

The Justification Basis of Personal Data as a New Object of Civil Right

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Abstract

Data is a new object produced with the development of the scientific and technological society, with unique characteristics such as intangibility and non-exclusivity, but data still has the independence and property required by the object of civil right, and is a new type of object of civil right in modern civil law. Analyzing the justification basis of personal data as a new type of civil right is the premise to solve the division of data ownership in the fields of big data market, network security, etc.

Keywords: personal data, civil right, object rights basis

In the surging big data era, the collection, analysis and utilization of data have gradually become the core of enterprise operations. In addition to the data obtained by providing their own services, enterprises' demand for data has further expanded to the periphery, and data trade featuring the buying, selling and sharing has become a noticeable commercial phenomenon. Before the analysis of the specific ownership of data, we should analyze the justification basis of data as a new type of civil right, clarify the reasons and characteristics why data as a new type of right, and lay the underlying framework, we can conduct the subsequent division of ownership based on these essential characteristics.

There are two views on the division of data rights in the industry. One is to take the user as the priority, and indirectly restrict the enterprise's data trade activities by the user exercising his personal data property right; the other, from the standpoint of the industry, hopes to make clear the enterprise's full and absolute ownership of data, loosen the restrictions on the enterprise's data processing activities, and minimize the intervention from the outside world. Although the above two views diverge in conclusion, they have a common cognitive starting point, that is, to recognize the property nature of data, or to say that data can generate property rights, which is the premise of discussing data ownership.

According to the interpretation of Yuan Zhao Legal Dictionary, the "ownership" refers to a person's exclusive dominion over something, which is a collection of rights to possess, use, lease, lend, establish a guarantee, transfer, present, and exchange the object, and other rights to dispose of the object. It is also the fullest, most complete, and most extensive right on the object (including tangible and intangible property) as recognized by the law.

Although the "thing" in the Real Right Part of the Civil Code of China only refers to tangible things, including movable and immovable property. But China's law does not exclude rights as the object of real right, such as property rights in intellectual property rights and so on ((Wang, L.-M., Yang, L.-X., Wang, Y., et al., 2015). That is to say, as the most important and basic real right — ownership, can be property rights as the object. Therefore, if property rights are recognized over data, there will be a legal basis to discuss data ownership.

The following discusses the property rights of personal Data. Whether in market practice or law theory, it is an irreversible historical trend that Personal Data has Property Attribute.

1. From the Perspective of Personal Right

There is a Theoretical Basis to Provide a Legal Support for the Development Trend of Data Commercialization. Personal data is the subject protected under the Personal Data Protection Law. 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, personality right has not only spiritual interests, but also property interests, and 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 images by means of contract and to obtain property income from it (Wang, L.-M., 2013). Our country's legislation has also provided legal support for this. As early as before the promulgation of the Civil Code, Article 100 of the General Principles of the Civil Law has reflected the principle that the right to portrait has property rights and interests, and the provisions of this paragraph negatively confirms the right to portrait has property rights and interests. (Wang, L.-M., 2012)

In this regard, the right to personal information and the right to portrait are not substantially different. The main difference between the two merely lies in that not everyone has the opportunity to claim his/her property rights and interests of the right to portrait, only celebrities, public figures and other minority groups have the opportunity to claim; but from the perspective of personal information, both celebrities and ordinary people, the market recognizes the commercial value of personal data thereof. Theoretically, everyone has the possibility to exercise his/her property rights and interests in his/her personal data.

Therefore, modern personality rights have the corresponding theoretical basis for the recognition of property rights and interests in personal data. Only at the regulatory level, further clarification is needed in the specific legal system, and legal rules should be established in relation to the commercialization of data.

2. Intangibles and Non-exclusivity Do Not Affect Data as an Object of Civil Rights

As intangibles, data is controlled by codes or technical rules, and needs to exist or be transferred through a computer terminal or storage medium. Therefore, it is necessary to prevent others from stealing data by technical means. However, such characteristics of data do not mean that people cannot control and manipulate data as an object of civil rights.

In existing civil rights, works, inventions, trademarks, trade secrets, etc. as the object of intellectual property rights, are also intangibles (Note 1). They are intangibles and simultaneity: a number of people can use them simultaneously in a number of places, so the owners of the intellectual property rights are vulnerable to infringement (Helmut, K., 2010). However, this does not hinder the establishment of intellectual property rights system in order to encourage more inventions and creations, such as granting the right of publication, the right of reproduction, the right of distribution, the right of information network dissemination and other personal and property rights to the copyright owner, so as to ensure the rights owner's control over the works.

Even if data has the nature of non-exclusive public goods, legislators, on the basis of needs and value, can still grant civil subjects certain exclusive rights over data by legal provisions and thus create artificial scarcity.

3. Maximizing Social Welfare Shall Be Realized: Data as the Object of Civil Rights

On the one hand, the treatment of data as the object of civil rights can protect the civil rights and interests of individuals, and enable natural persons to have the right to control personal data, so as to prevent a series of problems triggered by the leakage and illegal use of personal data. Moreover, the control of personal data by natural persons can effectively avoid people to pay extra costs in their daily lives for access to network services and meet the use needs of data products. It is the establishment of the rule that requires data practitioners to obtain the consent of the persons whose data are collected before the collection, use and transfer of personal data that forces data practitioners to pay for the collection and utilization of personal data, such as providing network services and various data products to consumers free of charge.

On the other hand, if data practitioners, especially data companies, can't control the data they collect and store, they will have no incentive to invest in collecting, storing and utilizing mass data, including personal data, and then mining the great value contained in the data, let alone develop more data products, which is not conducive to the flow and utilization of data, and the development of the data industry and the big data era will be out of the question.

Article 127 of the Civil Code stipulates: "Where the law has provisions on the protection of data and network virtual property, the provisions shall be followed." Obviously, in stipulating the protection of data, following the provisions on personality right, property right, creditor's right and intellectual property right, legislators have recognized that data right is a new kind of property right. On July 22, 2020, the Supreme People's Court and the National Development and Reform Commission issued the Opinions on Providing Judicial Services and Guarantees to Accelerate 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. In addition, it also explicitly provides that the collection, use, trading and intellectual achievements derived from data shall be protected in accordance with the law.

Therefore, there is a theoretical foundation for the recognition of the property rights and interests associated with

personal data in respect of personality rights. Only at the rule level, there is a need to further clarify the property interests associated with personal data rights in the specific legal system, and to set up corresponding legal rules on commercialized use of data.

4. Personal Information Is Contained in Data

Information is the content of data, while data is the form of information. In the big data era, it is impossible to separate data and information and discuss data rights in an abstract manner. As for personal data, the reason why it is of economic interests or involves personality interests is that it contains personal information. Data without personal information is not personal data. It is only in the form of bits represented by binary code, and has no meaning to the persons who collect and use such data. Therefore, the law cannot and does not need to regulate or adjust it. For example, although movable and immovable property as the object of ownership is certainly composed of various chemical elements, the law would never discuss whether elements can become the object of civil rights, let alone consider that a specific civil subject should be entitled to the ownership of an element. The only thing that needs to be discussed is the civil rights of the civil subject over the specific movable or immovable property composed of elements. If a civil subject only obtains or copies binary -coded data but fails to present and use it in the sense of "information", this act will neither bring economic benefits to the person who obtains the binary -coded data, nor will it harm the economic or personality interests of the person who is copied. Only when data is informationalized and presented, will there be a dispute over the ownership of data or scarcity of resources, and then it is necessary to discuss whether the data shall be controlled by private persons and how to protect the civil rights in data by public law enforcement agencies. Therefore, to discuss the civil rights of natural persons to personal data is, of course, to discuss the civil rights of natural persons to personal information in the form of data or the rights to the data containing personal information. (Guo, Y., 2012; Xie, Y.-Z., 2013; Liu, J.-G., 2016) In short, in the era of big data, the right to personal information and the right to personal data are the same thing. If it is clear that data and information or, more specifically, personal data and personal information are a unified and inseparable whole, then the dispute over the objectivity and property-related of personal data will not arise.

This article believes that data should be treated as the object of civil rights, in order to protect individual civil rights and interests and promote the flow and use of data, so as to maximize social welfare. On the one hand, data being the object of civil rights gives a natural person the right to control personal data, so as to prevent a series of problems arising from data leakage and illegal use. Moreover, the control of personal data by natural persons can effectively avoid people to pay extra costs in their daily lives for access to network services and meet the use needs of data products. It is the establishment of a legal rule requiring data practitioners to obtain the consent of the receiver before the collection, use and transfer of personal data that forces data practitioners to pay for the collection and use of personal data, such as providing network services and various data products to consumers free of charge. On the other hand, for data practitioners, if data practitioners, especially data companies, do not have monopoly control over the data they collect and store, it is obvious that they will have no incentive to invest in the collection, storage and use of mass data, including personal data, and then mine the great value contained in the data, let alone develop more data products, and the development of data industry and the big data era is impossible to talk about.

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Note

Note 1. Article 123 of the Civil Code: Intellectual property rights are the exclusive rights of the right owners in accordance with the law in respect of the following objects: (1) works; (2) inventions, utility models and designs;

(3) trademarks; (4) geographical indications; (5) trade secrets; (6) layout designs of integrated circuits; (7) new varieties of plants; and (8) other objects specified by law.

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