

Data Is Property

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Disclaimer

- Christina Mulligan and I are Advisors to the ALI/ELI project on Principles for a Data Economy
- This paper emerged from our conversations about the conceptual issues involved
- We speak for ourselves, not for the ALI, the ELI, the reporters, or any other participants

Introduction

A paradox

- Tori Tortfeasor wrecks Owen Owner's car
 - Tori is liable to Owen for conversion
 - Tori has violated Owen's property rights
- Tori deletes data from Owen's Dropbox
 - Tori is liable to Owen for computer misuse
 - Tori is not typically thought of as having violated Owen's *property* rights

No property?

- The computer is tangible personal property
 - But it belongs to Dropbox, not to Owen
- None of the IP fields fit the facts
 - E.g., no copyright unless the data is original
 - And there is never IP liability for deletion

Our argument: *data is property*

- Property in a thing is possible where we can:
 - Say what the thing is (*subject matter*)
 - Say who owns the thing (*ownership*)
 - Say when thing has been misused (*violations*)
- Data meets all of these criteria — provided that we are careful about the details

Taxonomizing property

Property

Tangible

Intangible

Physical

Non-physical

Immovable

Movable

Rival

Non-rival

Real

Personal

Intangible

IP

Tangible

Tangible

Intangible

Intangible

Immovable

Movable

—

—

Rival

Rival

Rival

Non-rival

Naturally Excludable

Naturally Excludable

Naturally Excludable

Legally Excludable

The logic of personal property

- Owen's car is tangible, movable, rival, and excludable
- Ownership flows from and protects exclusive physical control
- Personal property torts (e.g., conversion, trespass to chattels) protect against unauthorized use, impairment, and dispossession

The logic of real property

- Blackacre is tangible, immovable, rival, and excludable
- Exclusive physical control is still the core of ownership
- Real property torts (e.g., trespass, nuisance, ejectment) protect against unauthorized use, impairment, and dispossession

The logic of intangible property

- A domain name is intangible, rival, and excludable
- The “thing” is socially recognized, but it still obeys the logic of exclusive control — mydomain.com can only point to one website
- Conversion protects against dispossession

Intangible property and tangible things

- Intangible property is often linked to specific tangible things
 - E.g., DNS servers, corporate share ownership records, taxi medallions
- These things are *prima facie* but not conclusive evidence of ownership of the intangibles

The logic of IP: copyright

- A copyrightable work is intangible, non-rival, and non-excludable
- An author first “possesses” a work when it is fixed in a tangible medium of expression
 - Possession thereafter plays no role
- Infringement is unauthorized use

Information is different

- Information is non-rival: multiple people can simultaneously possess the same information
- Information is not naturally excludable
 - Copyright creates legal excludability
- Selling a copy of the work exhausts copyright control over that copy, but not over the work

Data as property

Data as a nexus between information and object

- Owen cares about information like his family photos, his business accounts, and other data
- These exist in multiple *copies* — in tangible objects like his and Dropbox's computers
- The information is valuable only to the extent that it is contained in at least one object
- The objects are valuable only to the extent that at least one of them contains the information

Control of data

- To possess data is to have control over a copy
- Nonexclusive in two senses:
 - Others may possess the object
 - Others may have control over other copies
- *Cf.* EU GDPR (“‘controller’ means the natural or legal person ... which ... determines the purposes and means of the processing of personal data”)

Data property violations: learning from trade secret

- Trade secret law protects against unauthorized use
- This is a relational tort: there is no violation if Tori independently discovers the information, or even reverse engineers it
- I.e., trade secret infringement involves improper dealings with *Owen's* copy of the data
- “Improper means” imports large swaths of tort law, property law, computer-misuse law, etc.

Data property violations: beyond unauthorized use

- Trade secret, like copyright, deals only with use
- Other bodies of law prohibit dispossession and interference
 - CFAA “damage” includes “any impairment to the integrity or availability of data”
 - Remedies for conversion of the computer include damages for value of lost data

The common thread

- If I have control of a copy of data, the legal system allows me to exclude you from accessing my copy
 - I.e., data property protects the natural (but partial) natural excludability of data in copies
 - We can transact about the conditions under which I will give you control of a copy
- Data property does *not* limit your acquisition or use of the information itself, as copyright does

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Intangible

Information

Tangible

Tangible

Intangible

In copies

As information

Immovable

Movable

—

Rival

Rival

Rival

Naturally Excludable

Naturally Excludable

Naturally Excludable

Data

IP

Intangible

Intangible

—

—

Non-rival

Non-rival

Partially Excludable

Legally Excludable

Implications

Resistance to property in information, pt. 1

- Many IP scholars bear the scars of the battles over new IP rights: database protection, APIs, ratings hot-news misappropriation, etc.
- They are understandably skeptical of data “property” as a source of new IP rights
- Our point is that data property *is not an IP right*; it more closely follows the logic of real, personal, and intangible property

Resistance to property in information, pt. 2

- Many technology-law scholars bear the scars of the battles over access to computers: clickthrough agreements, digital trespass to chattels, expansive CFAA prosecutions, etc.
- They are understandably skeptical of strong rights to control access to data on computers
- We believe that these are best understood as disputes *about the scope of property rights*

So why bother?

- People are already doing socially valuable transactions in data, so it would be better to be clear about what they are doing
- Some transactions — e.g., creating security interests — really need conceptual clarity
- Recognizing how existing “property” law sensibly applies might reduce the hydraulic pressure towards creating new rights

Questions?