Data Is Property

James Grimmelmann
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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

Physical
- Tangible
  - Immovable
  - Movable
- Intangible
  - Rival
  - Naturally Excludable

Non-physical
- Rival
- Non-rival

Real
- Tangible
  - Immovable
  - Rival
  - Naturally Excludable

Personal
- Tangible
  - Movable
  - Rival
  - Naturally Excludable

Intangible
- Intangible
  - Rival
  - Naturally Excludable

Information
- In copies
- As information
  - Data
    - Intangible
    - Non-rival
    - Partially Excludable
  - IP
    - Intangible
    - Non-rival
    - 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
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.
• 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?