论个人信息的财产权保护

THE PROTECTION OF PROPERTY RIGHTS IN PERSONAL INFORMATION

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摘　要

本书分为前言、问题与挑战、个人信息及其确权规则、个人信息法律保护的现状及其评价、个人信息财产权保护所面临的理论障碍、个人信息财产权保护的必要性与合理性、个人信息财产权的界定与实现、我国个人信息财产权保护的立法对策七个部分。

前言部分主要介绍了本文选题的背景、意义、研究对象的界定及研究方法。一方面，按照权利的客体把私权分为财产权和人格权是大陆法系民法理论的重要根基。但是，随着个人信息商业化现象的产生及逐渐发展，大陆法系的民法理论已开始关注这种现象。但在解释这种现象时，由于在传统理论上对人格权和财产权区分标准及对个人信息的法律地位存在认识上的偏差，大部分学者站在人格权的基本立场上来认识这种个人信息商业化利用现象：有的认为它是新型人格权，有的则认为是商事人格权，也有的认为是经济人格权，还有学者提出了二元人格权观点，只有少部分学者认为这种权利属于财产权。笔者认为，这些用人格权理论来解释财产权的做法不仅违反了财产权与人格权区分理论，而且自身多存在诸如无法解释个人信息商业利益的继承和概括性转让问题等逻辑障碍。无论是美国的公开权，大陆法系的形象权，还是学者们提出的各种人格权理论，都是针对传统条件下对诸如姓名、肖像、隐私、声音等直接个人信息的某些商业化利用情形——广告宣传情形（必须要与特定的商品或服务联系在一起），它们既无法解决直接个人信息在当今社会除广告宣传之外的其他商业性利用问题（如肖像的商业性网络传播和展示情形），也无法适用和解决当今条件下诸如消费习惯、手机号码、电子邮件地址等间接个人信息的商业化

问题。另一方面，在信息时代，“信息就是商品”、“信息就是金钱”，包括个人信息在内的信息交易已经成为一个重要的产业——信息产业，而合法的个人信息商业价值转让不仅符合作为信息所有人的个人之意愿，也具有促进信息流通和信息产业健康发展的积极意义。由此，需要从理论和法律上承认个人信息商业价值的独立法律地位，明确其作为信息所有人的私有财产。但是，除了针对姓名、肖像等直接个人信息的公开权外，既有的法律制度和理论基本上不承认个人对其信息，尤其是诸如通信号码、消费习惯等间接个人信息的商业价值享有财产权，甚至既有的商业秘密保护法、欧盟数据库保护《指令》和英国 1998 年的《个人数据保护法》等视个人信息为商家的财产。这样，几乎所有的商家都把个人信息的商业价值视为自己的财富，由此个人信息的商业价值几乎被商家独占，正是这种立法和理论对个人信息人格利益和财产利益保护态度上的不和谐导致了现实生活中个人信息的非法收集、加工、滥用和隐私侵权现象日益普遍。这样，不仅由于个人信息的商业价值基本上被商家独占而加剧了个人（消费者）和商家之间利益关系的不平衡，有失公平，而且由于信息滥用和隐私侵权使得消费者个人对于网络和电子商务产生信任危机，进而影响到网络和电子商务的健康发展。同时，这种法律和理论现状也无法为合法的个人信息交易提供有效的规范依据。本文正是在此背景下提出应该对个人信息的商业价值给予财产权保护的观点，并试图对有关理论问题展开探讨。

本文在研究方法上，综合运用了比较分析与综合分析、哲学方法、经济学视野、逻辑学和法学分析等方法。

第一章“问题与挑战”通过对目前各种个人信息商品化现象及其问题的分析，指出既有的法律制度缺失是导致这些问题产生和泛滥的主要原因。同时，通过对已经出现的“合法”个人信息商业价值的转让和交易案例分析，认为由于法律规范的缺失导致法律适用上的困难。在面临现实中的这些问题时，笔者认为，无论是新型人格权、二元性人格权还是公开权理论，都无法为新形势下的个人信息商业化利用问题的法律规制提供有力的理论支撑，从而不仅无法有效地解决目前广泛存在的个人信息滥用问题，而且也无法为合法的个人信息商业化利用提供依据。因此，有必要对针对个人信息商业化的新现实，为个人信息商业价值的法律保护提供有力的理论支撑。本文提出的个人信息财产权保护理论则有助于对这些问题的解决。

第二章“个人信息及其确权规则”部分共分二节：个人信息的内涵与分类；个人信息的确权规则。在本章，笔者首先对个人信息进行了界定和

分类，认为个人信息是能够直接或间接识别出特定自然人身份而又与公共利益没有直接关系的私有信息；尽管个人信息可以有多种分类，但是，按照能否直接识别出特定自然人身份，把个人信息分为直接信息和间接信息及按照是否与人格尊严有直接关系，把个人信息分为与人格尊严有直接关系和与人格尊严没有直接关系的个人信息是两种最有价值的分类方法。两种分类方法具有统一性，即从实证的角度上看，由于直接个人信息攸关人格尊严，因此，现行的法律通过姓名权、隐私权、肖像权等法律制度分别予以了人格权保护，而间接个人信息则由于与人格尊严没有直接关系而在现行法律制度上没有获得类似的人格权保护。另外，笔者根据历史、现实和逻辑提出如下命题：并非所有的个人信息都与人格尊严有直接关系、都应该给予人格权保护，只有姓名、肖像、隐私等直接个人信息才具有人格价值，才应该给予人格权保护；间接个人信息则不具有人格价值；在信息时代的今天，一切个人信息都具有潜在的商业价值。因此，笔者的这种分类方法的意义在于：根据不同类型的个人信息为其提供不同类型或不同性质的权利保护。其次，笔者对个人信息的确权规则进行了探讨。在该标题下，笔者首先对“权利对象”和“权利客体”这两个对学术界关于人格权和财产权及其相互区分理论的认识有重要乃至决定性影响的概念及其关系进行了厘清。在此基础上，笔者提出了“权利对象是一个具体的、描述性概念，一般表现为物、行为、信息等”、“权利客体是一个抽象的概念，在现行民法理论上，它要么表现为财产利益，要么表现为人格利益”、“不同权利的区别在于其客体而不是对象的不同”、“不同的权利，其客体一定是不同的”、“同一个权利对象上可以同时存在或体现财产利益和人格利益，即同一对象上可以同时存在财产权和人格权，二者各自独立，并不会出现我们理论上认为的‘人格性财产权’、‘财产性人格权’或‘混合型权利’”，因此，“我们应该根据权利客体而不是权利（所指向的）对象来界定和区别不同的权利”等命题，并认为这样既可以解释人格权理论在面临诸如“特殊物”的法律地位与保护问题、个人信息商业化问题时的困境，也可以合理解释个人信息的法律地位及个人信息财产权的法律属性及其与个人信息人格权之间的关系问题。随后，笔者提出了个人信息确权的基本规则：应该按照个人信息所体现的价值或功能而给予相应的权利保护，即如果个人信息具有人格价值，就应该给予人格权保护，如果具有财产价值，就应该给予财产权保护，如果同时兼有财产利益和人格利益，就应该同时给予人格权和财产权的双重保护。据此，由于姓名、肖像等直接个人信息兼有人格价值和财产价值，因此，应该给予人格权和财产权的双重保护；

而间接个人信息则不具有人格利益而只具有财产价值，因此，只应该给予财产权保护。关于个人信息的权利归属问题，笔者从伦理、法律和逻辑上论证了个人信息财产权或个人信息的商业价值应该给予个人而非商家。

第三章“个人信息法律保护的现状及其评价”分为“国际公约和地区立法”、“欧盟立法”、“美国个人信息法律保护现状”、“我国个人信息法律保护的现状”、“个人信息法律保护的现状”五节。通过对有关立法内容与基本精神进行概述后，笔者把目前国际上有关立法归结为欧盟模式和美国模式，并对二者进行综合比较分析。笔者认为，尽管二者在具体立法技术、哲学基础、政治立场、价值偏爱上存在差异，但是，二者都受人格权理论的支配和影响，并由此在对个人信息商业价值的保护和归属态度上立场趋同，不明确个人对其信息，尤其是间接个人信息享有财产权，导致在实际上由商家而不是个人占有个人信息的市场价值。这种立法理论及其现状是导致目前个人信息滥用问题的主要原因。

第四章“个人信息财产权保护所面临的理论障碍”包括“人格权理论及其评价”、“言论自由说及其评价”、“公共产品观及其剖析”、“侵权法保护说”四节。在“人格权说及其评价”一节中，笔者首先对反对者所仰赖的“人格权理论”进行了概述，然后运用逻辑分析和反证法证明该观点所依据的“人格权的客体——人格要素内在于主体、与主体不可分离”是一个假命题，并由此提出根据这样一个假命题所推演出的结论——“承认个人信息财产权会有损于人格尊严”是不可靠的；随后又从人格权理念及人格权和财产权之间的关系出发，得出承认个人信息财产权不仅不会有损于人格尊严，反而有利于保护和捍卫人格尊严的结论。在“言论自由说及其评价”部分，笔者从言论自由的适用范围与限制及“个人信息财产权能且只能存在于对个人信息的商业性利用条件下”出发，得出承认个人信息财产权并不会妨害言论自由的结论。在“公共产品观及其剖析”部分，笔者从三种信息经济学理论对信息属性的不同认识出发，结合现行法律对知识产品和商业秘密的法律保护，得出“信息是公共产品”是一个假命题，以此为前提而认为不能给予个人信息财产权保护的观点是不可靠的结论；同时，笔者还从个人信息商业价值的特性及商家对个人信息商业价值的使用方面提出“商家对个人信息商业价值的使用具有竞争性”观点，由此得出应该通过产权配置——给予个人信息以财产权保护来保证市场供求关系的平衡之结论。在“侵权法保护说”部分，笔者从侵权法保护所具有的缺陷——不能为个人信息保护提供一套明确、清晰、连贯如一和可靠的保护机制、不利于促进包括个人信息在内的信息产业的健康发展，同时从制度

经济学上论证了财产权保护是一种更为有效和可行的制度选择。除了上述反对观点外，还有一些以成本、可操作性、格式条款等理由反对给予个人信息财产权保护。笔者则分别针对其各自的观点用逻辑和法学方法予以了分析和反驳，认为这些反对给予个人信息财产权保护的理由成立。

在“个人信息财产权保护的必要性与合理性”部分，笔者从公平正义与保护弱者的现代法律理念、法律体系内在价值逻辑统一性要求、预防和减少人格侵权和个人信息滥用行为需要、信息时代社会发展的客观需要四个方面论述了给予个人信息财产权保护的必要性。在“个人信息财产权保护的必要性与合理性”方面，笔者分别从哲学、经济学和法学上分析了个人信息财产权保护的依据。在哲学层面上，笔者分别从洛克的劳动所得财产权理论、黑格尔的自由意志财产权理论、庞德的社会学说和功利主义思想论述了个人信息财产权保护的哲学基础。尽管洛克的劳动所得财产权理论一向被用来解释劳动成果的财产权保护，但是，笔者还是从其关于“每个人对于其自己的人身享有所有权”出发推演出每个人应该对其人身描述——个人信息的商业价值享有财产权，从“劳动获得财产权必须是建立在对处于自然状态的物品或资源进行劳动”出发，认为个人信息并不属于处于自然状态的物品或资源，由此得出：凡是对他人的财产进行所谓的“劳动”或没有经过他人同意而擅自对他人的财产进行所谓的“劳动”都是不能正当地取得其“劳动成果”的财产权的结论。如果把这一结论适用于目前市场上广泛存在的未经允许而擅自收集、加工和买卖他人个人信息情形，就可以自然地得出那种把个人信息视为商家财产的观点是不妥当的结论，这也从反面证明了只有个人才能对其个人信息的商业价值享有财产权的结论。黑格尔在其《权利哲学》中关于财产、人格与自由的关系的思想对于个人信息财产权保护也具有借鉴意义：首先，黑格尔关于人与客体、外在物和内在物的区分为确立个人信息财产权扫清了理论上的障碍。其次，黑格尔关于财产属于个人自由、是主体自由意志的外在表现形式的观点为个人对其信息的商业性使用价值享有财产权提供了正当性依据。最后，黑格尔关于财产权的动态规则为个人信息财产权的实现提供了理论上的借鉴。关于庞德的社会学说，笔者认为，庞德关于个人利益、社会利益和公共利益应该协调、平衡的观点为个人信息财产权制度的建立奠定了理论基础。庞德关于物质利益的理解也为承认个人信息财产权提供了空间。同时，笔者认为，功利主义的理论对个人信息成为财产权具有以下意义：一方面，将个人信息财产权配置给信息的所有人，符合社会利益最大化的价值目标。另一方面，如果对个人信息这种稀缺资源进行合理的制度配置

和利用，承认个人对其信息的财产权，就会确保这种稀缺资源向那些认为他最有价值的人手中流动。这样，既避免了纠纷的发生，也可以促进整个社会福利的最大化。关于个人信息财产权保护的经济学分析，笔者认为，目前广泛存在个人信息滥用行为产生了巨大的社会成本——负的外部性，造成了个人信息的浪费和无效率利用，如果利用财产权模式，通过将消费者作为市场主体引入市场并给予其个人信息财产权的方式，就可以迫使商家以竞价的方式使用个人信息，消费者的利益得到最大化；市场竞争压力将迫使商家将其与个人信息的收集、加工有关的成本内化，从而可以避免信息收集和利用过程中的恣意性和浪费现象。这样，既可以提高个人信息的利用效率，也可以提高隐私保护的水平，减少个人信息滥用情形，从而更有助于尊重和保护个人尊严。关于个人信息财产权保护的法学分析，笔者从两个方面论证了个人信息财产权保护的法学基础：一方面，笔者从法学上关于财产的三要件：稀缺性、有用性、可控制性出发，认为个人信息商业价值符合这些要件，应该被视为个人私有财产；另一方面，笔者从私法自治及其与人格尊严之间的关系出发，认为贯彻和实现意思自治与捍卫人格尊严的私法理念需要承认个人信息的商业价值是个人的私有财产权。

第六章“个人信息财产权的界定与实现”共分为“个人信息财产权的界定”、“个人信息财产权的属性”、“个人信息财产权的实现方式”、“个人信息财产权的私法保护”四节。在第一节中，笔者从个人信息商业性使用的背景出发，借鉴和发展了美国的公开权制度，提出了个人信息财产权概念，并认为它是以个人信息的商业价值为客体的支配权，其客体是个人信息中的商业价值而非人格利益；鉴于个人信息自身的可识别性特征，笔者认为，对于原始权利人而言，其个人信息财产权在效力上是绝对权；对于继受者来说，其权利效力范围与是否公示有关。在内容上，个人信息财产权应该包括复制、披露、持有权、使用权、处分权等积极权能。关于个人信息财产权的限制问题，笔者认为，鉴于个人信息财产权是主体对个人信息商业价值的支配权，与公共利益无涉，由此，理论上讲，它应该像所有权一样，没有期限限制，可以自由转让、继承。关于“个人信息财产权的属性”，笔者从目前理论上对个人信息商业化利用的各种观点进行了分析，并比较了它与公开权或形象权之间的异同，由此笔者认为，公开权是个人信息财产权的早期形式，它主要针对的姓名、肖像、隐私等直接个人信息的某些（必须要与特定的商品或服务联系在一起，即充当“第二商标”）商业化利用，而个人信息财产权则是一个上位概念，它包括但不限于对某些对直接个人信息的商业化利用情形——公开权的使用范围，还包

括对其他对直接个人信息的商业化利用情形和对间接个人信息的商业化利用。最后，笔者认为，个人信息财产权是目前任何一种既有的权利体系都无法容纳的一种完全新型的财产权。关于“个人信息财产权的实现方式”，笔者认为，可以包括自己使用和许可使用两种形式，在具体实现方式上，应该区分初级市场和二级市场两种不同的情形：在初级市场上，根据不同的交易情形又有不同的应对策略。一般来说，基于非网络的交易则相对容易，消费者可以面对面地与商家进行协商，按照对己最为有利的条件选择交易对象和进行交易；对于网络交易来说，信息所有人则可以通过使用诸如 P3P 技术自动与商家就个人信息的收集、利用条件达成协议。关于个人信息财产权在二级市场上的实现途径问题，笔者认为，美国学者 Kenneth C. Laudon 提出的根据股票交易市场模式而建立的“国家个人信息交易市场”方案值得借鉴。关于“个人信息财产权的私法保护”，笔者首先基于侵权行为理论对其作了相应分析。笔者认为，关于侵权行为的构成要件问题，首先应该区分侵权行为的构成要件和责任承担的构成要件，构成侵权行为，并不一定要承担赔偿责任。这是因为侵权责任包括但不限于赔偿责任，还包括停止侵害、恢复原状、赔礼道歉等形式。据此，由于原始个人信息财产权是一种绝对权，鉴于该权利能且只能存在于商业性利用环境中，因此，任何只要未经权利人许可的商业性利用行为都是一种侵权行为，既不需要考虑侵权人的主观过错，也不需要考虑其获得的收益或权利人受到的损失，即其侵权要件只有两个——商业性利用行为和未经授权。关于责任承担问题，由于个人信息财产权不是人格权，侵权行为所侵害的是财产利益，因此，在考虑责任承担问题时，不能只适用赔礼道歉、停止侵害的人格侵权责任形式，只适用停止侵害、赔偿损失。当然，考虑到个人信息的特殊性，虽然无法要求侵权人返还个人信息，但是可以要求侵权人删除其所留存的所有信息复制件，以免其继续实施侵权行为。由于个人信息财产权的行使主要是通过合同许可的方式实现的，因此，对于个人信息财产权的救济首先应该考虑通过《合同法》上的违约责任制度实现，即对于那些违反合同约定使用个人信息进行营利的行为，权利人有权要求其承担相应的违约责任。当然，由于个人信息财产权是一个绝对权，因此，这种违约行为同时也可以认为是一种侵权行为。这样，就面临着违约行为和侵权行为的竞合问题。在此情况下，权利人可以根据自己的选择决定是追究对方的侵权责任还是违约责任。其次，对于那些没有经过合同许可而对个人信息进行商业性使用的侵权行为，应该通过侵权责任制度为权利人提供相应的救济措施。

最后一章“我国个人信息财产权保护的立法对策”分为“我国个人信息保护所面临的问题”、“我国民法典的制定与个人信息财产权保护”、“我国个人信息财产权保护立法的制度构建”三节。其中，在“我国个人信息保护所面临的问题”一节中，笔者认为，我国个人信息保护所面临的主要问题是“垃圾信息泛滥”；而垃圾信息之所以泛滥，其主要原因在于对个人信息的非法交易与滥用。因此，要根治垃圾信息，必须在立法上承认个人信息财产权。在“我国民法典的制定与个人信息财产权保护”一节，笔者首先对传统民法对个人信息保护的现状进行了简单概括和评价，由此认为，传统民法对个人信息不加区分地给予人格权保护而拒绝承认个人信息财产权的做法，不仅无法适应信息时代个人信息商业化利用的现实，也是导致个人信息侵权和滥用的根源所在，无法适应信息时代社会发展的客观需要。然后笔者对我国目前正在起草的民法典学者建议稿有关个人信息的内容进行了分析，认为两个学者《建议稿》对个人信息都采取的是人格权保护模式，即不承认有独立的个人信息财产权存在。不过，就个人信息的商业化利用问题，梁慧星教授负责起草的《中国民法典草案建议稿》没有正面规定，而王利明教授负责起草的《中国民法典草案建议稿》则在人格权的名义下作出了规定，即权利人可以就其姓名、肖像、隐私等人格利益许可他人使用并获得报酬。关于个人信息财产权立法与民法典之间的关系，笔者认为，不管采取哪种立法模式，考虑到个人信息财产权属于民法财产权之一种，应该适用有关财产权的基本规则，因此，未来的民法典应该在总则中的民事权利中为个人信息财产权安排一个适当的位置，同时，如果制定财产权总则的话，也应该考虑到个人信息财产权对财产权总则构建的影响。最后，关于“我国个人信息财产权保护立法的制度构建”，笔者认为，应该包括个人信息的界定、个人信息的分类与确权、个人信息财产权的内容、范围与效力、个人信息财产权的行使及其限制、个人信息财产权的保护等内容。

关键词： 个人信息；人格利益；人格权保护；财产利益；财产权保护

Abstract

This book consists of a preface and seven chapters.

The preface mainly introduces the background against which the topic has been chosen, the significance of the topic, the definition of the object of study and the method of study. Due to its increasing prevalence, commercialization of personal information has become an object concerned by Civil law. However, restricted by the traditional distinction between personality rights and property rights, most scholars see the commercialization of personal information from the standpoint of personality rights: some view it as a new personality right; some a commercial personality right, still some an economic personality right, and others a dual personality right, whereas only a small number consider it as a property right. In fact, interpreting property right by means of the theories of personality rights not only confuses the distinction between property rights and personality rights, but is illogical in itself as well. On the one hand, either right of publicity in American law, merchandising right in Continental law, or theories of personality rights of various kinds, they are all invariably targeted at the commercial use of such direct information as name, image, privacy, voice, which is associated with a specific commodity or service in the advertisements. and none is able to address other situations of commercialization of direct personal information than advertisements, e. g. online dissemination and exhibition of images. They are also not applicable to the commercialization of indirect personal information such as spending habits, cell phone numbers, email addresses. On the other hand, information is a commodity or

means money in the information age, and trading of information including personal information, has become an industry – information industry. The legal transfer of the commercial value of personal information not only conforms to the will and interests of data subjects, but also can promote the circulation of information and the healthy development of information industry. Therefore, it is imperative to recognize the independent legal status of the commercial value of personal information and accept it as a private property in theory and in law.

But the fact is, except publicity right theory of the protection of such direct personal information as name and image, no other theories or existing legal systems recognize individuals' property rights in their personal information, indirect personal information in particular. Even in the existing laws for the protection of commercial confidence in European Directive on the Protection of Data (1995) and Personal Data Protection Act (1988) of the UK, personal information is invariably regarded as property of the businesses. Obviously, most businesses are happy about this and make the commercial value of personal information their preserve as a matter of course.

Actually it is the very incongruous attitude towards the personality and property interests of personal information in legislation and theory that has contributed to the increasing rampancy of illegal collecting, processing and abuse of personal information as well as infringement on privacy, which is not only unfair to the individuals/consumers but also causes their deep distrust in the Internet and E – commerce and thereby hinder the healthy development of Internet and E-commerce. Meanwhile, regulation on the trade of personal information is short of legal grounds. It is in this context that this book proposes that property – right protection should be given to the commercial value of personal information in order to resolve this awkward situation.

In Chapter I "Problems and Challenges", the author argues that the lack of relevant legislation is the main reason for such problems as the rampancy of unsolicited text messages and spam, illegal collection and trading of personal information; and the lack of legal regulation has caused the difficulty in solving those problems. Specifically speaking, neither "New Personality Right" argument and "Two – Tier Personality Right" view nor the "Publicity Right" Viewpoint can provide strong theoretical support for the regulation on commercialization of personal information in real life. However, the author's argument for protecting personal

information by property right hopefully can help tackle the problems.

Chapter II "Personal Information and Rules for Conferring Relevant Rights on It" consists of two sections: (i) definition and classifications of personal information; (ii) rules for conferring rights on personal information. The author defines personal information as the private information through which a natural person can be directly or indirectly identified and which is not directly associated with public interests. There are a number of classifications of personal information, but the following are two most valuable ones, one being "direct information" and "indirect information" in light of whether a piece of information can be used to directly identify a specific natural person; the other "information directly related to personality dignity" and "information not directly related to personality dignity". These two types of classification somewhat correspond to each other since direct personal information is closely linked with personality dignity and thus can be protected under the current law through rights to name, privacy, image and the like. However, indirect personal information has failed to be protected by present caw due to its irrelevance to personality dignity. In fact, not every piece of personal information is directly linked with personality dignity and should be protected in the name of personality right; only direct personal information, such as personal names, images, privacy, etc, possesses personality values, and thus should be protected as personality rights. In this information age, all sorts of personal information have potential commercial values and therefore they should be classified and be given corresponding protection of property rights. To understand personality rights and property rights and their relationship, clarifications must be made of the following two important concepts, "Right Target" and "Right Object". "Right Target" is a specific and descriptive concept, which generally takes the form of visible/tangible articles, an action, information, etc., whereas the latter is an abstract concept, which, in the current civil law theory, represents either property interests or personality interests. The distinction between the two rights lies in their objects rather than their targets, hence different rights to different objects can co – exist in the same right target. So it is possible for property rights and personality rights to co – exist in the same right target, they are independent from each other and thus we are unlikely to have personality property rights, property personality rights or mixed rights. The differentiation of rights in accordance with right object rather than right target makes it possible to explain the difficulty facing the theory of personality

when confronted with such questions as legal status and protection of "special thing" and commercialization of direct personal information, which include both property interests and mental interests. Also it can help define legal status of personal information and legal nature of property rights in personal information as well as its relationship with personality rights. Then it is not difficult to draw the following basic rules for ascertaining rights to personal information: if personal information possesses personality values, the law should give it personality right protection; if the personal information possesses property values, the law should give it property – right protection; if the personal information possesses both property values and personality values, then the law should give it both personality – right and property – right protection. This rule naturally applies to personal names, images and other direct personal information which possess both personality and property values. To indirect personal information, only property rights protection should be given since it possesses only property values. Finally, in terms of the ownership of personal information rights, the author argues that ethically, legally and logically commercial values or property rights in personal information should belong to the individual rather than a business.

Chapter III "The Current Protection of Personal Information and Its Analysis" is divided into five sections as "EU Legislations", "US Legislations", "International Treaties and other Regional Legislations", "Legislations in China" and "The Analysis of Current Legislations". Based on a general survey of the content and spirit of the legislations in some countries and regions, the author classifies the current legislations into EU and US mode. A comparative and comprehensive analysis on the two modes makes it clear that, in spite of the differences between them in terms of legislative techniques, philosophical ground, political stand and preference of value, the two modes are similar in that they are both under the great influence of the personality right theory, hence their attitude and stands towards the commercial value of personal information are alike, both denying individuals property rights in their personal information, which results in the seizure of the market value of personal information by the businesses rather than by the individuals. In a nutshell, the current legislative situation is the main reason why it is now so difficult to keep personal information abuse in check.

Chapter IV "The Theoretical Obstacles to Property – Right Protection" falls into five sections: "The Personality-Rights Argument and its Analysis", "The

Free-Speech Argument and Its Appraisal", "The Reconsideration of the Viewpoint of Public Products" and "The View of Tort and its Analysis". In Section One, after a summary of the theory of personality rights, by logical analysis and reduction to absurdity, the author proves that the opinion that personality – right object, namely personality characterization, is innate and inseparable with the subject is a false proposition and the conclusion thereby that recognition of personal information property rights will damage personality dignity is not tenable. In fact, an analysis on the personal right theory and the relationship between personal rights and property rights suggests that the recognition of the property rights in personal information will protect and defend the personal dignity rather than jeopardize it.

In the next section, based on the study of the application scope and limitations of free speech and the argument that the property rights in personal information can only exist in the commercial use of personal information, the author concludes that the recognition of property rights in information personal will not hinder free speech.

In the third section, after an examination of the definitions of the nature of information in the three information economic theories and a survey of the current legal protection of intellectual products and commercial confidence, the author concludes that the opinion that information is public product is a false proposition and the notion that personal information is not eligible for property – right protection does not hold water. Finally the auther proposes that the businesses' exploitation of the commercial value of personal information is competitive and thus property right protection should be given to personal information in order to keep a market balance between supply and demand.

In Section Four, the author argues that the limitation of tort law – incapability to provide a specific, clear, consistent and reliable protective mechanism is not good for the healthy development of information industry, including personal information, whereas property – right approach will, from the perspective of institutional economics, furnish a more efficient and feasible option for personal information protection.

In Chapter V, first the auther argues the necessity for protecting personal in formation by property rights from several perspectives. For one thing, law is supposed to protect justice and the disadvantaged groups; for another, legal system requires unity of logic and value; finally, the infringement on personality and per-

sonal information abuse is getting increasingly serious and challenging in the information age.

Then the author presents the philosophical, ecomomical and legal grounds for protecting property rights in personal information. Although the Lockean theory of property rights has been used invariably for defending the protection of labor outcomes, from his idea that everyone enjoys ownership of himself, the author infers that everyone should enjoy the property rights to the account of his person—the commercial value of his personal information. Also, according to Locke, property rights are generated through labor on objects and resources in their natural state, thus we can reason that any "labor" on others' property without their consent cannot lead to ownership of the property rights. If we apply this conclusion to today's common practice of colleting, processing and trading of personal information without the consent, we can easily see that it is not right to regard personal information as the property of the businesses; rather, only the individual is entitled to the commercial value of his/her personal information.

Hegel's theory about property, personality and their relationship with freedom is instructive. First of all, his distinction between the subject and the object and between the exterior and the interior clears the theoretical obstacles to the establishment of the concept of property rights in personal information. Second, his idea that property is a freedom which represents the subject's free will provides ground for individuals' property rights to the commercial value of their personal information. Finally his dynamic rule of property rights provides theoretical support for the realization of property rights in personal information.

When it comes to Pound's sociology, the author thinks his opinion that personal, social and public interests should be kept in balance also provides theoretical grounds for the establishment of the system of property rights in personal information. Moreover, his understanding of material interests allows space for recognition of property rights in personal information. Also, his utilitarianism is of significance to personal information. On the one hand, allocation of information-property rights to individuals conforms with the end of maximizing social interests; on the other hand, the rational allocation and use of personal information – a rare resource, and recognition of property rights in personal information, will ensure its transfer to the hands of those who are likely to bring him the greatest profit, thus disputes will be avoided and social welfare will be promoted to the utmost. Eco-