

Is There Property in Data?: Property and the Principles for a Data Economy

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Overview

- The Restatement of Property aims to be “comprehensive.” Does this include intangibles? Data?
- The ALI-ELI Principles for a Data Economy avoided property notions.
- One can frame some policy questions in basic terms: things, possession, conversion.
- Can property tort liability for intangibles provide useful protection without creating massive liability or an alternative route to expansive IP?

Restatement Fourth of Property

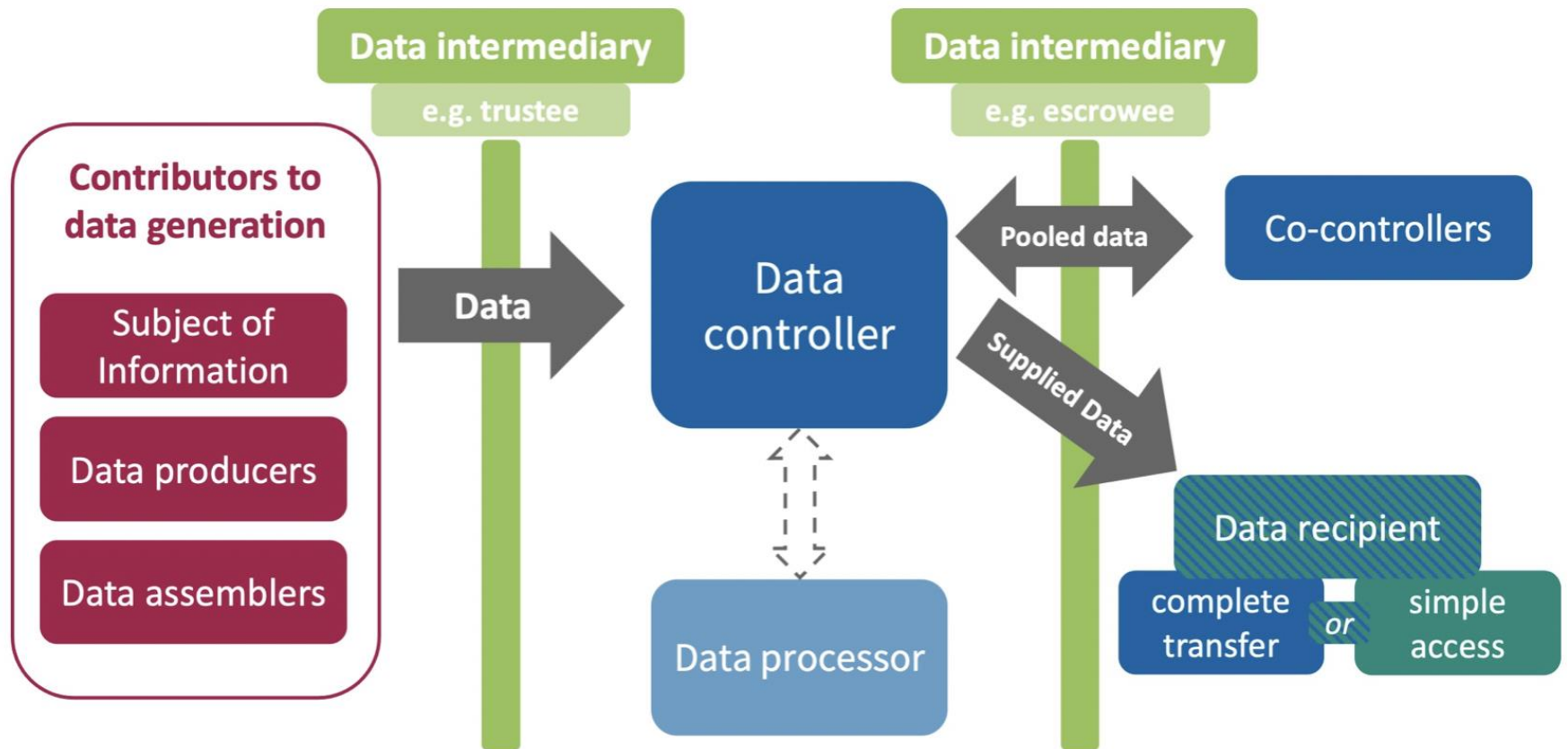
- The ALI was formed in 1923 to address the “complexity” and “uncertainty” of the common law, given that codification was not in prospect. Restatements mainly consist of “blackletter” and comments.
- The Restatement of the Law Fourth, Property (R4P) was started in 2015 with the aim to be comprehensive.
- Trusts and intellectual property are not included.
- Two tentative drafts have been approved (membership vote) and much other material has passed the Council (next stop, a membership meeting).

Principles for a Data Economy

- Principles Projects are less tied to existing law and are more directly normative. This is especially appropriate for a just-emerging body of law.
- The Principles for a Data Economy was a joint ALI-ELI effort to clarify “how to deal with data as a new type of asset from a legal point of view.” The final draft was approved by both organizations in 2021.
- The Co-Reporters were Professor Neil B. Cohen and Professor Christiane Wendehorst and the Co-Chairs were Steven Wise (also an Advisor to the R4P) and Lord John Thomas.

Principles for a Data Economy

A large number of players are involved in transactions of the data economy. The Principles take the relations between these **actors** as a **starting point** to develop concepts, such as contract rules, that could apply in the specific situations.



Principles for a Data Economy

- The Principles for a Data Economy is couched in terms of contracts but not “property”.
- Rather it specifies rights in data and third-party protection in the context of data sharing.
- Focus on transactions rather than impersonal tort contexts.
- Operationalized in terms of “control” without notions of possession and ownership.

Property Basics (R4P, Council Draft 1)

§ 1. Property

As used in this Restatement, “property” refers to rights, obligations, and other legal relations among persons in and through a thing.

§ 2. Legal Things

A legal thing is a possible subject matter of legal relations that receives treatment as a separate whole and is no more than contingently associated with any particular actor.

Some Examples of Property

- A's ownership of a watch falls under “property”
So does A's possession or custody of a watch.



- Even a license (permission) to be on land falls under “property” despite its not being a property interest.

Some Examples of Legal Things

- A watch or a car is a legal thing. So is a plot of land. So are some intangibles, e.g. those defined by IP law (expression, invention . . .).
- A contract right is not a legal thing except under certain circumstances.
- Separated body parts may be legal things, but ownership does not follow.
- Someone's labor (and self) is not a legal thing.

Basics (R4P, Council Draft 1, § 2 Cmt d)

- Intangible items, even under some circumstances rights themselves, can be things for purposes of property law, provided they are regarded as a separate whole that is only contingently related to any particular actor.
- Physical separateness or physical boundaries do not help to identify intangible things.
- One must look more to economic and social practice and social norms and customs: having value if considered apart from any other thing, consisting of mutually complementary attributes, having value without regard to the identity of the person who holds it, and being commonly transferred or bought and sold on a stand-alone basis.

Possession (R4P Tent. Draft 2, 2021)

§ 1.1. Possession

A person has possession of a physical thing if the person has established effective control over that thing and manifests an intent to maintain such control to the exclusion of others.

§ 1.8. Right to Possession

The right to possession is the legal right to gain possession of a physical thing or prevent its loss. A person in possession of a physical thing typically has a right to possession against all except those with superior title. A person not in possession of a physical thing who has a superior title relative to the actor in possession also typically has a right to possession. A person not in possession who asserts a right to possession based on superior title can typically gain possession only if the right is to immediate possession.

Possession vs. the Right to Possess

1. A takes hold of a piece of driftwood that has washed on the shore. A is in possession of the driftwood and, assuming the driftwood is unowned and unclaimed by another actor, A has the right to possess the driftwood.

2. Same facts as Illustration 1, except that B steals the driftwood from A. B is now in possession of the driftwood but has no right to possession of the driftwood.

3. Same facts as Illustration 2, except that A discovers B has the driftwood. A is no longer in possession of the driftwood but has the right to possession as against B.

*Driftwood at the
Huntington Beach State
Park beach*

Source: DogsRNice, CC BY-SA 4.0



First Question: Possession

- R4P restricts possession to physical things.
- R4P does not restrict things to physical things. Property and ownership can extend to intangible things.
- What if possession were to be extended to intangible things? Implications for limits on intellectual property?
- If possession is not extended to intangible things, how can or should property and ownership be operationalized for intangibles?
- What kinds of "control" (cf. Principles) might be invoked?

Second Question: Conversion

- Can intangible things be converted (aka “stolen”)?
- Case law varies greatly on this question.
- If many intangibles could be converted in many contexts, would this be an alternative route to (overly) expansive IP?
- How can (should?) nonrival resources be thought of for purposes of conversion?
- What is the object of ownership: information, data, digital data, data files, or data carriers?

Conversion in the R4P (PD4)

§ 1. Conversion in General

Conversion is an actor's intentional interference with an item of personal property to the exclusion of another's superior rights to control it, such that the other is entitled to compensation from the actor for the full value of those rights.

§ 2. Elements of Conversion

An actor converts an item of personal property if, by interfering with it, the actor denies another's superior rights to exclusive control in such a way that the other cannot exercise those rights.

Conversion in the R4P (PD4)

§ 3. Ways of Committing Conversion

A conversion may be committed by intentionally:

- (a) dispossessing another of a thing;**
- (b) destroying or so materially altering a thing as to change its identity or character;**
- (c) using a thing without authorization;**
- (d) receiving a thing;**
- (e) disposing of a thing;**
- (f) misdelivering a thing;**
- (g) refusing to surrender a thing; or**
- (h) making a thing unavailable to another.**

Conversion of Intangibles?

- Conversion originally required an interference with possession of a tangible thing, and only those with possession or an immediate right to possess would have standing to sue in conversion.
- Later, as conversion came to be applied to some intangibles, courts modified or dropped the possession requirement.
- Under the R4P, documentary intangibles can be converted. Pure intangibles can be converted only by severing the owner's connection to the property, as by denying all access (such as by appropriating all digital copies) or falsifying a registry of ownership.

The Hat on the Rack



Coat Rack. Source: Kjetil Ree, CC BY-SA 3.0

Conversion Illustrations

1. On leaving a restaurant, A mistakenly takes B's hat from the rack, believing it to be his own. When he reaches the sidewalk, A puts on the hat, discovers his mistake, and immediately reenters the restaurant and returns the hat to the rack. A is not liable to B for conversion.

2. The same facts as in Illustration 1, except that A keeps the hat for three months before discovering his mistake and returning it. A is subject to liability to B for conversion.

3. The same facts as in Illustration 1, except that as A reaches the sidewalk and puts on the hat a sudden gust of wind blows it from his head, and it falls down an open manhole and is lost. A is subject to liability to B for conversion.

4. Leaving a restaurant, A takes B's hat from the rack, intending to steal it. As he approaches the door he sees a police officer outside, and, fearing arrest, immediately returns the hat to the rack. A is subject to liability to B for conversion.

Conversion of Intangibles: Illustrations

7. A convinces the registrar of Internet domain names to register B's domain name as belonging to A. Because the domain name is a pure intangible and A has denied B all access by falsifying the registry, A is liable to B for conversion.

10. A convinces a company to record A as the owner of a negotiable security belonging to B. B possesses the security. A is not liable to B for conversion.

13. A is fired by B and uses confidential information disclosed by B to A in the course of A's former employment. A is not liable to B for conversion. A may be liable to B for misappropriation.

14. A is fired by B and removes the only copy of a customer list belonging to B from A's former place of employment. A may be liable to B for conversion.

Third Question: Trespass to Personal Property

- Can there be liability for interference with intangibles short of conversion?
- Case law varies on this question too.
- Trespass to personal property at one time was thought to be a threat to the openness of the Internet.
- Some of the “solutions” to this problem have undesirable consequences for trespass to personal property.

Trespass to Personal Property in the R4P (PD4)

§ 2. Elements of Trespass to Personal Property

An actor commits trespass to personal property against another when the actor intentionally interferes with an item of personal property in such a way as to as to impede the other's ability to exercise possessory rights in it by:

(a) dispossessing the other or a third party of the item of personal property,

or

(b) using or intermeddling with the item of personal property while it is in the possession of the other or a third party.

§ 4. Harmful Use or Intermeddling

A use or intermeddling impedes the exercise of another's possessory rights in an item of personal property when:

(a) the item is impaired as to its condition, quality, or value; or

(b) the item is made unavailable to the other or for a substantial time.

Trespass to Personal Property: Illustrations

1. While B is away using the bathroom at a coffee shop, A erases the photos stored on B's laptop. A is subject to liability to B for trespass to personal property.

2. B accidentally leaves a letter she has written on a table in a coffee shop. A views the letter. A is not liable to B for trespass to personal property.

3. Same facts as Illustration 2, but A photographs the letter. A is not liable to B for trespass to personal property.

Trespass to Websites?



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Cybernorms

- Extralegal norms of access to things are important in both everyday life and on the Internet.
- Example: One who hangs her coat on a restaurant coat rack has no trespass claim when others, in the ordinary course of hanging their coats, touch or even move and then properly rehang her coat in a slightly different location on the rack.
- Norms of access on the Internet have already developed.

Cybernorms

- Thus, failures to comply with certain terms of service on a website may be a contractual violation, but according to the norms of cyberspace, they do not constitute the kind of interference that trespass to personal property addresses.
- If a website requires users to click “I agree” to a prohibition on reposting material, a reposter may have violated a contract (if it is enforceable) or copyright, but would not be liable for trespass to the owners of computers hosting the website.
- By contrast, stealing a password or evading security measures can give rise to liability for trespass to personal property.

Illustrations of TPP Online

3. By eavesdropping on a conversation between B and C, A overhears B's password and uses it to access B's email account, which is hosted on D's servers. A is subject to liability to D for trespass to personal property.

4. A deliberately sends a large number of "spam" emails to users of B's computer system, causing computers on that system to operate at reduced speeds. A is subject to liability to B for trespass to personal property.

5. A sends a single, unsolicited email to B. Even if the email offends B, A is not liable to B for trespass to personal property.

6. A clicks "I agree" on terms of service for B's website that prohibit reposting of material from the website. A copies a cat meme from B's website and posts it on his (A's) blog. A is not liable to B for trespass to personal property.

Conclusions

- Notions like property, ownership, thing, and possession are general and normative, and not purely legal.
- How they apply to intangibles is not a matter of deduction but of policy and fit.
- Altering densely interconnected concepts in property law is likely to have far-reaching effects, like "back-door IP".
- R4P extends conversion and trespass to personal property in a limited way, rather than expanding possession.