directories (themselves the product of a private census effort by the R. L. Polk organization), or from the telephone book.

Starting with a raw list of names and addresses from the telephone book, for example, a listing organization may sort the addresses by census tract for a first cut at arranging the list by income. Census tracts, the smallest units for which decennial census data are regularly published, cover urban neighborhoods of about a thousand families each. For each tract population, the census reports median income and education, average family size, distribution of occupations, size and type of housing, and other statistical data that permit a fairly accurate estimate (American neighborhoods being as homogeneous as they are) of the buying power of every individual on the raw telephone-book list.

So far, making the list has demanded only modest clerical resources. Although most telephone books are computer-produced to begin with, and thus already exist in machine-accessible form, a good deal of handwork is required to sort out listings that do not conform to the usual structure of names. (Despite the earnest efforts of mailers and their computer experts, there is a whole class of computer stories about the Little Sisters of the Poor, for instance, getting offers beginning "Dear Mrs. Little.") In some towns, this handwork is the basis for a sizeable cottage industry.

Other useful sources of names are the rosters of various license holders and professional societies. Lists from these sources allow highly selective mailings to advertise specialized books and equipment. Since most recipients are genuinely interested in the advertised matter, there is little opposition to direct mail from this source, although clubs of stamp and coin collectors take pains to protect their members from inadvertently advertising their collections to burglars.

With lists of various sorts to work from, relatively simple computing equipment will enable a list broker to assemble very specialized mailings. Matching a medical society list against census tract addresses against motor vehicle registrations, for example, can easily produce a list of physicians in a given suburb who own Oldsmobiles more than two years old. A sales message tuned to just that audience may have excellent results.

In some cases, the computer can be used to generate specialized lists from a single mass list like the telephone book. A simple program can print out all addresses for which more than one family name is listed to produce a list of apartment-house dwellers. The computer may simply replace every name on the list with the word "occupant," trading the benefits of a personalized approach for those of easier postal delivery. Computer programs are even available which will sort names into ethnic categories. These claim accuracies of better than 75 percent and have been widely used in recent political campaigns.

There is some evidence, however, that this selective computer-tuning of advertising may have passed its peak of popularity. In part, this may be due to rising concern about personal privacy, but it is also likely that the computer-written letter has itself lost some of its novelty. Whatever the reason, except for the very largest direct-mail firms, mostly magazines, there are few companies that find extensive computer work in fine-tuning mailing lists worth the expense of a special automated facility. The managers of the small and middle-sized firms that account for the bulk of direct-mail advertising usually prefer to work from "fresh" lists of people who have recently bought merchandise through the mails. A list may well have originated from a completely different kind of product or service (in fact, direct competitors usually do not exchange lists and even "salt" their own lists with the names of friends who will watch their mail for unauthorized use), but freshness and accuracy of addresses are considered more valuable than affinity. Since about 20 percent of the U.S. population changes address each year, the useful life of any list is ephemeral. Unless the fixed costs of the computer operation can be shared with payroll, inventory, and other conventional business tasks, sophisticated computer processing of mailing lists is not economically practical for most firms.

To what extent should the safeguards suggested by the Secretary's Advisory Committee on Automated Personal Data Systems apply to the direct-mail industry? We have found no evidence that direct-mail advertising is anything more than an annoyance to a small part of the population. That small part, however, deserves its share of reasonable protection. Furthermore, there is no way of knowing whether the number of annoyed people today will grow as an increase in computer-tuned mailing begins to vex those who are

now neutral about it. Certainly it should be easier to deal with such an eventuality if pains are taken now to understand the present situation.

An underlying function of the Advisory Committee's recommended safeguards is to provide effective feedback mechanisms that will help to make automated personal data systems more responsive to the interests of individuals. Systems maintained by most government agencies, and by many private organizations, do not now provide for tight links between individuals and the system operators. The direct-mail industry, however, is largely organized around the idea of public feedback; the trade press concentrates almost obsessively on methods for maximizing response and minimizing complaints.

Because most mailings draw a response from only 3 or 4 percent of the addressees, a small change in the response rate can have relatively large economic implications for the mailer. The same is true for the compilers and brokers of mailing lists, because the price a list commands in the rental market depends not so much on its demographic sophistication as on its accuracy and freshness. Lists are cleaned by adding a special imprint to the mailing which gives the Postal Service authority to correct and return (at first-class rates) all undeliverable pieces. Since it costs about four times as much to discover and correct a "nixie" as it does to make a clean mailing in the first place, there is a powerful economic incentive to concentrate lists on known buyers at addresses of known accuracy.

Another feedback mechanism operates on the industry as a whole. Direct-mail advertising is strongly dependent for survival on the official good will of a large number of agencies of the government; opposition from the Postal Service, from motor vehicle registrars, or from the Census Bureau, to name a few examples, would seriously hamper the industry on its present scale. It seems likely that a scandal involving public records, or the development of a public allergy to direct-mail advertising, would lead to government moves to put constraints on the industry.

Constructive publicity toward emphasizing the rights of the individual relative to direct-mail advertising, especially the methods the industry has adopted for getting off and getting on the larger lists, would go far in strengthening these feedback mechanisms that already operate. In particular, the Direct Mail Advertising Associ-

ation's Mail Preference Service deserves wider attention. Although the Association claims that the service has received wide publicity throughout the country, it does not seem to have made a very deep impression on the public mind. This may reflect the persistent antagonism between the direct-mail industry and newspapers and magazines. Competition for the advertising dollar has often led periodicals to adopt a jaundiced editorial view of "junk mail," and it may therefore be that the Mail Preference Service will have to be publicized mainly through official, especially Postal Service, channels.

If feedback mechanisms stronger than those provided by the economics of the industry should become desirable, there would be formidable practical difficulties in applying the Committee's safeguards to the freewheeling small operators of the direct-mail industry. The most directly applicable of the Committee's safeguards is the requirement for the informed consent of the data subject to be obtained before any collateral use may be made of data from an administrative personal data system. To accomplish this, forms that are used by the system in transactions with individuals (applications, for example), and that are vulnerable to mailing-list uses, could be printed with a block in which the individual—by his deliberate action—could indicate whether or not his name and address could be sold or otherwise transferred to another data system for mailing-list use. Of course, this could not prevent his name and address from being copied by hand out of a public record system, but the cost of such handcopying would sharply curtail much commercial use.

In view of the controls already at work in the direct-mail advertising industry, this limited application of the Committee's safeguards seems sufficient. It would provide protection to individuals from having their names unexpectedly appear on mailing lists without their consent. We doubt the utility and feasibility of trying to make the rest of the Committee's proposed safeguard requirements apply to mailing lists as such, as a form of administrative automated personal data system, or to organizations that deal only in mailing lists. If the control of mailing lists is to be undertaken by law, it should be done by legislation that is directed specifically to that purpose. Any attempt to do so by less direct means, such as through the application of all the Committee's safeguards, would be likely to prove ineffectual, unless the courts come to place a value

on mailbox privacy far higher than that reflected in the *Lamont* case cited earlier.<sup>9</sup> Long before that would have occurred, popular feeling against intrusion on personal privacy would have had to rise to such a pitch that the direct-mail business would already have become, for the first time, flat, dull, stale, and unprofitable.

If the foregoing analysis of the situation underestimates the felt need for greater mailbox privacy, it would be feasible to undertake specific legislative action against the direct-mail advertising industry to provide greater protections, as the regulation of information practices in the consumer-reporting industry amply demonstrates.

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<sup>9</sup> Note 4, p. 290, above.