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Who owns our data?

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ABSTRACT

The layman's answer to the question posted in the title to this paper lies in the question itself. The common understanding of people when they talk about information about themselves is that it is indeed "theirs". Until relatively recently, the law has been content to remain agnostic on the subject. The Common Law in general and English Courts in particular have traditionally avoided philosophical debates about the nature of things, preferring to develop concepts and principles from the results of cases decided on specific facts and circumstances. This approach has been acceptable while we have been winding our way gently up the foothills of the Information Age, but now that we see the towering peak of Big Data standing before us, covered by the ubiquitous Cloud, it is necessary to make a critical examination of some of the basic assumptions which we have hitherto carried with us about the way in which the law should treat rights over personal information. This paper will argue that the correct approach which the law should adopt is a proprietary one. That is to say that the protection of the economic value inherent in personal information should be grounded in property rights acknowledged by the law.

1. Why is there a need for a change of approach?

The World Economic Forum report of 2011 described information as the "new oil". By this it meant to demonstrate how the vital raw material for the digital economy is information itself. Consider how revolutionary this notion really is, and you will see why it requires an equally revolutionary adaptation by the law to cope with it. When the principal asset class of value was land, the law developed many and various ways of increasing complexity and subtlety to allow the economic exploitation of this asset class. The law of real estate, the law of trusts and rules of equity all bear witness to these developments. With the arrival of the industrial age, land itself became less the means of wealth creation and the focus turned to the moveable property and manufactured goods which were produced by the process of industrialisation. This gave rise to the law of personal property, of banking and finance and to the ancillary disciplines of shipping law which dealt with the movement of these goods, and of intellectual property law which covered the industrial application of ideas.

By common agreement, we are now in an entirely new economic phase, which we call the Information Age, and it is information itself which is powering the engines of this particular outpouring of human creativity. The law must therefore wrestle with the problems which are thrown up by the new economic order and seek to find the right way of providing checks and balances and economic redress for wrongs for participants in this new economy.

The law has until now focused on the protection that should be afforded to one particular class of information, so

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called "confidential" information. A significant body of case law has been developed by the Courts over the years, from which we know that if information is:

(a) possessed of the necessary quality of confidence;
(b) imparted in circumstances imparting an obligation of confidence;
(c) used in an unauthorised way to the detriment of the confider,

then the Court will grant remedies ranging from injunctions to damages to prevent misuse of the information concerned. (See *Coco v A.N. Clark* [1969] RPC 41, and many subsequent cases where this formulation has been accepted and further developed.) Lawyers have debated for many years whether it was appropriate to classify "confidential information" as a species of property without reaching a firm conclusion one way or the other. The most recent ruling by an English court on the subject was given by Lord Neuberger, the Master of the Rolls, and is typical of the reluctance of the judges to give a definitive view on the subject: "while the prevailing current view is that confidential information is not strictly property, it is not inappropriate to include it as an aspect of intellectual property". (*Coogan v News Group Newspapers* [2012] EWCA Civ48.) As the observant reader will note, the hedges in that sentence seem to be designed so as to allow the rider of a sufficiently spirited horse to be able to surmount them in a future case.

Be that as it may, the information that applies to each of us as individual citizens and economic actors will not ordinarily satisfy the three criteria set out above so a consideration of how the law treats *confidential* information should not be determinative in deciding how the law should treat the much wider class of information into which our "personal information" falls. In this connection it is helpful to draw a distinction between what we may call a mere fact and "information" properly so called. That my name is Christopher Rees is a mere fact. A specific address is a mere fact. If my name is connected with a specific address the sum of the two mere facts becomes information. The reason for this distinction is that addressability is a valuable economic asset. Once you can be addressed, whether by phone, by mail or online you are of value to the market. Without more, this information would not usually be of much moment or commercial value. (Although if my name were William Gates III then the information would already be more valuable.) If a further "mere fact" were to be added to this information, for example that my household insurance policy was about to expire then it can easily be seen how the personal information concerned would be of great interest to insurance companies anxious to expand their business. So at a certain point, usually by the third step in this accumulation of "mere facts" a commercially valuable nugget of "personal information" has been assembled. The question is why should the law not protect this nugget of information in the same way that it protects a nugget of gold?

The answer is that the law does indeed offer protection, but up to now it has sought to provide that protection and redress by treating personal information as an aspect of human dignity and autonomy. It has been protected in this way in various codes around the world, most notably in the data protection laws in Europe which are based on Article 8 of the European Convention on Human Rights. This Article grants to citizens the right to protection of their private life, their home and correspondence. From that premise, the Data Protection Directive has established a formidable set of rights and obligations which surround the processing of personal information. This paper does not seek to belittle the considerable achievements of this body of law and practice over the past 30 years. It has served well to raise the awareness of the importance of respect for personal information amongst both individuals themselves and the industry which carries out much of the processing of it. Nonetheless, it is an observable fact that the data protection approach is fatally flawed. It is flawed because by focussing on the "human rights" aspect of the issue it has ignored entirely the economic value in personal information. As a corpus of law Data Protection or Data Privacy as it is variously known is hopelessly wordy, prescriptive and out of touch with reality. It is also, as Hamlet put it, more honoured in the breach than the observance. It is estimated for example that if each of us were to take the trouble to read the Privacy Policies on the websites which we use in the course of each year, then we would need to allocate five working weeks to do so. One survey in America by McDonald & Cramor in 2008 put the annual costs of perusing the privacy policies of US internet sites at the sum of $781bn. That they settled on the figure of 781 rather than 780 billion is presumably intended to show a degree of scientific exactitude to their number, but even if a large dose of salts is allowed in the assessment of the value of such estimates, the basic proposition that the law is being inefficient in its attempt to regulate the use of personal information is unarguable.

2. Can personal information be treated as property?

To answer this question, we first have to understand what the law means by property. The English jurist Austen defined property as the right to use something and the power to exclude others from its use. If you consider personal information about yourself, you will see that it fits within that definition. As torturers through the ages have learnt to their cost, if you want to keep a matter about yourself secret, no power on earth can make you yield it up. In economic terms, property can be said to be the sum of things which have money value. In law, things can be either tangible, that is to say they have objective form, or intangible, that is a mere right enforceable by action in a court of law. So where is the intangible right in personal information? Under English law, it is found in Section 13 of the Data Protection Act 1998. This states that "an individual who suffers damage by reason of any contravention of any of the requirements of this Act [the Act regulates the use of personal information] is entitled to compensation from a Data Controller [the person who is using the information] for that damage." Thus, the law already acknowledges a property right in personal information.

It may be objected that the courts have decided that the categories of property are restricted and therefore it will not be open to them to admit a new category of personal information to the class of things which are recognised as property.