

## PERSONAL DATA PROTECTION UNDER INTERNET PLATFORM ECONOMY

Dongyi Shi\*

**Abstract:** The data subjects' ownership of personal data and the basic rights and interests derived from it need to be implemented and clarified in practice by laws and regulations, and corresponding supporting regulatory systems should also be constructed accordingly. This article deduces "ownership" by discussing the "transmission" of personal data, studies the data's usage through discussing the case of Taobao v. Meijing and explores the supervision direction brought by technological progress. Platform companies should satisfy data users' wishes to obtain and transmit their personal data. Transfer of personal information being determined by individuals, makes for a fair and healthy competition environment among Internet platform companies. Under the most recent law environment, requiring every data subject to grant informed consent, would face complex application issues in practice. In order to make personal data circulate more conveniently in the society, this article proposes to refer to the spirit of the "Personal Information Protection Law", which is, the basis of "informed consent" and the principle of "minimum necessity", plus the method of "explicit permission", and adopt a "payment consideration" model in specific commercial fields.

**Key words:** personal data, data subject, data ownership, right to data portability, right to control

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\* Billion Industrial Holdings Limited, Jinjiang

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## INTRODUCTION

### A. Research Background

Nowadays, we are deeply involved in the era of data explosion where the data produced per day overwhelms those over past thousands of years in the human history. Here are the questions: Who owns the data? What is the data's source and destination? Who has access to the data? Who can control the data? and Who must register with the competent authority for the data? In the times of Internet, personal data has become important assets for which various platform enterprises are competing. Questions such as whether the data is carried tangibly, whether individuals can be endowed with the Information Property Rights, or whether the data information can be commercialized, still remain unanswered.

The 4<sup>th</sup> Plenary Session of the 19<sup>th</sup> CPC Central Committee was held in Beijing in October 2019. The session deliberated on and approved the *Decision of the CPC Central Committee on Some Major Issues Concerning How to Uphold and Improve the System of Socialism with Chinese Characteristics and Advance the Modernization of China's System and Capacity for Governance*. The session also clearly stated that "It is required to improve the mechanism where the market evaluates the contribution and determines remuneration according to contribution for labor, capital, land, knowledge, technology, management, data and other production factors".<sup>1</sup> In addition, "data" should be included into the category of factors to get rid of institutional obstacles for its participation in income distribution.

The digital age promotes the revolution of national governance system and capacity. From the article *Constant Optimization and Enhancement of Chinese Digital Economy*, General Secretary Xi Jinping points out the improvement of the digital economic governance system, national laws and regulations, mechanism as well as the modernization of digital economic governance system and capacity.<sup>2</sup> The digitalization plays a crucial part on modernization<sup>3</sup> of national governance system and capacity, which is the essential reflection of the law-ruling thoughts<sup>4</sup> from Xi Jinping. In March 2020, during the onsite visit in Hangzhou, the general secretary Xi Jinping pointed out that to apply leading technologies such as Big Data to promote the government governance innovation, models, and methodology, and build a digital government is the only way to promote the modernization of government governance

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<sup>1</sup> The Fourth Plenary Session of the 19<sup>th</sup> CPC Central Committee, *Questions and Answers about the Decision Adopted at the Fourth Plenary Session of the 19<sup>th</sup> CPC Central Committee*, 37. *Why It Is Necessary to Improve the Mechanism where the Production Factors such as Labor, Capital, Land, Knowledge, Technology, Management, Data, etc. Are Assessed by the Market for Contributions, and the Returns Will Be Determined by the Corresponding Contribution* (Apr. 30, 2022, 11:02 AM), [https://www.12371.cn/2019/12/27/ARTI1577414321749300.shtml?from=groupmessage&ivk\\_sa=1024320u](https://www.12371.cn/2019/12/27/ARTI1577414321749300.shtml?from=groupmessage&ivk_sa=1024320u).

<sup>2</sup> Xi Jinping, *Constant Optimization and Enhancement of Chinese Digital Economy*, QIU SHI, 2022 (2) / (No.807), at 7-8.

<sup>3</sup> The important proposition as "Modernization of National Governance System and Capability" is abbreviated as the "National Governance Modernization" by some scholars. It is considered as the 5<sup>th</sup> Modernization after the modernization of "Industry, Agriculture, National Defence and Scientific Technology" (Four Modernization).

<sup>4</sup> In November, 2020, Xi Jinping's Rule by Law Thought is expressly determined as the guidelines for the Rule by Law from all aspects in the Central Comprehensive Rule by Law Working Conference which is held for the first time in the history of CPC. Xi Jinping's Rule by Law Thought is the latest achievements of the Sinicization of Marxist theory of the Rule by Law which is created by complying with the expectations for great rejuvenation of the Chinese nation. It is also the important part of the Xi Jinping Thought on socialism with Chinese characteristics in the new era, as well as the fundamental guidance and action guide for the comprehensive Rule by Law.

system and capacity. How to achieve above is the major topic for national governance under today's digital transformation background.<sup>5</sup>

At present, there is a political trend that there are ethical arguments in the algorithm operation of data capture from the platform enterprises, and this technology should be supervised and restricted. The platform can restrict the browser content through Big Data, which is against the initial reading purpose of data subject. Facebook uses Big Data to influence the political views of the US people, to influence the voting results and the US election; Similarly, the intense discussion on "Cocoon Room Effect" triggered by today's headline algorithm shows that the attention should be aroused on information promotion impact of the platform on individuals and society.

The Data attributes from the current theoretical discussion include full public ownership (including state-owned and public data), full private ownership (including platform and individual ownership) and complex ownership. Only there is a clear picture on Data ownership problem, there is a base of judgement for infringement. In order to define a certain behavior if it infringes on information rights, it is necessary to decide the relief measures' basis of the claim right – the information ownership. The thesis aims to analyze the above open topic to decide the ownership, application and supervision direction of personal data under the platform economy.

## B. "Data Ownership" Methodology

Nowadays, how to define the "Data ownership" becomes a key topic due to the situation that "data" has become a production factor which has a significant impact. Its ownership directly determines the basic Data value and the allocation of responsibilities and obligations. *Opinions of the CPC Central Committee and the State Council on Improving System and Mechanism for Factor Market-Oriented Allocation* (hereinafter referred as to *Opinions*) is the first central government document on the allocation of factor market. *Opinions* highlights the revolution direction by classifying in the five factors of land, labor, capital, technology, and data, it also defines the specific measures to improve the factor market-oriented allocation. As a new factor, the data becomes the focus in the opinions.<sup>6</sup> On 30<sup>th</sup> Nov. 2021, the Ministry of Industry and Information Technology (hereinafter referred as to MIIT) issued the *Big Data Industry Development Plan in the "14th Five Year Plan"*, which further emphasizes the value of Data based on continuing the definition and connotation of Big Data industry in the "13th Five Year Plan". The MIIT pointed that data is an important production factor in the new era and a national basic strategic resource. China pays high attention on the cultivation of data factor market.<sup>7</sup> In Dec. 2021, the Central Cyberspace Affairs Commission published *National Informatization Plan for the 14th Five Year Plan (The plan)* as the programmatic document leading the national informatization development in the next five years. The plan proposes to establish an efficient data resource system as a solid foundation for the construction of a strong, digital China and wisdom society.

On this matter, Lawrence Lessig, an American scholar and early ideologist who supported the creation of free market for personal data stated his view of "In cyberspace, code

<sup>5</sup> Shangguan Lina, *Practice of Modernization of Government Governance Capability in Digital Times*, NATIONAL GOVERNANCE, 1-2022 (Part 1), at 25.

<sup>6</sup> *Opinions on Building of Improved System and Mechanism for Market-oriented Allocation of Factors by the CPC Central Committee and the State Council*, SOCIALIST FORUM, 5-2020.

<sup>7</sup> *Interpretation of Big Data Industry Development Plan in the 14<sup>th</sup> Five-year Plan* (May 10, 2022, 10:22 AM), [www.gov.cn/zhengce/2021-12/01/content\\_5655197.htm](http://www.gov.cn/zhengce/2021-12/01/content_5655197.htm).

is the law” in the early development of the Internet. However, along the Internet developing time, the issue is far from what the ideologist thought. “Ownership” refers to the obligee right of legal possession, usage, revenue and disposal of immovable or movable property.<sup>8</sup> It is a free right. This is the most basic property theory from civil law, which is also the premise of international trade. However, as the Internet era arrives, especially after the beginning of the 21<sup>st</sup> century, the new search engines based on various algorithms (i.e. Google) and “social Internet” (i.e. Facebook) jointly formed the “digital economy” platform which has broken the obligees’ disposal right on properties. The vague data ownership has also affected the national data protection associated with individual behavior on the Internet. It results in an increasingly acute social phenomenon after the year of 2015, the relevant conflicts are urgently to be resolved.

The popularity of digital economic platform in the middle and late 2010 enables the platform to collect and use massive personal data on business development for users who are using the services from Headlines, TikTok, WeChat, Taobao, JD and other platform software. This is basically by considering the interests of those platform companies themselves, rather than as declared of improving social efficiency as well as the welfare, even generates negative effects. Whereas, the laws and regulations somehow lag behind. In the absence of relevant laws, the platform has been encouraged to freely collect personal data, which causes the situation that the privacy, safety and rational usage of personal data are unable to be governed and guaranteed. The effectiveness of the *Personal Information Protection Law*<sup>9</sup> has enhanced the laws and regulations of China. However, the data ownership and its derived basic rights and interests still need to be implemented and clarified by laws and regulations in practice. In addition, optimizing the use of data jointly by individuals and platform enterprises is equally important, and the corresponding supporting regulations and systems should be constructed accordingly.

As the definition of “Data Ownership” is unclear, the author believes that it is a feasible methodology to provide hypothesis on the “ownership” by relating the “Transfer of Data”. Learning from the beneficial experience from international legislation and adding relevant provisions<sup>10</sup> on personal information portability is a highlight of the *Personal Information Protection Law*. When discussing “how to use” and “how to circulate” of the data, by knowing that if individuals have “right to data portability” and the data can be transferred, it can be deduced that the data belongs to individuals rather than platforms. On this basis, it can further distinguish the transferable situations so as to make a systematic decision.

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<sup>8</sup> Zhong Hua Ren Min Gong He Guo Min Fa Dian (中华人民共和国民法典) [Civil Code of the People’s Republic of China] (promulgated by Nat’l People’s Cong., May 28, 2020, effective Jan. 1, 2021) NAT’L PEOPLE’S CONG. (China). Article 240.

<sup>9</sup> The Personal Information Protection Law of the People’s Republic of China was approved by the 30<sup>th</sup> meeting of the Standing Committee of the No.13 National People’s Congress of the People’s Republic of China and implemented on November 1, 2021.

<sup>10</sup> In accordance with Article 45 of the Personal Information Protection Law of the People’s Republic of China, “Individuals have the right to check and reproduce personal information from the personal information processor unless otherwise specified in Paragraph 1, Article 18 and Article 35 of the Law. The personal information processor shall timely provide the information that is to be checked and/or reproduced by individuals. And personal information processor shall provide the way of information transfer when individuals request to transfer personal information thereof to the another designated personal information processor and such request meets the requirements of the Cyberspace Administration of China.”

## II. “DATA OWNERSHIP” CONFIRMATION METHODOLOGY

Firstly, to analyze the Data Ownership from Data Portability.

### A. The Inspiration on Personal Data Information’s Definition, Domestic and International Laws and Regulations on “Data Portability” and the Practice of “Transfer Network with Number”

#### 1. Definition of Personal Data, Personal Information

Definition from Article 4 Paragraph 1 of EU *General Data Protection Regulation* (hereinafter referred as to “GDPR”) states that “personal data” means any information relating to an identified or identifiable natural person (“data subject”); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.<sup>11</sup>

Definition of “Personal Information” of *California Consumer Privacy Act, USA, 2018*, (hereinafter referred as to “CCPA”) is information that “identifies, relates to, or could reasonably be linked with you or your household”. For example, “it could include your name, social security number, email address, records of products purchased, Internet browsing history, geolocation data, fingerprints, and inferences from other personal information that could create a profile about your preferences and characteristics.”<sup>12</sup>

The China’s *Civil Code* defines part of provisions on Data Protection. The Article 127 states, “according to the law, it has provisions on the protection of data and network virtual property.” Meanwhile, Article 1034 defines, “The personal information of a natural person is protected by law. Personal information hereby is defined as all kinds of information recorded electronically or means that can identify a specific natural individual or combine with other information, including but not limited to the name, date of birth, ID number, biometric information, address, telephone number, e-mail, health information, tracking information, etc. The private data shall apply to the private data provisions, otherwise the provisions on the personal information shall apply.”

Whereas, the “identifiable” characteristic is the key standard to distinguish individual or non-individual information.

#### 2. “Right to Data Portability” Theory and Development

“Right to Data Portability” theory is raised by the social organization “Data Portability.org” of its Data Portability Project<sup>13</sup>, Google and Facebook announced to join this project in 2008. Meanwhile, Google established “Google Takeout” tool to support users to export or download the data generated while using the server. Marshall Kirkpatrick mentioned that “users can take their data from the websites they use to reuse elsewhere and where vendors

<sup>11</sup> Article 4, General Data Protection Regulation, Regulation (EU) 2016/679 of the European Parliament and of the 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.

<sup>12</sup> California Consumer Privacy Act (CCPA), CA Civ Code § 1798 (2018).

<sup>13</sup> *Data Portability Project* (Apr. 29, 2022, 11:08 AM), [dataportability.org](https://dataportability.org).

can leverage safe cross-site data exchange for a whole new level of innovation.”<sup>14</sup>. In year 2010, the US white house promoted “My Data”<sup>15</sup> scheme, which accelerates the data circulation. Google, Facebook, Microsoft and Twitter jointly launched the “Data Transfer Project” in 2018, emphasizes that “portability and interoperability are central to cloud innovation and competition, allowing people who want to switch to another product or service they think is better to do so as easily as possible.”<sup>16</sup>

### 3. Development Process of International “Right to Data Portability” Legal System

The EU has established data protection system for personal data rights through GDPR, and affirmed the “Right to Data Portability” in legal provisions for the first time in 2016, which involves the personal data control over data subject, that is, the free attribution in the process of implementing its rights. The realization of this attribute in the “data portability” is that the data subject has the free right to receive and transfer the personal data. GDPR raised many new requirements to data controllers (i.e. Internet platform companies) to collect, store and process personal data within the EU, the new requirements include setting access rights and clarifying the portability of data, and mentioned that data subjects have the right to require controllers to provide access, modification or deletion of personal data. According to Article 20 of GDPR, the data subject is legally to get the relevant personal data provided to the controller, and the personal data shall be “in a structured, commonly used and machine-readable format”, and the data subject shall have the right to “transmit those data to another controller without hindrance from the controller to which the personal data have been provided”. That is, data subjects can transfer their personal data from one platform to another through “One Click Transfer”. Paragraph 4 of Article 20 of GDPR also confines right to Data Portability to the data subject that the right shall “not adversely affect the rights and freedoms of others”.

*The California Privacy Rights and Enforcement Act* (hereinafter referred to as the “CPRA”) was passed in 2020 in USA. It is the amendment to CCPA. It clarifies consent standards and the special right to limit use of sensitive personal information, expands definition of sensitive personal information.<sup>17</sup>

Apart from the EU and the USA, India, Japan, Singapore and other jurisdictions have also introduced the basic concept of “Right to Data Portability” as a personal information right. The Item 11, Paragraph 1, Article 2 from Japan’s Law on *The Prevention of Illegal Competition* defines that behavior in terms of theft, fraud, coercion or other illegal behavior to data, or by improper using and disclosing restricted data, which are classified as illegal competition.<sup>18</sup> Singapore’s *Personal Data Protection Law* defines that “Right to Data Portability” includes three core contents, which are “Data Transmission Request Right and Data Transmission

<sup>14</sup> Marshall Kirkpatrick, Bombshell, *Google and Facebook Join DataPortability.org - ReadWrite* (Apr. 29, 2022, 10:22 AM), <https://readwrite.com/goog-fb-data/>.

<sup>15</sup> Kristen Honey, Phaedra Chrousos, Tom Black, *My Data: Empowering All Americans with Personal Data Access* (Apr. 29, 2022, 11:33 AM), <https://obamawhitehouse.archives.gov/blog/2016/03/15/my-data-empowering-all-americans-personal-data-access>.

<sup>16</sup> Craig Shank, *Microsoft, Facebook, Google and Twitter Introduce the Data Transfer Project: An Open Source Initiative for Consumer Data Portability* (Apr. 29, 2022, 9:10 AM), <https://blogs.microsoft.com/eupolicy/2018/07/20/microsoft-facebook-google-and-twitter-introduce-the-data-transfer-project-an-open-source-initiative-for-consumer-data-portability/>.

<sup>17</sup> Alston & Bird, *The California Privacy Rights and Enforcement Act of 2020 – Key Impacts* (Apr. 29, 2022, 9:01 AM), <https://www.jdsupra.com/legalnews/the-california-privacy-rights-and-38090/>.

<sup>18</sup> Li Yang, *Law against Unfair Competition and View on Data Protection in Japan*, JOURNAL OF POLITICAL SCIENCE AND LAW, 8-2021 (4), at 72.

Obligation”, “Conditions and Restrictions for Data Transmission” and “Relevant Rules for Third-Party Data Transmission”.<sup>19</sup>

#### 4. China’s Law to “Right to Data Portability” and Inspiration of Historical “Transfer Network with Numbers” Practice in Telecom Industry

China’s *Personal Information Protection Law* involves the concept of “Rights to Data Portability”, which is in parallel with the fundamental *Civil Code* and *Criminal Law*. It is the only law directly marked “according to the Constitution” in China’s current Network Laws, reflecting the constitutional spirit of respecting and protecting human rights, the inviolability of human dignity, and the legal protection of citizens’ freedom and privacy of communication. China’s “*Personal Information Protection Law*” fully guarantees the “independent” decision making on the purpose and method of processing personal information from data user.<sup>20</sup> Article 4 defines the definition and scope of personal information processing which should be legal, legitimate and necessary; Article 6 regulates that personal information should be processed in a way that has the least impact on personal rights and interests; Article 14 extends out the right to know and consent; Article 15 refers to the right of withdrawal; Article 16 regulates that personal information processors shall not refuse to provide products or services by the reason that individuals disagree or withdraw on the consent to personal information; Article 45 refers to the relevant provisions on the right to personal data portability.

In historical practice, the “Across Network with Numbers” of the mobile communication industry is an example of the “Right to Data Portability”. The similarity between the Mobile Number Portability right and the Data Portability Right is that both allow users to carry highly associated products with themselves.<sup>21</sup> The EU expects the data portability right as fluent as transfer network with numbers. China has explored multi-solutions on Transfer Network with Numbers at national situation, which strengthens the control of users over personal information. Its legal effect is to break the strong position of existing telecom operators, to generate competition so as to optimize the mobile communication market structure. By advocating the same principle and spirit of rights of Internet platform can also generate the competition of digital economy of Internet platform and optimize the market structure.

### B. Complex properties of Data Ownership

The famous American magazine “The New Yorker” once published a cartoon “On the Internet, nobody knows you’re a dog”<sup>22</sup>, which shows the network virtuality and reflects its privacy of personal data in the Internet era.

<sup>19</sup> Dong Chunhua, “Data Portability” in *Personal Data Protection Law of Singapore*, CHINA SOCIAL SCIENCES, 6-7-2021 (007).

<sup>20</sup> Zhong Hua Ren Min Gong He Guo Ge Ren Xin Xi Bao Hu Fa (中华人民共和国个人信息保护法) [Personal Information Protection Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 20, 2021, effective Nov. 1, 2021) STANDING COMM. NAT’L PEOPLE’S CONG. (China). Paragraph 1, Article 73.

<sup>21</sup> Zhong Chun and Wang Zhengyu, *Conception on Right to Data Portability and Practice from the View of Competition Law*, ELECTRONICS INTELLECTUAL PROPERTY, 2021 (5), at 11.

<sup>22</sup> Michael Cavna, ‘NOBODY KNOWS YOU’RE A DOG’: As iconic Internet cartoon turns 20, creator Peter Steiner knows the joke rings as relevant as ever (Apr. 13, 2022, 11:08 AM), [https://www.washingtonpost.com/blogs/comic-riffs/post/nobody-knows-youre-a-dog-as-iconic-internet-cartoon-turns-20-creator-peter-steiner-knows-the-joke-rings-as-relevant-as-ever/2013/07/31/73372600-f98d-11e2-8e84-c56731a202fb\\_blog.html](https://www.washingtonpost.com/blogs/comic-riffs/post/nobody-knows-youre-a-dog-as-iconic-internet-cartoon-turns-20-creator-peter-steiner-knows-the-joke-rings-as-relevant-as-ever/2013/07/31/73372600-f98d-11e2-8e84-c56731a202fb_blog.html).

Richard A. Posner, a legal economist, believes that personal information is a property right.<sup>23</sup> Through qualitative analyzing of personal information from the economics perspective, will help to clarify the economic benefits, which is, the personal and social benefits from the property rights of personal information. The Right to Data Portability is the exquisite right of the data “owner”, which depends on the identity status of the subject right. Data portability right has exceeded the definition of “freedom right” in traditional theory. It is the freedom of access and transmission of data with personal attributes, and individuals have property interests in the data, which is independent.

In China’s practice, medical records are a form of Right to Data Portability which can be “portable and insertable”. This right belongs to individuals rather than platforms. Platform enterprises cannot arbitrarily trade personal medical data; Hospitals and platforms must not prevent patients from accessing their own medical records. In the past, the situation such enterprises refused to provide medical records is because they did not receive sufficient economic benefits rather than the reason of no provisions in the law. Medical records by carrying the plug-in format from patients overcame this unfair and unreasonable situation. In addition, some scholars emphasize that giving Internet platform users the right to access their personal information is equivalent to empower the data producers the right. The author believes that this is not sufficient. The nature of the right to access, read the personal data information is different from that of data ownership, such as a user borrowing a book from the library does not mean that he has ownership of the book; Under the mandatory requirements of public security, the company shall provide citizens’ check in records to the public security and WeChat chat records to national security, which does not mean that the state or the platform has the ownership of those data. Therefore, the author firmly believes that those data information is owned by individuals.

In fact, before the *Personal Information Protection Law* was passed, under the inequivalent resources and capabilities, the premise for individuals to consume on Taobao website is to agree to the terms and conditions from the platform, which forces users to provide user data accordingly.<sup>24</sup> In this case, when the single option of “agree and access to the website” and “If disagree, you can’t use the website” is set, the user actually has no choice but to accept, however Taobao receives income by using those data. Therefore, when Taobao forces individuals to share data with their platforms, it is violating users’ information property rights.

In real life, in real estate industry, it appears “House checking with Helmet” (which is, the customer wears helmet to avoid being captured by the face recognition system from the sales). With the system above, the developer can receive the information related to the customer, which results in constantly advertisements promotion to the customers, or share the data to peers, however with no prenotice or inform to the customers. It is obviously an illegal behavior to receive the personal data.

It is difficult to suspend this illegal behavior if without any regulation governed, in this case, it highlights the necessity of institutional protection. After the implementation of the

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<sup>23</sup> Richard A. Posner, *The Right of Privacy*, GEORGIA LAW REVIEW (1978), Vol. 12, No. 3.

<sup>24</sup> In accordance with Article 3.2 of Taobao Platform Service Agreement, user account can only be assigned when “conditions that allow assigning of user account as specified by Taobao platform rules are satisfied. As per Article 5.2, Taobao is authorized by users to deliver information that is provided and forms during the period of user registration and/or service use to Ali platform, Alipay and/or any other service providers, or obtain information that is provided and forms during the period of user registration and/or service use from Ali platform, Alipay and/or any other service providers.” *Taobao Platform Service Agreement* (Apr. 30, 2022, 10:11 AM), <https://www.taobao.com/go/chn/member/agreement.php>.

*Personal Information Protection Law*, it shows the bright future that the data ownership belongs to data owners.

### III. ANALYSIS ON USAGE OF PERSONAL DATA IN THE PATTERN OF PLATFORM ECONOMY BASED ON THE CASE OF MEIJING SUED BY TAOBAO<sup>25</sup>

How to use personal data under the condition of platform economy plays a significant role. The author decides to analyze it by considering relevant case since the crucial points in the ownership of personal data may be indirectly avoided by the platform economy in practice. And such concern is reflected by the *Unfair Competition Case on Big Data Products of Meijing Sued by Taobao*. However, the original determination of legal responsibility may be proved irrational due to the change of the legal environment.

#### A. Descriptions of the Case on Meijing Sued by Taobao

The Case on Meijing Sued by Taobao is deemed as a representative case involving the use of personal data by the Internet platform in 2018. It is selected as one of the *10 Major Civil Administrative Cases Handled by the People's Court in 2018* with details of the Case described as follows:

Taobao (China) Software Co., Ltd. (hereinafter referred to as “Taobao”) is the developer and operator of the data products relating to retail E-Commerce at the seller end of Alibaba – the “Business Advisor”. As claimed by Taobao, the data provided by the “Business Advisor” is essentially derived from the massive raw data that are formed on the basis of the traces of browsing, searching, saving, purchasing, transaction and/or any other activities performed by the users on Taobao E-Commerce platform (including Taobao and Tmall) and collected and recorded by Taobao with the consent of the users. The raw data accepts the Desensitization Treatment, excludes the personal data and individual privacy and completes with the Deep Treatment. Hence, Taobao believes that the data provided by the “Business Advisor” doesn't infringe on any of the users' rights during the process of formation. It is the achievements obtained by Taobao legally.

During the business operation as mentioned above, Taobao discovers Anhui Meijing Information Technology Co., Ltd. (hereinafter referred to as “Meijing”)’s violation against the legal rights of Taobao which is committed through “Gugu Help Platform” (software) and “Gugu Crowdfunding Consultancy” (website), implementing the substantive substitution of the data products of Taobao, directly resulting in the reducing order quantities and sales volume of such data products and constituting the unfair competition.

As defended by Meijing, Taobao illegally captures, collects and sells the information of which the ownership belongs to Taobao Merchants or Taobao software users for the purpose of profit making without the prior consent of such Taobao Merchants or Taobao software users since the capture, collection and/or selling infringes on the property right and individual privacy of Internet users as well as the business secrets of merchants. Moreover, it is unfair to

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<sup>25</sup> Taobao (Zhongguo) Ruanjian Youxian Gongsi Su Anhui Meijing Xinxi Keji Youxian Gongsi Bu Zheng Dang Jingzheng Jiufen An (淘宝(中国)软件有限公司诉安徽美景信息科技有限公司不正当竞争纠纷案) [Case on Meijing Sued by Taobao], Case No. of First Trial: (2017) Z.8601M.C.No.4034; Case No. of Second Trial: (2018) Z01M.Z.No.7312; Case No. of Retrial: (2019) Z.M.S.No.1209. (China).

force the owners of the raw data to buy the data products derived from their own data properties at a high price since the data control is monopolized by Taobao.

## **B. Major Concerns in Case Trial in 2018**

The argument provided by Meijing in the case comes to the heart of the entire Internet platform economy, which is whether Taobao has legal right of the data products provided by the “Business Advisor”. The unfair competition such as Meijing’s infringement on Taobao’s rights will become groundless provided that Taobao’s operation activities are illegal. However, Meijing lost the lawsuit and paid Taobao totally RMB 2,000,000 as the compensation for Taobao’s economic loss and any other reasonable expenses as decided by the competent court.

Pursuant to the basis of determination provided by Zhejiang Senior People’s Court, which is also the Court of Retrial in this case: First, Taobao’s collection and usage of user data information doesn’t constitute any violation of legal provisions since the user information categories relating to the “Business Advisor” fall within the scope of information collectable and usable as declared in the Service Agreement and Privacy Policy which are already published by Taobao on Internet. Second, Taobao legitimately enjoys the competitive property right over the data products provided by the “Business Advisor” since such data products “evolve into the Big Data Products through detailed analysis, handling, integration and processing” and “act independently from the Internet user information and raw network data”. Moreover, the data products can be actually “controlled and used” by the operator and produce “economic profits” for the operator regardless of its presentation as “Intangible Resource”. The data products are essentially capable of the exchange value.

Remarkably, the Big Data Products provided by the “Business Advisor” differ from the raw Internet data in the logic mentioned above. Contents of the Big Data Products refer to the “Derived Data not directly corresponding to the Internet user information and raw Internet data”. However, the mere argument of the raw Internet data is not “disengaged from the information scope of the original Internet user”. And the Internet operator’s usage of the raw Internet data is still subject to the “Internet user’s control over the information provided by such Internet user”. With the absence of independent right, the Internet operator can only exercise its “Right of Use” over the raw data as agreed with the Internet user.

## **C. Usage of Personal Data**

The Court of Retrial believed that Taobao legitimately owns the rights of data products provided by the “Business Advisor”. Taobao’s collection and usage of the user data information doesn’t constitute any violation against the legal provisions since “the user information categories relating to the Business Advisor fall within the scope of information collection and usage as declared in the Service Agreement and Privacy Policy which are already published by Taobao on Internet”. Things have changed since the promulgation of *Personal Information Protection Law* from November 1, 2021. The situation that “individuals are unwilling to authorize but cannot reject the Internet platform’s forced access to personal information” is prohibited which however widely existed in the Internet platform economy. Article 16 of the Law expressly provides the basis as “Informing and Consent”. To be specific, “the Information Processor’s rejection to provide products and/or service cannot be justified by the individual’s dissent in processing personal information and/or consent withdrawal. Personal information that is necessary for provision of products and/or service is excluded from such limitation.” Platform company’s access to data will be illegal without the voluntary authorization of the user. Thus, the obtainment of derived data is devoid of legal basis due to the same cause. The

promulgation of the *Personal Information Protection Law* drags the Case on Meijing Sued by Taobao into trouble where “a thief plays the trick to stop another thief”.

According to Article 1035 of the *Civil Code*, “personal information shall be processed legally, fairly and necessarily. Over-processing is unacceptable”, which remains consistent with Article 6 of the *Personal Information Protection Law* and can be abbreviated as the “Principle of the Least Necessity”. To be specific, “personal information shall be processed for definite and rational purpose, and in direct relationship with the purpose of such processing. The processing shall be carried out with the least impact onto personal rights. Collection of personal information shall be restrained to the minimum scope that can realize the purpose of processing. Over-collection of personal information is prohibited”. The new law taking effect since 2021 will affect the essential interests of the platform enterprises. In particular, all businesses of Alibaba are derived from the user’s personal data, e.g. Alibaba Express, ads, pushes, etc. Hence, Taobao’s claim to the so-called “Desensitization Treatment” in the case as mentioned herein is in vain before personal data protection.

In the new legal environment, how to deal with implementation of the legal framework is worth thinking. From the perspective of the platform, its basic business pattern can hardly escape from profit seeking which results in massive collection of personal data of users. However, the technology barrier exists in the practice that we can hardly require all users to be informed and provide consent before using the platform service. Moreover, platform enterprises have gifted advantages and overwhelming position compared with individual users. Pursuant to the *Anti-monopoly Law* applicable for the time being, the process during which the platform enterprise develops, expands, and grows into market leader does not violate the *Anti-monopoly Law*.<sup>26</sup> Thus, it is a big concern whether or not each data subject required to be informed and consent is still applicable in the complex practice.

As presented by the author, deriving a concept as “Usufruct” is a feasible development path in China under existing platform economy. Professor Shen Weixing from the School of Law, Tsinghua University proposed this concept as mentioned here. He intends to turn Data Control to be a Dual Right Structure<sup>27</sup> in which the data originator has data ownership and the data processor has Data Usufruct through the provisions of the law from the perspective of establishing “Data Usufruct” so as to facilitate the orderly development of capital. Restricted real rights are attributed to the platform enterprise. Furthermore, crucial issues also include how to improve the rational commercial use of data, coordinating the tension between use rights and human rights, etc.

It is definite that the platform enterprise shall be included into the regulation scope of the *Anti-monopoly law* and sanctioned provided that the platform enterprise that is developed and ascends to a dominant position in the market is disruptive of the normal market competition order and hinders the development of the platform economy via monopoly, its dominant market position, monopoly agreement and/or improper business concentration.<sup>28</sup>

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<sup>26</sup> Li Dan, *Study on Regulation of Monopoly of Platform Enterprises*, ECONOMIC LAW REVIEW, 2021 (1) / (Vol.37), at 62.

<sup>27</sup> Shen Weixing, *Study on Data Usufruct*, CHINESE SOCIAL SCIENCES, 2020 (11), at 110.

<sup>28</sup> Li Dan, *Study on Regulation of Monopoly of Platform Enterprises*, ECONOMIC LAW REVIEW, 2021 (1) / (Vol.37), at 62.

#### IV. SUPERVISION DIRECTION OF DATA OWNERSHIP WITH TECHNICAL PROGRESS

As defined by the *Statistical Classification of Digital Economy and Its Core Industries* (2021) published by the National Bureau of Statistics, “Digital Economy” refers to the economic activities which take the data resources as essential production factors, modern information network as the critical carrier and effective use of the information communication technology as the significant impulse behind efficiency promotion and economic structure optimization.<sup>29</sup> As mentioned in the preceding sentence, the Digital Economy serves as the significant impulse behind efficiency promotion and economic structure optimization in current stage. Furthermore, it is also the main field where new growth areas and drivers are fostered. Digital Economy will be a new social-economic formation where human beings are living in succession to the agricultural economy and industrial economy. Valid governance is the integral part of the healthy development of the Digital Economy. Thus, the Digital Economy Governance plays a significant role in the national governance system.<sup>30</sup>

Technological advancements, particularly the cloud and encryption, will soon render our current legal frameworks outdated. Preserving the balance between security and privacy in the context of law enforcement therefore requires updating our warrant regime to better align the incentives of government, technology companies, and individual consumers.<sup>31</sup> Numerous irrationalities and injustices exist in the platform monitoring in China under current legal framework. As stated in the service terms and privacy policy of WeChat (Tencent), “Property of the WeChat accounts remains with Tencent. The user, upon completion of the registration procedures, will be entitled to the use of the WeChat account. The Right of Use however only belongs to the original applicant and cannot be granted, lent, rented, assigned or sold. Tencent is authorized to recover the user’s WeChat account where necessary for business.”<sup>32</sup> The user’s personal data and information stored in WeChat account may be lost or disclosed, and the withdrawal of balance in the WeChat Pay will be disabled provided that Tencent recovers the WeChat account without consent of the user. The service terms mentioned above essentially refer to provisions of credit card prepared by the issuing bank. That is “Party B (Issuing Bank) has the property of the credit card. The credit card can only be used by the cardholder rather than rented or lent. Otherwise, Party B has the right to claim RMB 1,000 from Party A as the Default Money.”<sup>33</sup> It indicates the gap between platform enterprise’s understanding and implementation of personal data ownership and the spirit of applicable new laws enacted in China.

The data subject is provided with the Right to Data Portability so as to highlight the basic concept of data protection and reinforce the active control of personal data by the data

<sup>29</sup> *Statistical Classification of Digital Economy and Its Core Industries* (2021) (No.33 Directive by National Bureau of Statistics), STATE COUNCIL GAZETTE, 2021 (20), at 17.

<sup>30</sup> Ouyang Rihui and Liu Jia, *Data Economy Governance - the Integral Part of National Governance System*, GOVERNANCE, 12-2017 (2), at 14.

<sup>31</sup> Reema Shah, *Law Enforcement and Data Privacy: A Forward-Looking Approach*, YALE LAW JOURNAL (2015), at 558.

<sup>32</sup> Tencent, *Tencent’s Wechat Terms of Use and Privacy Policy* (Apr. 30, 2022, 8:07 AM), [https://support.weixin.qq.com/cgi-bin/mmsupport-bin/readtemplate?styp=&promote=&fr=&lang=zh\\_CN&check=false&nav=faq&t=wxin\\_agreement](https://support.weixin.qq.com/cgi-bin/mmsupport-bin/readtemplate?styp=&promote=&fr=&lang=zh_CN&check=false&nav=faq&t=wxin_agreement).

<sup>33</sup> China Construction Bank, *Terms of Use in the Claim and Use Agreement on and in respect of Party A’s claim and use of the Dragon Credit Card (hereinafter referred to as Credit Card) entered into by and between the Dragon Card applicant (herein after referred to as Party A) and Branch, China Construction Bank (hereinafter referred to as Party B)* (Apr. 30, 2022, 11:02 AM), [http://creditcard1.ccb.com/cn/creditcard/service/card\\_lingyongxieyi.html](http://creditcard1.ccb.com/cn/creditcard/service/card_lingyongxieyi.html).

subject. The platform enterprise shall meet the user's demand for having access to and barrier-free spread of personal data. The user shall decide the circulation of personal information in sole discretion, which is beneficial to the fair and positive competition among Internet platform enterprises. In China, the platform shall provide convenience to the individual to obtain data without prejudice to the expectation of privacy and legal rights of data subject. The platform enterprise shall by no means put up technical barriers against users in data migration.<sup>34</sup>

It is noted that the improper use of the Right to Data Portability will result in hidden dangers. For example, all of the user's information may be obtained and transferred by the hacker who steals or fraudulently uses the user's identity once the user is entitled to the Right to Data Portability.<sup>35</sup> Thus, China shall enhance the study on theory and practice of the Right to Data Portability. Moreover, as specified by GDPR published by the EU, the data subject (user) may claim to the Right to Erasure (also called as Right to be Forgotten)<sup>36</sup> when claiming to the Right to Data Portability from the data controller (Internet platform enterprise), which may however deprive the original data controller (platform enterprise A) of the legal ownership of the personal data after sending to any other data controllers (platform enterprise B).<sup>37</sup> Chinese laws and legal practice will be inspired by this from new perspective. Applicable scope of the Right to Data Portability is not explicitly provided in the *Personal Information Protection Law* applicable for the time being. It is expected to further explore and improve the specific business scenario and judicial interpretation of the Right to Data Portability in practice, including the way of portability, payer of the expenses aroused from the supporting measures to the Right to Data Portability, etc.<sup>38</sup>

Frame of "Informing and Consent" lays foundation for the data protection system established by EU, which secures the data ownership, a type of combined rights having the property of personality and property attribute. A data user may essentially receive a "license" to use the subject's data, since the data subject has temporarily waived her right to exclude it from using her information. But the data subject maintains the discretion to terminate this license and force the data user to cease storing or using her information.<sup>39</sup> For the purpose of more convenient circulation of personal data in the society, the author believes that the *Personal Information Protection Law* can be referred with its spirit which is represented by "Informed Consent" basis and "Minimum Necessity" principle together with the way of "Explicit Approval" so that the mode of "Pay with Valuable Consideration"<sup>40</sup> can be carried out in dedicated business fields, which makes personal data available for commercialized transaction on the premise that the data subject (user) has property control. Meanwhile the data subject (user) always reserves the final rights of the complex right.

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<sup>34</sup> Ding Xiaodong, *Study on Property, Influence and Application in China of the Right to Data Portability (RTC)*, STUDIES IN LAW AND BUSINESS, 2020 (1/37), at 73.

<sup>35</sup> Ding Xiaodong, *Study on Property, Influence and Application in China of the Right to Data Portability (RTC)*, STUDIES IN LAW AND BUSINESS, 2020 (1/37), at 77.

<sup>36</sup> Article 17, General Data Protection Regulation, Regulation (EU) 2016/679 of the European Parliament and of the 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.

<sup>37</sup> Zhuo Lixiong, *Right to Data Portability: Basic Concept, Challenges and Replies by China*, ADMINISTRATIVE LAW REVIEW, 2019 (6), at 142.

<sup>38</sup> Wu Xiaoli, *Portable Personal Data*, CHINA CONSUMER NEWS, 8-25-2021 (004).

<sup>39</sup> Jacob M. Victor, *The EU General Data Protection Regulation: Toward a Property Regime for Protecting Data Privacy*, YALE LAW JOURNAL (2013), at 524.

<sup>40</sup> Hong Weiming and Jiang Zhanjun, *Data Information, Commercialization and Protection of Property Rights of Personal Information*, REFORM, No. 3, 2019 (No. 301), at 154.

## CONCLUSION

As proposed by the Report of the 19<sup>th</sup> National Congress of the Communist Party of China, “we must promote further integration of the Internet, big data, and artificial intelligence with the real economy, and foster new growth areas and drivers of growth in medium-high end consumption, innovation-driven development, the green and low-carbon economy, the sharing economy, modern supply chains, and human capital services.”<sup>41</sup> In the era of digital economy, the data subject and the data controller may obtain access to more information and improve information processing capability via the Internet, big data and artificial intelligence. Mastery of data will influence the interested parties (users and platform enterprises) which make decisions on the basis of information when data becomes one of the production factors of great significance.

In accordance with the important article – *Adherence to and Intensified Promotion of the Socialist Legal System with Chinese Characteristics* of Xi Jinping (the General Secretary of the CPC Central Committee, the State President and the Chairman of the Central Military Committee) in the No.4 *Qiushi* published on February 16, 2022, we must expedite the legislation work in the field of digital economy, and make endeavors to complete the legal system which is urgently needed by state governance and can satisfy the Chinese people’s increasing aspiration for a better life. The Rule of the Communist Party by Law shall play the role of political assurance in developing the cause of the party and the state. It is expected to form a pattern in which national laws and party regulations complement each other.<sup>42</sup>

The rise of digital economy has changed the public attitude for data to great extent. The platform enterprises acquire measureless data on the daily basis. They optimize the commercial strategy and business behavior pattern through algorithm so as to improve the efficiency. Data trading and other gray industry chains emerge under this circumstance. Nevertheless, laws and regulations relating to the virtual assets are not explicitly established in China. The Authentic Right of data will affect the rights distribution among individuals, enterprises and authorities, and has fundamental significance in facilitating the development of data economy. The important role of law relies in ensuring the realization of the core public interests of the society. It is possible and necessary to establish the property right of personal information since the urgent demand for data’s Authentic Right is reflected by local legislation in practice.

The data’s Authentic Right is of significance to the Internet platform enterprises in China. The attendant phenomenon under the platform economy directly affects the political positioning and valuation of all platform enterprises. Most platform enterprises develop through constant rising valuation and financing despite the nonprofitable beginning. In the past 2-decade development history of Internet, the rising valuation of the Internet platform enterprises is benefited from the ambiguity in the data ownership which is caused by the indefinite ownership. The chain reaction is unavoidable once the global monitoring environment is toppled to whichever extent. Many competitive Chinese enterprises such as Alibaba, Tencent, TikTok, etc. enter the international market and provide service and products to consumers in EU and any other nations and regions in the new international environment

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<sup>41</sup> Lu Jing, *Ministry of Industry and Information Technology of the P.R.C.: Facilitating the Deep Integration of Internet, Big Data, AI and Real Economy* (May. 10, 2022, 7:12 AM), [https://www.cs.com.cn/xwzx/201806/t20180625\\_5829078.html?open\\_source=weibo\\_search](https://www.cs.com.cn/xwzx/201806/t20180625_5829078.html?open_source=weibo_search).

<sup>42</sup> Xi Jinping, *Adherence to and Intensified Promotion of the Socialist Legal System with Chinese Characteristics*, QIU SHI, 2022 (4) / (No.809), at 6.

where regulation becomes the common practice. Only with the better protection of personal data and the winning of the users' trust, Chinese enterprises can expand the market and obtain more opportunities overseas, and avoid punishment caused by violation of local laws. Thus, China will have a louder voice and bigger leadership in formulation of personal data protection rules.<sup>43</sup>

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<sup>43</sup> Zhuo Lixiong, *Right to Data Portability: Basic Concept, Challenges and Replies by China*, ADMINISTRATIVE LAW REVIEW, 2019 (6), at 143.