

Data Ownership: Civil Law Aspect

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Abstract—Data ownership is the subject of scientific discussions among researchers and policy makers due to the growing processes of informatization, digitalization and the rapid development of data science. The article analyzes data ownership in the context of civil law, trying to give a reasoned answer to the possibility and potential effectiveness of this approach from a legal point of view. The purpose of the study is to determine the definition and place of information in the array of civil law norms as a full—fledged object of civil legal relations, as well as to put forward a model of data ownership from the position of civil law. To achieve these goals, the article examines various types of information in the aspect of civil law, compares it with other similar objects of civil law and identifies problems and contradictions in the topic under study. The article concludes that it is necessary to develop a special regime for certain types of data, similar to the property regime, however, having its own characteristics. The article, in addition, is of interest from the point of view of unexplored, since the consideration of data ownership in the context of civil law is not widespread enough. Information property from the angle of civil law is not sanctified in the legislators of most countries of the world, for this reason, this article is valuable and carries scientific novelty.

Index Terms— data ownership, property rights, information as an object of civil law, economically valuable information, data in civil legal relations.

I. INTRODUCTION

In today's realities, legal science in the field of information tries to take into account the changing trends in legal relations arising in this area. One of these areas, moreover, one of the most important, is the so-called concept of "data ownership", which occupies an impressive scientific space and is of particular research interest to the scientific community.

In this regard, the question of the legal nature of information property is regularly raised by researchers and policy-makers, and this term itself can be found in the legislation of different countries. At the same time, it is not entirely clear what is meant by this, does this mean the legal regime of property rights as such? The legislative framework of different countries reflects different approaches to this phenomenon, often without answering the most pressing questions.

The article attempts to consider information property from the point of view of civil law and as a possible object of civil legal relations. This is of crucial practical importance, because in civil law we can find answers to many life situations and problems faced by individuals and legal entities. Information in the context of civil law is covered unreasonably little, and this phenomenon requires attention and development.

II. CONTRADICTIONS IN APPROACHES TO DATA OWNERSHIP

Considering the issue of data ownership, the key question that lawyers have is which interest groups do we protect? And this leads to the following question - what models exist and can exist to protect these interests?

The controversy and complexity of the concept of data ownership is quite understandable, in order to consider this aspect more deeply, first of all it is necessary to turn to the very concept of ownership. "Jurists have defined ownership in different ways. All of them accept the right of ownership as the complete or supreme right that can be exercised over anything. According to Hibbert ownership includes four kinds of rights withing itself. Right to use a thing. Right to exclude others from using the thing. Disposing of the thing. Right to destroy it"¹.

And we immediately encounter the first obstacle on the way to the possibility of owning information. By its very nature, a complete monopoly on information is impossible. The information "remains" with both the previous owner and the new one. Thus, the very concept of property rights is violated.

The second thing that we can see from the concept of ownership is that it is impossible to own, dispose of and use information in the classical sense. However, this is possible if we are talking about the ownership of information by analogy, for example, with patent law.

The next thing we would like to note is the contradictory nature of the information. Many researchers find real signs in it, for example, Herbert Zech considers information as an object of property rights, unlimited intellectual property. It manifests itself in personal aspects and even in property law. Therefore, the author classifies information, highlighting semantic, syntactic and structural information.² It has a lot in common with material goods, which, first of all, gives us the opportunity to consider it in the civil aspect.

Consideration and analysis of the existing legal regimes in relation to property led us to the conclusion that in the European Union, not to mention the legal systems of the world, there are very different approaches to this issue. Similarly, a completely different approach is demonstrated by the legislative bases of the EU countries in relation to intangible objects. For clarity, let us illustrate the inconsistency of the definition of the term "thing" within the framework of European property law. Austria and Scotland, for instance, have some of the most liberal approaches in Europe. Everything that can be distinguished from a person and is usable is legally defined as a "thing." Ownership includes everything that belongs to someone, regardless of whether it is corporeal or not. The

French Civil Code incorporates tangible and intangible "biens," i.e., goods.³

The Civil Code of Switzerland consists of 5 books, of which we are particularly interested in the fourth - Property Law. It is noteworthy that Article 713 of the Code states that these natural forces "are a legitimate "thing" under certain conditions." Further articles consider the benefits received from nature, even such as a swarm of bees generating honey.⁴

Studying slightly different approaches to data ownership in the national systems of the European Union, we note that "Germany assumes a rather narrow definition. The strict requirement of a steady corporeality excludes everything that cannot be sensibly demarcated from other objects, like electricity. Ownership of incorporeal goods is, therefore, not possible."⁵

III. DATA OWNERSHIP IN THE ASPECT OF CIVIL LAW

The issue of information property can be studied and considered from a variety of angles, starting with global categories in the field of human rights and freedoms and ending with the concept of classical property rights. The author made an attempt to consider the information in a narrower legal aspect – the aspect of civil law, which is explained by its practical significance and maximum approximation to real life situations.

Legal relations, as is known, assume as mandatory elements the presence of subjects, object and content. The same applies to civil law. In legal relations, one way or another related to information, it is the definition of the object that is a controversial factor. The reason is the huge variety of types of information, to isolate from which only those that fall within the scope of civil norms is not the easiest task. However, it is necessary, because information today «is even becoming more than an intangible business asset. Information is rapidly and increasingly becoming an economic good and a very tangible business asset. The challenge is clear: those that haven't connected their critical data yet and aren't able to make sense of ever more unstructured data will have a hard time to catch up»⁶.

IV. CLASSIFICATION OF TYPES OF INFORMATION IN THE ASPECT OF CIVIL LAW

In order to determine which type of information is subject to the norms of civil law, the author attempted to classify the types of information that are significant from the point of view of law, linking them with a possible concept of data ownership, thereby immediately excluding from the legal field information that does not fall under it. Of course, it is possible to classify information from completely different points of view "data is initially separated into groups, or classes, based on shared characteristics with the intent of treating those groups differently. Data is then tagged and organized into relevant groups based on shared characteristics, such as the level of sensitivity, the risks they present, or the compliance regulations that protect them".⁷

Having considered in detail a large number of types of information, the description of the features of which is not the task of this article, we came to the conclusion that only a few of them can theoretically fall under the regime of property rights. Among a huge number of different types of data, such as publicly available personal data and restricted personal data; big data; test data; well-known information; state secrets and other restricted access data in the interests of the state; confidential information in the form of personal and family secrets related to the personal life of the subject; health data, medical secrets; commercial, business and professional secrets, which include lawyer and notary activities; information about production secrets and know-how, which is close to the latter, but has a more specific character, but not it falls under the data ownership regime we are interested in, since it already has its own regime. Another type of information that is rapidly gaining momentum is information created in a machine, automated AI (artificial intelligence) and many other types of information.

Based on the analysis done, we have identified several groups of information that theoretically may fall under the regime of property rights. Firstly, it is information that has economic, commercial value, is used in civil law relations, is the object of contract law and the object of transactions.

Secondly, information related to the private life of individuals, representing personal secrets, for example, of an intimate nature. This is information of exceptional importance for an individual or a group of people (family secret).

And finally, information that is the result of the compilation of various data and is formed into a single system that carries a single meaning. The subject who created such information by collecting, processing, thinking process, searching and sampling from a huge amount of data may well claim to own such information. We are talking about the collection of "depersonalized" data, that is, not copyrighted, free and publicly available. If copyright objects are used, when, in order to avoid infringement of this copyright, it is necessary to specify the source. Having made some efforts and obtained a result that may interest potential buyers, for example, gives the right to dispose of the result of this activity, which cannot be called intellectual, because it is not about the creative process.

Having conducted this analysis, we did not come to the conclusion that the data ownership regime must necessarily be established in relation to the three types of information mentioned above, since we must find out whether this is possible from the point of view of the law.

V. INFORMATION AS AN OBJECT OF CIVIL LAW

So, let's move on to one of the key questions of our research. Consider data as an object of civil rights. And the first question we have to answer is - what properties should information have in order to be a full-fledged object of civil legal relations?

Firstly, it should have a meaningful meaning, satisfy someone's private need, which is characteristic of the category of property and non-property goods. Secondly, it should carry

³ Andreas Boerding Nicolai Culik Christian Doepke Thomas Hoeren Tim Juelicher "DATA OWNERSHIP & PROPERTY RIGHTS", page 337

⁴ Switzerland Civil Code, 1907, book 4, art 713

⁵ Andreas Boerding Nicolai Culik Christian Doepke Thomas Hoeren Tim Juelicher "DATA OWNERSHIP & PROPERTY RIGHTS", page 338

economic value and interest, and this is the main characteristic that allows to classify data as property, even if "disembodied", and therefore as objects of civil legal relations.

Information as an object of civil legal relations has both general properties of information as an object of legal relations: meaning, quality, reproducibility, physical inalienable, indestructibility and non-consumability, legal alienability, separateness from the manufacturer by expressing in an objective form on any material medium, the ability to be an independent object of rights, and the properties of a civil nature: the ability to participate in civil turnover, be a commodity, have value and generate income.

Since huge flows of economically valuable information are circulating in civil turnover today, such information is a very important category for the business sphere. As Teresa Scassa notes in her research, data ownership can play a role in commercializing data: "it is common for companies and organizations to seek to control the data they collect through their activities in order to commercialize them. An ownership right can support various techniques for control, including contracts/licensing and technological protection measures".

So, the economically valuable type of information indicated by us is negotiable, that is, it can participate in a dynamic commodity-money exchange and represent an object of civil legal relations. In order to substantiate this statement, it is necessary to define the concept and features of the object of civil turnover. Thus, objects of civil turnover are objects of rights that have negotiable properties, in respect of which civil transactions are concluded, the subjects of which can transfer their property rights, that is, these rights are dynamic, capable of alienation and transfer from one subject to another.

It should be noted that the data themselves cannot be independent objects of civil turnover. These are the property rights assigned to their "owners", and not the object itself as such. According to the principle of analogy of law, this scheme is similar to intellectual property legislation, where the objects of civil legal relations are exclusive intellectual property rights, and not the intellectual property object itself as such. We drew an analogy with patent law, or rather, with its access control system. After all, this is one of the models where there is not only a human monopoly, but also the possibility of access to information. "A patent does not refer to a right to practice or use an invention, but rather, the right to exclude others from using, selling, making, offering for sale, or importing the patented invention. Once patented, the underlying invention will be protected from use, sale, production, or importing for the term of the patent, which is typically 20 years from the filing date."⁹ Thus, it can be concluded that in civil law relations concerning economically significant information, not the information itself will participate, be transferred and alienated, but property rights to it, fixed in the ownership regime or similar to it.

⁶ "Information as an economic good: the next information age stage", <https://www.i-scoop.eu/information-as-aneconomic-good-the-next-information-age-stage-in-four-steps/>

⁷ Context is everything: Unify data security, privacy, and governance with contextual data classification, 2022 SPIRION, page 3

Also, when studying and developing civil law regimes for new intangible objects of property rights representing economically significant data, it is necessary to establish the nature of these rights - they are absolute or relative, since this is of practical importance and will contribute to the development of legal doctrine. Absolute rights fix the statics of legal relations and the ownership of rights to individual subjects. When developing regimes for the protection of the rights of subjects of legal relations, the issue of responsibility is very important. In case of violation of the absolute right, measures of protection and responsibility can be applied to any violator, and in case of violation of the relative right, only a strictly defined person can bear responsibility, obliged by his actions to satisfy the interests of the authorized person.

Information is the object of absolute civil relations. Absolute civil legal relations arise over commercial, personal, family, state, official and professional secrets, as well as over open information, isolated and organizationally ordered in information resources. The absolute civil right to information is an exclusive right of a special kind, different from the exclusive rights to other results of intellectual activity.

The exclusive right to information is the ability of a person to possess, use and dispose of information belonging to him at his discretion and in his own interest by performing any actions with respect to this information that do not contradict the law and other legal acts and do not violate the rights and legally protected interests of others.

Information to which access is restricted, for example, a non-disclosure agreement, when disclosing confidential information or part of the information to another party, is subject to relative rights, since the contract is concluded directly with a certain circle of persons, for example, with company employees, partners, etc. If we are talking about personal data, then personal data with limited access is also subject to relative rights.

Information can be the object of obligations arising from contracts such as purchase and sale agreements, barter, donation of property, the object of obligations (as part of an enterprise) from purchase and sale agreements, lease of an enterprise, the object of obligations from contracts on the transfer of information for use, commercial concessions, agreements on the provision of consulting and information services, it can be alienated for the payment of rent, transferred to trust management, act as a contribution to the common cause under a simple partnership agreement, as a contribution to the authorized capital of business partnerships and companies, to be inherited and in the order of succession. At the same time, the legal regulation of the listed legal relations should be carried out taking into account the specifics of information as an object of civil legal relations.

⁸ CIGI Papers No. 187 — September 2018 Data Ownership Teresa Scassa, page 2

⁹ What is Patent Law? <https://patent.laws.com/patent-law>

¹⁰ 0 "Information as an Object of Legal Regulation in Ukraine", Svitlana Iasechko, Alla Ivanovska, Tetyana Gudzyk, Mykola Marchuk, Oleksandr Venglinskyi, Alla Tokar, May 2021

Another very important aspect that needs to be mentioned is the consideration of information as a category of services. If we think about it, we will find a lot of similarities between the information and the service. Both the service and the information have an immaterial nature and carry a certain value. In online games, it is now commonplace to buy donations for real money. Can this be considered as a contract of sale? In our opinion, this is more like a service, you pay money, and you are given access to the game with all the virtual objects and accesses that you need, this is a service agreement where the subject is an information service. And this service of an informational nature seems to us much more a service than a commodity. However, if we talk about the construction of the contract itself as such, then the construction of the contract of sale is best suited. The very structure of the contract, thus, will resemble a contract of sale and, in fact, carry the meaning of an information service.

However, information is again different from services, the very concept of services does not work, because there is an independence of information, it seems to us to some extent a category between a service and a thing. Civil law systems are not adapted for such a category, which has an interconnected and complex character, having the characteristics of things, services and intellectual property at the same time.

For instance, “the dominant theory in the Ukrainian science of private law is the theory of the advantages of the objects of subjective civil rights, which also found legal support in Article 177 of the Civil Code of Ukraine. Among the objects of civil rights listed in this article, information is singled out separately, and article 200 of the Civil Code defines general approaches to its understanding. In addition, the categorical opinion that information, as a personal intangible asset, cannot be the subject of a transaction, loses its essence. Transactions regulating personal nonproperty relations may contain information as a subject and change or terminate rights to it. The conclusions drawn are relevant not only for law enforcement and law enforcement practice, but also for the theory of civil law”.¹⁰

VI. CONCLUSION

Thus, in the system of civil law, we consider it necessary to legislate a special object of law that has a complex legal nature. And to be more precise, it is necessary to add an article on ownership rights to an intangible object as an object of civil turnover to the Civil Code at the national level, for example. And, most importantly, to consolidate the possibility of protecting the rights to this object. What is the protection of information rights? Control over it, the possibility of transferring rights to it, allowing or prohibiting access to it, the ability to benefit from it – these property rights, in our opinion, should be fixed at the level of the civil legislation of the countries.

The very first step for the development of such a regime should be the recognition as such of the existence of a special category of intangible objects that do not relate to things or intellectual property, which are extremely important for humanity today and allow the transfer of ownership rights to them to subjects of legal relations. At the same time, the

category of property rights as such should be subject to global development.

While working on this study, we felt a lack of doctrinal in-depth developments of this category, especially in relation to information property. For proper management, use and control of data, a strong doctrinal and legislative framework is necessary, assuming a balance between public and individual interests, risks and rights.

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