

# Data Is Property

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Yale ISP Ideas Lunch

October 11, 2022

# Disclaimer

- This is joint work with Christina Mulligan
- We were 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

# Motivation

# A paradox

- Tori Tortfeasor wrecks Owen Owner's car
  - Tori has violated Owen's property rights
- Tori deletes data from Owen's Dropbox
  - Tori has violated *Dropbox's* property rights
  - But not Owen's!

# No property?

- The computer is tangible personal property
  - But it belongs to Dropbox, not to Owen
  - And Dropbox owes Owen nothing
- 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

Data as property

Property

Tangible

Intangible

Physical

Non-physical

Immovable

Movable

Rival

Non-rival

Real

Personal

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

# Copies of data

- 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

# From copies to data

- The Restatement (2d) of Torts protects data only by protecting the objects it's embodied in
  - The damages for conversion of a copy include the “peculiar ... value” of data in it
  - E.g., a rare LP is valuable because the data recorded on it exists in very few copies
- Our move: disaggregate property rights in data from property rights in physical objects

# 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”)

# Exclusion from data

- I can physically and technically exclude you from accessing copies of data I control
- The legal system often *already* backs me up
- We can transact about the conditions under which I will give you access to my copies
- Data property does *not* limit your acquisition or use of the information itself, as copyright does

# The rights of a data property owner

- *Conversion*: depriving the owner of control of the data (e.g. deleting all the copies)
- *Interference*: interfering with the owner's ability to use the data (e.g. altering the data)
- *Misuse*: wrongfully copying the data for one's own use (e.g., in violation of the CFAA)

# Sources of data property law

- Existing law does a lot of this work
  - E.g., trade secret, CFAA
- But existing law has unfortunate gaps
  - E.g., misappropriation of family photos
  - E.g., deletion from cloud storage
- Common-law property can fill those gaps

# Back to Tori and Owen

- Tori deletes Owen's Dropbox account
  - This is an act of conversion as against Owen
  - (Trespass to chattels if Owen has a backup)
- NB: Dropbox is a bailee of Owen's data
  - Its obligations to Owen are governed by a mixture of property and contract law
- The structure of rights matches the situation!

# Implications

# Resistance to data property, pt. 1

- Some property scholars claim that only tangible objects can be subjects of property
- The argument is based on unsupportable conceptual claims about what property is
- It would also deny that domain names, Bitcoin, and bonds are property

# Resistance to data property, pt. 2

- Some privacy scholars propose property in personal data; others strongly disagree
- This “property” is a broad right to limit the use information *about* a person, in whoever’s hands it may be
- Our data property is narrower right over information in the owner’s possession

# Resistance to data property, pt. 3

- 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 response: data property *is not an IP right*; it gives no rights over information as such

# Resistance to property in information, pt. 4

- 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 are sympathetic to these concerns; we just don't think that data property makes them any worse
- These are 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?