Abstract

Since the late 20th century, with the advent of the Internet and digital technologies, a multi-billion-dollar information economy has developed and flourished. Companies such as Facebook, Google and Amazon own and operate digital platforms which have become essential to everyday life. However, the implicit price that consumers have had to pay in exchange for access to these digital platforms is an almost-unfettered access to their personal information to these digital platform companies. Current privacy policy frameworks have failed to recognise this trade between the consumer and the digital platform company. Companies like Facebook, Google and Amazon have thus been able to effectively commercialise the personal information on consumers as market intelligence and lucrative opportunities for better targeted advertising and more effective price discrimination. For the consumer, privacy has therefore become close to a lost concept. This essay contends that consumers should be able to exercise property rights over their personal information in order to truly recognise the trade that occurs at first instance between the consumer and the digital platform company. In doing so, the conferral of property rights would help strike the balance between enabling consumers to have greater control over their personal information whilst continuing to promote the development of the information economy.

CONSUMER PRIVACY IN THE INFORMATION ECONOMY: THE MISSING TRADE LINK

I INTRODUCTION

The proliferation and increasing adoption of mobile technology and Internet connectivity since the late 20th century have marked what is known as the 'digital era'. Consumers have embraced digital platforms to conduct all facets of their lives: communicating with friends and family, buying groceries, and conduct their banking, to name a few. This embrace has enabled the companies operating those digital platforms, such as Facebook, Google and Amazon, to operate an information economy: collecting, using and trading the vast swathes of personal information on the millions of consumers who use their platforms.

Certainly, the use and trade of personal information by companies helps bolster macroeconomic activity by better matching consumer preferences and so incentivising greater consumer spending. Information about specific consumers allows for the tailoring of products and pricing to individual customers, and for the reduction of search costs for consumers who seek the right product for them. Yet consumers have historically given away their personal information without any meaningful involvement in the trade of their personal information.

Policymakers have sought to balance macroeconomic considerations with consumer privacy concerns through the implementation of country-specific privacy law regimes, which give consumers rights to know how their personal information will be used.[1] However, by placing the onus on the individual consumer to interrogate any undesirable uses of their personal information, this status quo approach fails to address the unequal nature of the relationship between the consumer and the digital platform company.

This essay contends that, to empower consumers vis-à-vis their personal information and duly recognise their role in the trade of personal information, consumers should be able to exercise property rights over their personal information. Part II outlines the nature of the information economy which thrives on flows of personal. Part III highlights the core issue of imbalance between the consumer and the digital platform company, where the consumer is excluded from the notion of a trade of personal information. Part IV then explores how property rights over personal information would directly address that imbalance by giving content to the bilateral nature of the trade of personal information. Part V concludes.

[1] See, eg, *Privacy Act 1988* (Cth) in Australia.

II THE INFORMATION ECONOMY

The spread and adoption of digital technologies since the late 20th century have been astonishing. In 2017, more than 45,000 gigabytes of Internet Protocol traffic occurred every second across digital platforms, representing a 450-fold increase since 1992.[2] This speed continues to be sustained globally through increasing connectivity in rural and regional areas in developed countries such as Australia, as well as in developing nations.[3]

Increasing use of digital technologies has created the opportunity for consumers' digital footprints to be tracked ever more precisely. The use and triangulation of cookies, browser information, and browsing history facilitates the collation of rich longitudinal data sets for individual consumers. Consequently, this significant scale of information flows across the Internet has given rise to an information economy, operating on the collection, analysis and trade of consumer-specific information.

The information economy is characterised by a high degree of market concentration, with almost 70 per cent of the total market value resting with just seven companies: Microsoft, Apple, Amazon, Google, Facebook, Tencent (owner of WeChat) and Alibaba.[4] These companies' market dominance has stemmed from, and perpetuates, strong network effects, as these platforms are considered as essential methods of interpersonal communication and e-commerce among consumers and their personal networks. Moreover, these companies have further secured their market power through strategic acquisitions of complementary digital platforms, for example, Facebook's acquisition of Instagram and Microsoft's takeover of LinkedIn.[5] This kind of market concentration allows for the parent companies to collect a range of interlinked data on consumers across the platforms that they own. The concentration of detailed consumer information within these companies then enables them to more profitably monetise the information that they collect and analyse on consumers, primarily through offering third parties the opportunity to target their advertising and more effectively price discriminate.[6]

It is the commercialisation and trade of consumer data by companies like Microsoft, Facebook and Google that present the key risk to consumer privacy. Although it is the personal information of the consumers that is being traded, the *trade* relationship exclusively concerns the digital platform company and a third-party company which seeks to use that consumer intelligence to better market their own products. The exclusion of the consumer in the trade relationship involving information *about that consumer* creates a serious issue of consumer disempowerment.

---

[2] United Nations Conference on Trade and Development, *Digital Economy Report 2019: Value Creation and Capture — Implications for Developing Countries* (Report, 4 September 2019) 1.
[3] Ibid 3–4, 6.
[4] Ibid 3.
[5] Ibid 7.
[6] See Andrew W Bagley and Justin S Brown, 'Limited Consumer Privacy Protections against the Layers of Big Data' (2015) 31(3) *Santa Clara Computer and High Technology Law Journal* 483.

III An Issue of Imbalance

Without government intervention, consumers are highly vulnerable to having their personal information exploited for commercial gain by companies like Google, Facebook and Amazon, since the common law does not recognise any general right to privacy.[7] As a result, governments have legislated country-specific privacy law regimes, with the *Privacy Act 1988* (Cth) ('*Privacy Act*') being the relevant Australian legislation. The *Privacy Act* regulates the use of personal information by entities, such as requiring entities to maintain a program protocol if data matching of information is conducted,[8] and providing consumers the right to know why their personal information is being collected, how it will be used and to whom it will be disclosed.[9]

The current regulatory framework relating to the collection and use of consumers' personal information hence distinctly favours the digital platform company. When a consumer engages with a digital platform, they are confronted by a privacy policy, usually written in broad, legalistic language, which ticks the company's legal obligations with the domestic privacy law regime such as the *Privacy Act* but does little to support consumer understanding of how precisely their personal information is or may be used, transformed and subsequently traded. When a consumer wants to use a digital platform, they are generally obligated to click 'accept' on the privacy policy if they would like access to the digital platform. The 'price' then of access to the digital platform is the loss of privacy and the consumer's ongoing provision of their own personal information. Once the consumer enters that relationship with the digital platform company, there is then no recognition of how it is the *consumer's* own personal information, aggregated and transformed, that is the subject of lucrative trades that the company can then engage in with third parties, such as advertising companies.

The ongoing provision of personal information by the consumer is distinct from an ordinary trade, where money is the medium of exchange. Unlike money, further trade of customer-specific insights, after the consumer has offered their personal information in exchange for access to the digital platform, can go on to materially affect other transactions in which the consumer seeks to engage. This occurs without any express recognition that it is the ongoing provision of personal information at first instance that allows subsequent price discrimination by third parties to occur.

While the *Privacy Act* does offer consumers the right in most instances to, of their own initiative, seek clarification from the company about how their information is going to be used, this shifts the onus onto the individual consumer to try and protect their privacy. Moreover, consumer rights under the *Privacy Act* operate in a delayed fashion, as it is usually only at the point that the consumer is aggrieved or especially curious *after having engaged* with the digital service that they seek to know more. The status quo of Australian privacy law therefore does not engage with the reality of the trade in consumer personal information that is occurring.

---

[7] *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.
[8] *Data-Matching Program (Assistance and Tax) Act 1990* (Cth).
[9] *Privacy Act 1988* (Cth) sch 1 ('*Australian Privacy Principles*'); Office of the Australian Information Commissioner, *Rights and Responsibilities* (Web Page) <https://www.oaic.gov.au/privacy/the-privacy-act/rights-and-responsibilities/>.

Certainly, the introduction of the General Data Protection Regulation ('GDPR')[10] in the European Union, and open banking regimes in the United Kingdom,[11] and soon in Australia,[12] are all steps in the right direction in terms of consumer empowerment over their own personal information, by promoting greater knowledge of how consumer data is used. However, only pursuing transparency-focused reform misses the opportunity to recognise the first-instance trade of personal information between the consumer and the company for what it is: an economic exchange of property.

IV A Coherent Path Forward: Property Rights in Personal Information

A recognition that consumers can exercise property rights over their personal information is the critical step in repositioning the consumer as an important participant in the trade of their personal information with digital platform companies.

A *What Is a Property Right?*

In Australia, as in wider Western socio-legal systems, property rights are interlinked with the idea of personal liberty, empowering the holder of property to exercise dominion over the property. Importantly, property rights enable the property holder to prevent any interference with their property except through the property holder's consent in trade.[13]

The content of *property* then reflects what is considered economically important to society. Historically, property rights therefore first attached to tangible property, such as land, which was held to be of significance to the economic, political and social status of men, and eventually, all individuals. By the early 18th century, with the Age of Enlightenment representing a flurry of intellectual and philosophical thought, intangible concepts like ideas also began to be enveloped into 'property', with the first intellectual property rights formally being codified in law by the late 19th century.[14] In Australia, property rights are protected through the common law, State- and Territory-specific property legislation,[15] and in Victoria[16] and Queensland,[17] further protected as a human right.[18]

---

[10] *Regulation (EU) of the European Parliament and Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 119/1.
[11] Payment Services Regulations 2017 (UK).
[12] *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth).
[13] See Loren A Smith, 'Life, Liberty and Whose Property?: An Essay on Property Rights' (1996) 30(4) *University of Richmond Law Review* 1055, 1060.
[14] *Paris Convention for the Protection of Industrial Property (as amended)*, opened for signature 20 March 1883, 828 UNTS 107 (entered into force 6 July 1884).
[15] See, eg, *Civil Law (Property Act) 2006* (ACT); *Real Property Act 1900* (NSW); *Law of Property Act 2000* (NT); *Property Law Act 1974* (Qld); *Law of Property Act 1936* (SA); *Conveyancing and Law of Property Act 1884* (Tas); *Property Law Act 1958* (Vic); *Property Law Act 1969* (WA). See also *Personal Property Securities Act 2009* (Cth).
[16] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20.
[17] *Human Rights Act 2019* (Qld) s 24.
[18] Although certain civil and political rights are recognised in the Australian Capital Territory, property rights are not included amongst them: *Human Rights Act 2004* (ACT).

Central to the idea of property is a legal relationship in which power is exercised over the object of the relationship,[19] with there being two core features of that power. First, property rights are exclusive. Exclusivity refers to the ability of the property right holder to do anything with their property whilst being able to exclude others from interfering with that property. Second, property rights are enforceable against the world-at-large. This means that interference with the object by any person with whom the property right holder has not come to a direct or indirect agreement is unlawful.

Extending the strong protections offered by the legal characterisation of property would be a robust means of empowering the consumer vis-à-vis their personal information.

B *How Property Rights Can Attach to Personal Information*

Following the historical broadening of property from land through to ideas, personal information is particularly suitable to next be encompassed by the notion of property and therefore be subject to property rights. This is because personal information meets the three characteristics of property as identified above:[20] first, that it is of economic value and so answers the moral imperative that property law seeks to address; second, that it is compatible with exclusive use; and third, that rights over personal information are best conceptualised as being enforceable against the world-at-large.

First, personal information has significant economic value for the purposes of morally justifying protection under property law. This is evidenced by the multi-billion-dollar market capitalisations of the companies owning and operating the digital platforms, where the primary and overwhelming revenue driver is the ability of these companies to track and use consumer data to either conduct or on-sell targeted advertising slots. In financial terms, the services provided by these platforms, such as social networking, are therefore merely ancillary to the commercial opportunities presented by consumer data.

Second, personal information is best characterised as an excludable but non-rivalrous product. The use of personal information does not prevent the simultaneous use of that personal information and is therefore non-rivalrous in nature. However, personal information is most aptly conceptualised as being excludable, since the individual consumer is, or at least should be, able to exclude others from *using* their personal information. The important characterisation point to note here is that even though other parties may *know* the consumer's personal information, for instance, their date of birth or preference for Apple products, it is the *use* of that information that is of concern and is, or at minimum, ought to be, excludable.

Third, and finally, rights over personal information should be enforceable against the world-at-large, given the interconnected and multi-stakeholder nature of the information economy. Under the status quo, the personal information of consumers is collected, used, transformed and traded by companies with hundreds of other entities, usually for product marketing and advertising purposes. A privacy policy, which is essentially a contract between the consumer and the digital platform company, can therefore leave a gap when it comes to use

[19] See *Yanner v Eaton* (1999) 201 CLR 351, 365–6 (Gleeson CJ, Gaudron, Kirby and Hayne JJ) ('*Yanner v Eaton*').
[20] See above Part IV(A).

of consumer-specific information by third parties which is only partly filled by legislation such as the *Privacy Act*.[21] The conferral of property rights on the individual consumer over their personal information would then act as a legal safety net for consumers seeking to protect their privacy.

Indeed, this conception of personal information as property in the digital economy is not wholly novel. There has been judicial recognition of personal information, as a digital asset, being protected by the principles of property law, in both New Zealand[22] and the United States.[23] Moreover, in Australia, Gummow J in *Yanner v Eaton* suggested that equitable protections over confidential information 'makes it appropriate to describe it as having a *proprietary* character'.[24] This indicates that it remains open to legally characterise personal information as property in Australia. It is then to be considered why this will effectively address the problem of imbalance in the trade of personal information between the individual consumer and the digital platform company.

C *Recognising the Trade of Personal Information*

The idea of individuals exercising property rights over their personal information would be consistent with the reality of the information economy being a *trade* of personal information. The conferral of property rights over personal information would duly appreciate and frame that trade as a *bilateral* transaction of personal information, rather than bare legal compliance when the consumer clicks 'I Accept' on the company's privacy policy.

The operation of the information economy is fundamentally a bilateral one between digital platforms and their consumers. For digital platform companies, such as Facebook and Google, their access to personal information on the consumer is crucial to their interests, given the substantial commercial value of consumer data and intelligence. For consumers, their access to the digital platform is also central to their interests, in being able to undertake a variety of online activities, ranging from social networking to accessing recipes. Since provision of personal information by the consumer operates as an effective 'price' for access to the digital platform, personal information should be considered as property, just as money, the traditional unit of price of market exchanges, is presently recognised at law as property.

Indeed, presently it is only the individual consumer who has no legally recognised proprietary interest in their personal information. One common trade in the information economy that occurs is illustrated as follows: a consumer seeks access to a digital platform and the digital platform company requests access to their personal information as consideration; the company then collects and analyses the consumer's personal information, creating market insights which are de-identified and no longer (legally) personal information and which become proprietary to the company; the company then sells the market insights to a third party which then becomes the new proprietary owner of the market insights. Conferring property rights to the consumer over their personal information would thus fill the proprietary gap in the trade relationship across the information economy. In fact, it would simply align the

[21] See *Australian Privacy Principles* (n 9) principles 7, 8.
[22] *Henderson v Walker* [2019] NZHC 2184.
[23] In New York: *Thyroff v. Nationwide Mutual Insurance Company* (2007) N.Y.3d 283.
[24] *Yanner v Eaton* (n 19) 388–9 (emphasis added).

information economy to the standard product market economy, in which the input seller has a property right over their input product as much as the intermediary and final customer over their transformed intermediate and final products.

It may be argued that conferring property rights will do little to improve the actual level of consumer empowerment as it relates to their personal information given the market power of companies like Google and Facebook. Certainly, it is true that there may only be a few digital platform companies, meaning the personal information market is oligopsonistic. However, legal recognition that consumers exercise property rights over their personal information requires greater care on the part of the company to ascertain that due consent has been acquired from the consumer for the company to then use that personal information. It is that meaningful consumer engagement with the exact nature of what occurs once they click away their personal information that would be enhanced through the equipping the consumer with property rights over their personal information.

V Conclusion

The information economy has been growing exponentially in scale since the mid-20th century, supported by increasingly digital lifestyles and greater mobile connectivity. This growth has been premised upon the commercial use and trade of consumer data that is collected by the companies operating digital platforms, such as Facebook, Google and Amazon. Yet the development of this information economy has largely been to the detriment of consumers' privacy, as consumers have clicked away their personal information when confronted with legalistic privacy policies. Existing legal protections afforded by domestic privacy legislation has failed to recognise the trade that occurs in fact between the consumer and the digital platform company over the consumer's personal information. This has therefore left the consumer bereft of meaningful control over their own personal information and has allowed the digital platform companies to almost-unrestrictedly profit from commercialising that data. The necessary step to provide legal recognition of that trade between the consumer and the digital platform company is to enable the consumer to exercise property rights over their personal information. While it is not a panacea for rectifying all imbalances in the consumer-digital platform relationship, conferring property rights over personal information is an important step to ensure there is due legal recognition and support of the consumer's role in the trade of their personal information, and ensure that the information economy operates in a more economically- and legally-consistent way.