

## Data Ownership Does Not Work?

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**Abstract:** *The search for the most effective data governance model has become an urgent issue all over the world, including the European Union. The need for compliance with privacy rights, at the same time reasonable openness of data, pose a difficult task for policy-makers. This article discusses data ownership as one of the previously much discussed potential data governance model. The article gives the reasons why the hopes of effective functioning were placed on this approach, as well as an explanation of why these expectations were not met. The rejection of the concept of data ownership led to the search for other data governance models, some of them are proposed in the third section of this article. To date, the European Union adheres to alternative data governance options, which are also mentioned in this paper.*

**Keywords:** *Data Ownership, Data Governance, Information, Contract Law, Data Access*

### 1. Introduction

The debate about the ownership of data, first of all, should clearly indicate what is meant by this right? If we are talking about the legal right of ownership, then it is necessary to study data ownership as an absolute right.

The classical concept of ownership and the possibility of applying its action to data should be considered from all angles, and first of all, from the practically applicable side. The very first question that logically comes to mind is: is there in principle a need to recognize the ownership of data and why? Such a significant "expansion" and even "distortion" of the scope of the property right needs a concrete and reasoned justification.

### 2. The Concept of Data Ownership

First of all, it is necessary to specify the subject of protection itself as such. The legislation should give a specific interpretation of what is meant by "data" in the context of ownership of them, and is this possible, taking into account the diverse and complex nature of the data? And even if the legislation, hypothetically, copes with this task and is able to formulate the essence of the subject, then, naturally, a new question will arise about the scope of protection, real existing threats, what interests are we trying to protect? And, of course, the resulting practical side will be the remedies provided to the newly minted data owner. And even after mentally performing this gigantic work, the economic and legal need to reinvent the wheel remains open.

In addition, it seems very difficult to formulate uniform norms that take into account all sorts of factors and circumstances related to social relations arising and circulating in the field of data. "...Data ownership legislation would have to adequately respond to the wide variety of circumstances under which data is generated and used in the future. Whether it is possible to develop uniform rules in advance regarding the

subject of protection, the person who owns the rights, and the types of uses to which the right will apply, while the specifics of various sectors are delegated to exceptions and restrictions, remains rather doubtful<sup>1</sup>.”

There also remains the question of how, in any case, to link these two concepts of property and data for the most effective regulation of this sphere, as well as preserving the principle of “as open as possible, as closed as necessary.”

The important thing is that “property is not a completely unambiguous concept. It has many facets and it performs more than one function.<sup>2</sup>” Thus, the answer to the question about the effectiveness of the data ownership concept “cannot be a “simple yes” or “no”, but requires further discussion of which approach to data protection – market or non-market - we are ready to accept, which “face” of ownership is best suited for this, and, most intriguingly if the approach is non-market, should we go through the difficulties of implementing a new model of data protection through property<sup>3</sup>”.

Despite all the difficulties regarding the concept of data ownership, it has been discussed for a long time in scientific papers and debates for reasons that are covered in the next section.

### 3. Tasks that Data Ownership was supposed to Perform

Such an approach to data governance as data ownership has been voiced and discussed many times as a proposal in the EU scientific community. And to this day, it has supporters who, despite the increasing recognition of its insufficiently effective, continue to defend this position, citing various arguments.

This proposal takes place for obvious reasons. Firstly, due to the traditional nature of this approach and the development of the institution of property rights in the legislation of all countries. Data property is hoped to be able to settle a large number of emerging legal relationships in the field of data, in which it would be possible to secure ownership of specific entities, thus streamlining them and bringing specifics to sometimes chaotic and poorly controlled processes.

There is a set of expectations associated with data ownership. “It gives hope to those wishing to unlock the potential of the data economy and to those trying to re-empower individuals that have lost control over their data”<sup>4</sup>. In this spirit, calls for data ownership demand that data can be property.

The repulsion from this traditional mechanism can also be explained by the complex legal nature of data, which have many similar features and can manifest themselves both as things and as objects of intellectual property rights in different circumstances. Thus, Adriano Zambon speaks about the contradictory nature of information that allows it to be classified as property. He notes that the term “property” can be used to refer to something that is not a commodity, but has a commodity as an object. For example, intangible things that are registered under the name “information” are not designated by the term “property”, but they are the object of something that is designated by the term “property”<sup>5</sup>.

Also, data as a property fully meets the market challenges of today’s realities, data as a commodity, data as a real market currency and value, what, if not property, can better meet these challenges? Data has naturally become an integral part of the economy and this process is irreversibly gaining momentum. “Propertization would acknowledge the existing phenomenon of commodification of, or a high market value attributed to, personal data, and could offer a solution to the data protection problem – a result of the 20th century rise of private and government databases”<sup>6</sup>.

<sup>1</sup> Josef Drexler, “DESIGNING COMPETITIVE MARKETS FOR INDUSTRIAL DATA – BETWEEN PROPERTISATION AND ACCESS”

<sup>2</sup> “Property rights in personal data: Learning from the American discourse”, Nadezhda Purtova, p 519

<sup>3</sup> “Property rights in personal data: Learning from the American discourse”, Nadezhda Purtova, p 519

<sup>4</sup> Own Data? Ethical Reflections on Data Ownership. Patrik Hummel, Matthias Braun, Peter Dabrock; 2020

<sup>5</sup> Adriano Zambon, Property: A conceptual analysis, Revus, Journal for constitutional theory and philosophy of law, 2019.

<sup>6</sup> Property rights in personal data: Learning from the American discourse. Nadezhda Purtova. Vol. xx, No. xx, June 2009, Page 7

Thus, data ownership was proposed with the hope of successfully solving the problems that appeared with the development of the active phase of digitization and the circulation of large amounts of information.

What exactly was data property supposed to solve? Firstly, to simplify and fragment these very volumes of data, thus making it easier to manage them. The ability to organize and fragment data is needed for a reason, it was and it is an crucial task. Information flows are huge and incredibly confusing, they cannot be regulated by any single mechanism. Many problems that arise with data, such as data leakage, misuse of data, illegal disclosure of data, any unreasonable disposal of data, are difficult to control and find out all the relationships, reaching the true responsible party. It was assumed that they could be ordered using propertization. This is the so-called “erga omnes” effect, which entails that property rights apply to all persons, creating negative obligations for them without their consent<sup>7</sup>. A certain ability to track relationships, the direction of data, protect data from misuse using the privileges of ownership rights is at the heart of this approach. The erga omnes effect could indeed, at least theoretically, ensure data security and impose responsibility for unjustified actions with “other’s” data.

When talking about data structuring and fragmentation, we are talking not only about information security, but also about data control. To a greater extent, despite all attempts at legislation, “we have no real control over our personal data. And data property was declared a measure capable of regaining this control. Thus, if property rights are structured in a certain way, even after transfer of some control also by “selling” a fraction of rights an individual would always retain essential control over his personal data, e.g. allowing and defining the goals of data processing”<sup>8</sup>. Data control is important not only in relation to personal data, any data that is uncontrolled is a huge block of unresolved issues. And the data ownership was supposed to solve these issues, giving control over the data to individuals and organizations.

Propertization, in addition to the above goals, of course, pursued the task of optimizing economic processes. Data ownership as a tool for regulating economically significant data was seen as an adequate response to the widespread processes of expanding firms’ work with data, making profits from data, selling and buying a variety of types of data. As Anastasios Dosis and Wilfried Sand-Zantma note in their study, “we define property rights as the ability to control the amount of data collected and to monetize it. In this setting, we highlight a central trade-off between two forms of contractual incompleteness: the first linked to the firm’s decision to process the data and the second related to the limit to data monetization”<sup>9</sup>. In addition to monetization and profit from data, the authors also mention data control, but in the context of data control by large firms with massive amounts of information. “If the firm owns the rights, it has full control over the collection and use of the data of all consumers”<sup>10</sup>.

To sum up, propertization pursued several main tasks. First, information security, the possibility of being held accountable for illegal actions with data, systematization of the information space in such a way as to be able to follow the chain of actions with data and “find” the responsible party. Secondly, data fragmentation was aimed at facilitating control over them, simplifying their management system. Also, data ownership implied the return of the possibility of personal management of their personal data. And of course, one of the most important goals is to expand the boundaries of the data economy and monetization of information. Like other objects of civil turnover, the data were supposed to be involved in civil transactions, bringing income and profit to their owners.

#### **4. Why does data ownership not work? Limitations of the approach, legal obstacles**

The key question of any proposed approach is how well it is able to cope with the tasks in practice. And even more important is how realistic it is from a legal point of view. Data ownership has faced a lot of criticism

<sup>7</sup> “From ‘Classical’ To Modern European Property Law?”, Van Erp

<sup>8</sup> Property in Personal Data: Second Life of an Old Idea in the Age of Cloud Computing, Chain Informatisation, and Ambient Intelligence. Nadezhda Purtova

<sup>9</sup> The Ownership of Data Anastasios Dosis † Wilfried Sand-Zantman‡ September 2020

<sup>10</sup> The Ownership of Data Anastasios Dosis † Wilfried Sand-Zantman‡ September 2020

from opponents, who cite many arguments, including the impossibility of implementing such an approach from a legal point of view.

To consider the legal obstacles to the possession of information, first of all it is necessary to apply to the very concept of ownership. Whereas the owner always excludes everyone else from the right ownership of a thing, there are obvious obstacles to the possibility of owning information. By its very nature, a monopoly on information is impossible. Information “remains” both the previous owner and the new one. Thus, the very concept of property rights in the classical sense is violated.

The second thing that can be seen from the concept of property rights is that it is impossible to own, dispose of and use information in the classical sense. New mechanisms and methods are needed for data ownership, and therefore, again, we are not talking about ownership as such.

Turning to the practical side, there are explanations in the scientific community why the approach to data ownership is not able to solve specific practical problems. Many scientists are convinced that there is no practical need to own data, for example, there is a belief that even without data ownership, data would be produced, used, licensed, sold<sup>11</sup>.

The theory of great opportunities for data control using data ownership is being questioned, since such fragmentation can lead to even greater confusion. Many scientists are of the opinion that this approach could lead to the opposite effect and an even greater loss of control over the data. We return to the unavoidability of de facto data control through both technological and legal means. When we consider these two aspects cumulatively, an additional layer of property rights did not seem like a sufficiently attractive incentive which would dissipate de facto control, thereby ensuring greater circulation and use<sup>12</sup>.

A significant obstacle to the implementation of data ownership is a completely different approach to the institution of property rights around the world, as well as in the legal systems of the European Union countries. The approach to “disembodied” property is radically different, in some countries, for example, in Germany, the right of ownership can strictly apply only to material objects, other countries adhere to a more liberal approach, relating energy and information to property.

This raises the question of the ability of data ownership to solve all or most of the problems associated with different types of data and in different situations. Do we think that the solution can be universal for everyone? Do we believe that one-size-fits-all issue? In fact, it even sounds implausible.

Another issue is the dynamic nature of the development of the economic market. Data ownership does not seem to be a flexible enough approach to adapt to the fast pace and character of the economy. At least, in the continental system that is closer to us, property rights are already a “hardened” and well-established system that is not capable of rapid response.

Not only economic, but also technical “trends” require an approach that can change and adapt to them, which is obviously not typical for data ownership. Thus, data ownership in the legal sense is not a suitable and working approach to data governance.

So, having considered what the proponents of property rights wanted to achieve with respect to data, it becomes clear that in many cases ““when people in politics, the media, the industry, and academia refer to data ownership or to privacy as property, they have largely not proposed to establish a new type of right, but a transfer rule... When people have proposed establishing property over data, they have discussed the implications of having data protected solely by property rules, and not necessarily by ownership”<sup>13</sup>. This will be discussed in the next section of the article.

## 5. Not only Property Can Be a Right

Now more and more scientists are inclined to believe that “...transferring rights over data only by consent and on an agreed upon compensation is a property rule over something that one needs not have ownership

<sup>11</sup> Own Data? Ethical Reflections on Data Ownership. Patrik Hummel, Matthias Braun, Peter Dabrock; 2020. Vol. xx, No. xx, June 2009  
Page 9

<sup>12</sup> The Data Producer’s Right: An Instructive Obituary Dev S. Gangjee

<sup>13</sup> “Beyond Data Ownership”, Ignacio Cofone, 2020

over. Individuals do not need to hold a property right (ownership) in data in order for the transfer of whichever rights they have over it to occur via property rule<sup>14</sup>”.

One of the tools that can partially "replace" the right of ownership is **contract law**. European contract law today, like other areas of law is subject to serious challenges of the digital revolution. Today it is absolutely not enough to consider contract law in its classical sense. The realities of modernity dictate their conditions, make all systems of law, including contract law, be flexible. For this reason the position of professors R. Schulze and F. Zoll is interesting. “European contract law is once again proving to be a law in changing society. At the same time it makes clear that it is necessary to rethink the relationship between this contract law and other areas of European private law. In relation to the transfer and use of data, as well as the right of disposal, the contract law perspective will also have to focus above on the intellectual property law and property rights, but also on data protection law (i.e. public law and criminal law)”.<sup>15</sup>

From the position of the concept of data ownership in relation to contractual rights, first of all it is needed to realize is it possible to regulate relations in the field of data with the help of contract law? Answering this question, the closest conclusion is that in many cases it is possible, as well as convenient and does not contradict any norms at all.

In many areas, including the business sphere, the use of data is quite possible without relying on the legal concept of ownership, because such economic transactions as the purchase and transfer of data may well be carried out on a contractual basis. In addition, today there is extensive legal protection against various interventions in the personal use of data. Many norms of public law explicitly prohibit such interference.

In addition, the contractual framework allows the parties to take into account their individual needs and nuances that cannot be covered by general norms. Hereby, contract law “allows the parties to specifically design the rights and obligations as needed for making new business models work. Contract law provides the parties with the possibility to experiment with different arrangements over time and with the flexibility to adapt to different circumstances in very different sectors of the data economy”.<sup>16</sup>

Also, it should not be forgotten that today it is technical means that play a key role and provide access or, conversely, are able to restrict access to data. “...The players of the data economy do not seem to suffer from the lack of recognition of general data ownership. The reason is that markets can also develop with relatively little legal exclusivity where access can effectively be controlled by technical means”.<sup>17</sup> Technical solutions, coupled with contract law, are able to cover and solve many tasks that were supposed to be solved by data ownership.

But in reality, of course, not everything is so clear and simple. Contractual relations are often violated, not all circumstances can be provided for in the contract by the parties, and so on. One of the most common unresolved problems remains access to data within the framework of contractual obligations. The unequal power of the negotiating parties is the most discussed problem that hinders the normal functioning of such agreements. EU legislation has attempted to resolve this issue by partially addressing it in the Directive on Unfair Contract Terms. However, it does not cover all emerging problems and is aimed at consumer rights, other types of public relations remain unaffected.

Scientists pay attention to many factors that cannot be resolved by contractual measures with respect to data. “Classical contract law alone, will not solve the privacy problem. Unequal bargaining power and start-up transactions costs prevent individual consumers from insisting on contractual rights to privacy. No one business will absorb the costs of redrafting standard forms, implementing privacy procedures, and educating consumers”.<sup>18</sup>

<sup>14</sup> “Beyond Data Ownership”, Ignacio Cofone, 2020

<sup>15</sup> R. Schulze, F. Zoll, European contract law, second edition, 2018, p 37

<sup>16</sup> Josef Drexler, “DESIGNING COMPETITIVE MARKETS FOR INDUSTRIAL DATA – BETWEEN PROPRIETARISATION AND ACCESS”

<sup>17</sup> Josef Drexler, “DESIGNING COMPETITIVE MARKETS FOR INDUSTRIAL DATA – BETWEEN PROPRIETARISATION AND ACCESS”

<sup>18</sup> TILBURG PRIVATE LAW WORKING PAPER SERIES No. 09/2017 “Data ownership and consumer protection” Eric Tjong Tjin Tai, Professor of Private Law

And so, it can be concluded that contract law can act quite effectively with respect to economically valuable information when the parties are financially interested in exchanging/selling /transferring it and only in cases of equal bargaining power of the parties.

## 6. Conclusion

The article analyzes the previously proposed data governance model - data ownership. The arguments in favor of it and the tasks that it intended to solve are given. However, due to various obstacles, data ownership was not able to cope with the tasks set. Knowledge of the classical legal doctrine is necessary, especially for lawyers, but the article concludes that it is time to recognize that in the context of data, not only the ownership right itself leads to the "possession" of information; absolute rights are undoubtedly extremely important, but again, in the context of data, they can explain new approaches and a new vision and understanding of data "ownership". The idea that not only property can be a right is argued in the article, and attempts are being made to go beyond ownership, thereby bringing flexibility and compliance with rapidly changing realities in the field of data. The article provides arguments in favor of data governance with the help of contract law and technical measures.

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