Personal Information as Intellectual Property

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Abstract: Identity theft is a serious problem all over the world. A 2005 draft of Personal Information Protection Measures for the People's Republic of China declared that "personal information, as a part of a person's right of privacy, is a citizen's 'intangible property'." In United States law, there are already examples of intellectual-property-like protections for personal information, although personal information is not yet a category of intangible intellectual property. A thought experiment helps to examine what such a category of intellectual property protection for personal information might look like in the United States. The experimental design follows the changing aspects of personal information as that information moves out from the person who created it into files and databases controlled by others who collect and use personal information. This thought experiment suggests that it is appropriate to consider personal information as initially the intellectual property of the person without whom the information would not exist. Later, such personal information is often mixed with property rights of others in what amounts to coownership arrangements. How personal information in such coownership arrangements could be protected as a form of intellectual property is a central inquiry in this thought experiment sketching the contours of personal information as a form of intellectual property.

Introduction

With the concept of "identity theft" recognized as a serious problem all over the world, protecting personal information as a form of intangible intellectual property is clearly imaginable. Indeed, a 2005 draft of "Personal Information Protection Measures" for the Peoples Republic of China declared:

> [P]ersonal information, as a part of a person's right of privacy, is a citizen's "intangible property," and those who steal other's personal information for financial gain are in violation of the law and shall be duly punished." (CRI, January 9, 2006)

Personal information is not yet a category of intangible intellectual property in United States. But there are examples of intellectual-property-like protections for intellectual property under

United States law. Whether these existing protections could be generalized into a more comprehensive intellectual property right in personal information remains an open question This article recounts a thought experiment into what recognition of personal information as intellectual property might look like in the United States.

Before imagining a speculative intellectual property regime for personal information, it is essential to keep in mind that what counts as personal information worthy of legal protection varies considerably around the world. Something less than the whole potential universe of personal information might need to be defined for considering intellectual property protection for personal information in an experimental model.

Existing literature reflects considerable discussion of reasons why it may be appropriate to treat personal information as intellectual property. For example, such recognition acknowledges control by and reinforces respect for the person whose personal information is handled, or mishandled, by others. Moreover, since personal information is very valuable (particularly to data collectors, data miners, and personal data merchants) unjust enrichment concerns suggest that it may be unfair for such personal data handlers to capitalize on an asset that would not exist without the person who is the subject of the personal information.

At the same time, a number of reasons have been suggested why personal information should not be considered intellectual property. For example, the commodification of human personality is offensive and inhumane to some commentators. To human rights advocates, it may seem wrong to consider personal information property because to do so treats the person as just an asset, or asset-generator. Moreover, to the extent that rights to freedom of expression include rights to collect and to communicate information, including personal information, freedom of expression may be curtailed by recognizing personal information as intellectual property. Protection of personal information as intellectual property would, it is argued, be used to withhold from public discourse important information, especially personal information that relates to politically and economically powerful people. Additional counterarguments suggest that there are better, alternative ways to protect personal information through regulatory measures, contractual agreements, damages and other means, rather than creating yet another form of intellectual property. In other words, further proliferation of forms of intellectual property may be ill advised.

A general understanding of these arguments provides important background for this thought experiment designed to consider intellectual property law protections appropriate for personal information. The design of this thought experiment focuses on the changing nature of personal information as personal information moves from the person who creates the personal information into files and databases of personal information controlled by others. The thought experiment recounted here suggests that personal information is initially the intangible intellectual property of the person who created it. Later this personal information is frequently mixed with intellectual property rights of others in what amounts to a coownership arrangement. This thought experiment closes with suggestions regarding appropriate intellectual property rules to deal with personal information as intellectual property in such coownership arrangements.