Privacy, Property and the Commoditycation of Our Identities

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Property Rights as the Ultimate Solution

• Argument: extend property interest to personal data of individuals
• Why: data about individuals nowadays have become a key commercial asset
  • Why: individuals must be able to negotiate and bargain over the use of their data
• Result: data markets will be allowed to function more effectively
  • Result: less privacy invasion
Economic Arguments

• Protection of personal data is expensive and in short supply,
• whereas the collection and use of personal data is wasteful and inefficient;
  • Thus: we should consider market-oriented mechanisms based on individual ownership of personal data.
• Laudon, *Communications of the ACM*, 1996;
  • Mann, *First Monday*, 2000
Law and Technology Arguments

• In our society protection mechanisms based on private instruments gain priority;

• Vesting an ownership right would make it expressly clear that data subjects own personal data, not the business that collected them;

• Advances in technology make it easier to create and sustain the conditions for individual and personalized choices of data use.
Day-to-day Practice

• Customer data is a means of generating cash flow and silencing creditors

• Personal data changes hands or ‘ownership’, as part of merger-acquisitions, reorganizations and other strategic company movements

  • Companies may even believe that they have ownership rights in the personal data (compilations)

• Companies offer benefits in return for using personal data
Property Arguments and Human Right Dimension

- Property rights perspective does not fit the human rights perspective as adopted in, e.g., article 8(1) of the Rome Convention for the Protection of Human Rights and Fundamental Freedoms.

- Human right is a right of non-interference, not a right of positive entitlement.

- Privacy is attached to individuals by virtue of their personhood, and, as such, this right cannot be waived or transferred to others.

- Privacy is linked to constituting and maintaining a person’s personal integrity. Thus, it is a non-commodifiable right.
However:

• Various developments testify to the growing influence of property thinking in the human rights domain
  > property in personality
  > property in human body parts

• Contractual freedom and human rights
  • Directive 95/46
  • Distinguish Privacy from Personal Data
Would a Property Approach Solve Privacy Problems?

- Arguments made in legal literature:
  > merely addresses problems in relation to private sector use;
  > problems related to the concept of property itself;
  > ‘take it or leave it’ terms under the threat of exclusion or denial of access to digital services.
  > licensing all the necessary data would be costly, inconvenient, and time-consuming.
  > framing the debate in terms of proprietary rights neglects the fact that what data subjects really seek: control

- And: What is our real privacy problem?
It is all about Identities

• Individual data versus combined data
  • Ambient intelligence; RFID, personalised services

• Focus not so much on the individual data, but on the effects of the use of present-day technologies
  • Thus: focus on identities
Shifting in Our Attention

• Shift our attention from individual sets of personal data toward the statistical models, profiles and the algorithms with which individuals are assigned to a certain group or ‘identity’;

• data protection mechanisms must be structured along lines of control and visibility.
What We Need

• We need to know and understand how social and economic identities are constructed, influenced and used;

• We need instruments to know and to control how our ‘lives’ are ‘created’.

• We do not need ownership of individual data.