

PROPERTY RIGHTS IN PERSONAL DATA
A European Perspective

Nadezhda Purtova



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Preface and Acknowledgements

This book came as a result of four years of PhD research completed at Tilburg Institute for Law, Technology, and Society. The research was triggered by developments in information technology that gradually led to significant decrease of control that people have over their personal information. The unprecedented scale of challenges to information privacy necessitated considering of less traditional approaches to framing the data protection problem and its solutions. Therefore, in search for a better model to ensure control and respect for information self-determination, this study took an idea of ‘proptertisation’ of personal data – originally developed by the US scholars – under the loop. However, not the market side of proptertisation was the focus of examination, but the unique scope and ‘logic’ of property rights that ensure protection of an entitlement against the entire world. This particular effect of proptertisation, as opposed to the formal introduction of property rights, is in the centre of this book’s argument.

The examination of the potential of this tool of data protection coincided with review of the 95/46/EC data protection directive initiated by the European Commission, with a focus on new tools of implementing existing data protection principles. Many of the key components of the future reform already articulated, for example, in the Commission Communication to the European Parliament and Council of 4 November 2010, such as principle of accountability and privacy by design, are an organic part of the property rights approach proposed in the book.

There are many people to whom I am grateful for supporting me throughout my doctoral research and conclusion of this book. I should first of all thank all my colleagues at TILT for providing a warm and inspiring environment in my PhD years. Prof. Corien Prins has been the best supervisor I could ever hope for and the warmest person I am fortunate to have met.

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In the end, I would like to express my love and gratitude to my parents who gave me everything a daughter ever needs to find her way in life, and to my husband Jasper for putting up with me in the last months of finalising the book and encouraging me to pursue my dreams.

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Chapter 1

Introduction

1. SUBJECT MATTER, RESEARCH QUESTION AND AIM OF THIS STUDY

This study considers the familiar idea to introduce property rights in personal data against a backdrop of developments in the modern European concept of property rights and new applications of information technology not yet accounted for in the existing debate. The principal question that this book attempts to answer is whether, from a legal perspective, the propertisation of personal data is a realistic option in Europe in terms of further development of the European approach to data protection. The research question implies the two sub-questions: first, to what extent, if at all, is the propertisation of personal data legally possible; and second, if, and to the extent that it is possible, what would be the benefits and limitations thereof when it comes to resolving the personal data problem?

This research started off with an assumption, based on European literature on privacy, that the idea of the propertisation of personal data was a Bad Idea. Indeed, in European discourse propertisation was often used interchangeably with commodification both of personal data and a human right to data protection. Hence, the search for a European perspective on the issue began, based on Popper's idea of falsification, as an attempt to refute the hypothesis that propertisation is a good solution to the data protection problem in Europe, by finding evidence of possible harmful effects of propertisation and identifying further arguments against it.

Nevertheless, the results of the research into the concept of property in European law, as well as a closer examination of modern data processing, were convincing enough for the author to take another look at the propertisation debate. As it turned out, the analysis was not able to reject the

hypothesis that propertisation *might* be a solution. In Popperian terms, this does not mean that the hypothesis is proven – i.e. that propertisation *should* be introduced. At the same time, the results of this study have strengthened the case for propertisation considerably by its failed attempt at falsification. This study presented propertisation as a legitimate and promising tool in a new generation of data protection which is certainly worth further consideration.

Personal data, at least in the European legal lexicon, is not a conventional object of property rights; the transfer of ownership is not how we usually regard the act of telling people about ourselves. Yet, property talk has entered a policy discourse around personal data. First, regardless of the actual legal circumstances, lively markets in personal data have become a reality. The so-called information industry routinely collects and deals in databases containing the personal details of people as both citizens and consumers, and appears to regard this data as its property. Moreover, individuals also treat the data pertaining to them as *their own*, and habitually disclose it in exchange for money, goods, or services.

In the early 1970s, US scholars were the first to propose that personal information should be formally recognised as an object of property rights.¹ Propertisation would acknowledge the existing phenomenon of the commodification of, or the attribution of a high market value to, personal data. It would also return to individuals control over the personal information that had become lost in the course of the Information Revolution.² In addition, natural rights theory was also invoked to support property claims for personal information, implying an inherent connection between an individual and the data pertaining to him.³ Other commentators saw the benefits of propertisation in terms of the rhetorical value of property talks.⁴ Nevertheless, one of the most discussed approaches to the protection of personal data as property has come from an economic perspective. The idea to treat personal data as property was gaining even more appeal against the backdrop of the shortcomings of the US data protection system.

Notably, however, although the American debate on the propertisation of personal data has since passed its peak,⁵ in Europe such property talk has only

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1. Alan F. Westin, *Privacy and Freedom* (London, Sydney, Toronto: the Bodley Head, 1967).
 2. *Ibid.*, p. 7; Daniel J. Solove, 'Privacy and Power: Computer Databases and Metaphors for Information Privacy', *Stan. L. R.* 53 (2001), p. 1428.
 3. *Ibid.*, p. 1446 (although Solove does not develop the natural law argument further); Vera Bergelson, 'It's Personal, but Is It Mine? Toward Property Rights in Personal Information', *U.C. Davis L. Rev.* 37 (2003), p. 430; Margaret Jane Radin, 'Property and Personhood', *Stanford Law Review* 34, no. 5 (1982), p. 959.
 4. 'Property talk is just how we talk about matters of great importance' (Lawrence Lessig, 'Privacy as Property', *Social Research: An International Quarterly of Social Sciences* 69, no. 1 (2002), p. 247); 'If you could get people (in America, at this point in history) to see [a] certain resource as property, then you are 90 percent to your protective goal.'
 5. Indeed, the reader will find only few relevant works after 2004 (e.g. James Rule, *Privacy in Peril: How We Are Sacrificing a Fundamental Right in Exchange for Security and*

recently extended beyond lay circles.⁶ One cannot help but notice the growing attention now paid by European academics and policymakers towards the *privacy by design* principle. It requires that respect for information privacy is built into processes involving persona data, e.g. by using privacy enhancing technologies (PETs). The implementation of this principle among others promises to increase an individual's control and negotiating powers with regard to the collection and use of his personal data. The idea of property-like control over personal information has also received renewed attention at the EU level. For instance, in a 14 April 2009 video message, Vivian Reding, the EU Commissioner for Information Society and Media, said:

Europeans must have the right to control how their personal information is used, and [...] that the Commission would take action wherever EU Member States failed to ensure that new technologies such as behavioural advertising, RFID 'smart chips' or online social networking respected this right.⁷

The property in data is one of the tools at the disposal of the law when it comes to providing individuals with the desired degree of control.⁸

Despite the amount of literature available on propertisation by American authors, and a growing interest in the concept by European scholars, the current debate has three major flaws. First, it lacks structure and a systematic approach. There has been no comprehensive study in either Europe or the US which compares the substance of a personal data problem that propertisation would resolve with an assessment of what property as a legal instrument has on offer. The arguments for or against propertisation mostly focus only on individual aspects of the personal data problem, such as the commodification of personal information, and ignore others, or approach the concept of property one-sidedly, e.g. arguing that propertisation will induce, not limit,

Convenience (Oxford: Oxford University Press, 2007), Lawrence Lessig, *Code 2.0* (New York: Basic Books, 2006), a new edition of Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999).

6. Among the few European authors writing about property in personal data are Colette Cuijpers, 'A Private Law Approach to Privacy: Mandatory Law Obligated?', *SCRIPT-ed* 4, no. 4 (2007), J.E.J. Prins, 'Property and Privacy: European Perspectives and the Commodification of Our Identity', in *The Future of the Public Domain, Identifying the Commons in Information Law, Information Law Series* (The Hague: Kluwer Law International, 2006), Antoinette Rouvroy & Yves Poullet, 'The Right to Information Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy', in *Reinventing Data Protection?*, ed. Serge Gutwirth et al. (Berlin: Springer, 2009), Niels Van Dijk, 'Property, Privacy and Personhood in a World of Ambient Intelligence', *Ethics Inf Technol* 12 (2009).
7. 'Citizens' privacy must become priority in digital age, says EU Commissioner Reding' available online at <[http://ec.europa.eu/information_society/newsroom/cf/itemlon](http://ec.europa.eu/information_society/newsroom/cf/itemlon>)>.
8. For recent evaluations and proposals for the improvement of the 1995 Data Protection Directive see, e.g. Neil Robinson et al., *Review of the European Data Protection Directive: Technical Report Prepared for the Information Commissioner's Office* (Santa Monica: RAND, 2009).