

# Division of Data Ownership Between the Individual and the Enterprise That Collects the Data

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## Abstract

More and more cases involve disputes between users and platform providers over the protection of personal information and the ownership of the right to personal information. In the big data era, data is an emerging object of civil rights. The ownership of data is very important to the protection of personal information and data transfer. However, there is no explicit legislation to regulate the ownership. In this regard, the author is of the opinion that the original/underlying personal data shall belong to the user, and the fully anonymized dataset based on the original data shall enjoy the property rights and interests in the context of competition.

**Keywords:** data, information, data collection, personal information protection law

## 1. Distinguishing Between "Personal Data" and "Personal Information"

As for the right of personal data, Item 4, Paragraph 1 of Article 76 of the Cybersecurity Law provides: "Network data refers to all kinds of electronic data collected, stored, transmitted, processed and generated through the network." Personal data itself contains personal information. Personal data has the dual attributes of both information body and information medium. Article 127 of Civil Code protects the property attribute of data, and includes the protection of personal data under the part of personality rights. Personal data has the characteristics of confidentiality, completeness, usefulness and controllability. On the contrary, personal information has the characteristics of openness, fragmentation and uncontrollability (Zheng, F., & Li, S.-Y., 2021). The completeness of personal data makes it possible to directly or indirectly identify an individual. Such strong identifiability is lacking in personal information. The weak identifiability of personal information is also one of the reasons why legislators protect the property attribute of personal data rather than the personal attribute of personal information.

However, the purpose of the protection of personal information is to protect the personal information with use value, not all personal data. Therefore, both the Cybersecurity Law and the Civil Code adopt the expression of "personal information" in legislation (Wang, C.-H., 2018). Item 5, Paragraph 1 of Article 76 of the Cybersecurity Law provides: "Personal information refers to all kinds of information recorded in electronic or other forms that can be used, independently or in combination with other information, to identify a natural person's personal identity, including but not limited to a natural person's name, date of birth, identity document number, personal biometric information, address and telephone number, etc." Article 1034 of Civil Code defines personal information as "all kinds of information recorded in electronic or other forms that can be used, independently or in combination with other information, to identify a particular natural person."

## 2. Data Has Property Attribute

Many Internet business models which provide free Internet to users are actually built on the consideration of personal data. However, compared with the direct consideration obtained from selling personal data, which embodies value obviously, the property value of personal data in Internet business models is embodied invisibly. Take the search engine advertising alliance business model as an example, the alliance websites get advertising fees based on the use of user search history cookie records, to the user personalized advertising. Therefore, although the users use the search engine for free, in fact, it is the user's search records and other behavioral data that feed the search business, is the value source of the search business to continue and develop.

From the legal perspective, the legal field has already noticed the trend of personal data commercialization, and has the theoretical basis to provide legal support for the trend of data commercialization. Personal data is the object protected by the Personal Data Protection Law, and the source of personal data rights is the personality right.

Traditionally, the right of personality is distinguished from the right of property, and personality can not be used and traded like property. However, under the promotion of market economy and modern commerce, the view that personality right has not only spiritual interests, but also property interests has been generally accepted in the theory of law. The most typical one is portrait right. It has become a common commercial phenomenon for stars and public figures to transfer the right to use their own portraits by contract and gain property income from it. On this point, there is no essential difference between the right of personal information and the right of portrait. (Wang, R., 2015) From the perspective of personal information, the market recognizes the commercial value of personal data of celebrities and ordinary people. Theoretically, everyone may have the possibility to exercise the rights and interests of the personal data property.

Article 127 of Civil Code provides that, where the law contains provisions in respect of the protection of data and network virtual property, such provisions shall apply. Obviously, the protection of data by stipulating provisions immediately after the rights of personality, property, creditor's rights and intellectual property is equivalent to recognizing that the right to data is a new kind of property right. On July 22, 2020, the Supreme Court and the National Development and Reform Commission issued the Opinions on Providing Judicial Services and Guarantees for Accelerating Improvement of the Socialist Market Economy System in the New Era, which provides protection of digital currency, network virtual property and data as new types of rights and interests. It also expressly states that the collection, use, trading and intellectual results derived from data should be protected in accordance with the law. The Opinions of the Central Committee of the Communist Party of China and the State Council on Building a More Improved Mechanism for Market-oriented Allocation of Elements has already identified data as production elements.

### **3. General Rules for Processing Personal Information by Collecting Enterprises**

The rules on processing personal information are the main content of the Personal Information Protection Law. The Personal Information Protection Law adopts mandatory regulations to adjust the processing of personal information in an all-round and dynamic manner. Except for the processing of personal information between natural persons for personal and family affairs, all processing of personal information falls within the scope of the Personal Information Protection Law. The informing and consent rule is a principle that determines the legality of personal information processing, that is, unless otherwise provided by laws and administrative regulations. The informing and consent rule is not a ground for reduction or exemption of civil liability, and its application is subject to other rules and principles. There is no contradiction between the sensitive information in the Personal Information Protection Law and the private information in the Civil Code. The two have different regulatory purposes and functions. In principle, it should be prohibited to process sensitive personal information, unless there are special provisions in laws and administrative regulations for the purpose of protecting higher-level legal interests.

### **4. Division of Data Between Individuals and the Collecting Enterprise**

#### *4.1 The Division of Data Ownership Between the Enterprise That Collects Data and the Individuals From Whom Data Are Collected*

##### **4.1.1 Economic Perspective: Efficiency First**

From an economic perspective, the initial allocation of data property rights between different subjects such as individuals, enterprises, platforms, governments and other organizations will affect the final efficiency of allocation of data resources. The Coase Theorem II states: If the transaction cost is not zero, different initial allocation of property rights will bring different efficiencies of resource allocation. It can be concluded that the allocation of property rights will eventually affect the efficiency of resource allocation.

If a person's data is mastered and used only by him, the value of this data is almost negligible and the efficiency is very low; but if a large number of individuals' data are collected to some data enterprises, and finally summarized to platform enterprises, when the number reaches 100 billion or more, the value of this data will be immeasurable, and the use of big data, artificial intelligence and other scientific and technological means can make the efficiency and value greatly improved.

Therefore, we can conclude that the more data property rights are concentrated to large levels of subjects, the greater the value produced and the higher the efficiency.

##### **4.1.2 Equity Perspective: Just and Reasonable Priority**

The process of formation of data lies in that individuals generate data - enterprises collect and manage data. According to the "forehead sweating" principle, in the process of formation, both of them have participated in and paid efforts on the identification of data property rights. It is difficult to measure the specific pay and contribution

of individuals and enterprises, and it is not possible to solve the equity problem simply by dividing property rights to a certain subject. Although it is impossible to get the specific contribution of each subject directly, but from this point of view, the coexistence of data property rights between different subjects is reasonable.

#### 4.1.3 Reality Perspective: Balancing Efficiency and Equity

Although law belongs to the superstructure, this does not affect the characteristics of law in serving the economy. If property rights are allocated to platform enterprises only by efficiency, although the efficiency of resource allocation is the best among the existing data, this will inevitably lead to individuals' negative attitude and even resistance to the generation of data, which hinders sustainable development. This is also where the limitation of the Coase Theorem lies. If the allocation is only based on the principle of equity, data may become fossilized, which will affect utilization efficiency and social public interests.

Therefore, by taking into account both efficiency and equity, two points can be reached: (1) the ownership of underlying direct data belongs to individuals; (2) the right to use collective data belongs to data collection enterprises.

To address the first point: in *Taobao (China) Software Company Limited v. Anhui Meijing Information & Science Co., Ltd.* (an unfair competition dispute) (Note 1), the court held that the data of a single user itself has no direct economic value. In the absence of legal provisions or contractual provisions, network users have no independent property rights or property interests to speak of regarding the individual user information they provide to network operators, and the underlying data has a strong personal nature. If the property rights belonged to the enterprises, under the personal information protection system provided by the existing Cybersecurity Law, it is difficult for the enterprises to do anything with such data. Furthermore, this will also affect the perception of product users and the actual feeling of use, and the data production process will also languish in a long time, which will ultimately hinder sustainable development of the digital industry.

To address the second point: although such collective data in essence is an aggregation of personal data, the collection, management and storage of such data require considerable costs. Therefore, it is reasonable for the data collection enterprises to have a right to use such data, which reflects the principle of equity. If the personal data that data enterprises spend a lot of money to collect cannot be used and transacted, the data enterprises will have no economic incentives to engage in such activities, and the liquidity of data and the value implied in data will be difficult to be realized.

To sum up, the ownership and property rights of the underlying direct data directly belong to the individuals as they involve the rights closely related to personality and personal rights. With the users' consent and under the premise of ensuring that the users' privacy and other legitimate rights and interests are not infringed, enterprises enjoy the legitimate rights and interests in respect of the overall user data collected for commercial use based on their business activities with the perspective of economy, fairness and practicality. (Note 2) Individuals enjoy the property right or limited ownership of their personal data. If data sets arise from the processing of users' data by data enterprises, the enterprises enjoy the property right or limited ownership of such data sets.

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### **Notes**

Note 1. See Internet Court, (2017) Zhe 8601 Civil First Instance No. 4034 Civil Judgment.

Note 2. See the civil ruling (2019) Jin 0116 Civil First Instance No. 2901 issued by The People's Court of Tianjin Binhai New Area.

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