WEP Warwick Evans Publishing

International Journal of Social Sciences and Public Administration

ISSN: 3005-9836 (Print), ISSN: 3005-9585 (Online) | Volume 8, Number 1, Year 2025
DOI: https://doi.org/10.62051/ijsspa.v8n1.16
Journal homepage: https://ijsspa.org

Research on the Unjust Enrichment Remedies for Personal Information Leakage in China

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ABSTRACT

As an important strategic resource, personal information data not only possesses personality interests, but also contains great economic potential. However, the problem of personal information leakage has become increasingly serious. Whether it is the traditional tort remedy or the“risk-based damage theory”, such problems are faced with practical or theoretical dilemmas, such as the difficulty of determining “damage” and the excessive burden of proof. Based on this, this article advocates the improper enrichment law as the core, to build a new type of personal information leakage relief path. First of all, unjustified enrichment relief path has the value of legitimacy and practical operability, through the personal information leakage is divided into “active leakage” and “passive leakage” of two kinds of situations, will be recognized as the rights and interests of infringement of unjustified enrichment, and based on the Chinese law, the law of unjustified enrichment is the most effective way to protect the rights and interests of the people of China. By classifying personal information leakage into “active leakage” and “passive leakage”, identifying it as unjustified enrichment, and based on Chinese law, interpreting the constituent elements and legal effects of unjustified enrichment on the basis of infringement of rights and interests, it not only can give full play to the complementary function of unjustified enrichment, but also can realize the relief of the subject of information.

KEYWORDS

Data Elements; Personal Information Leakage; Tort Law; Unjustified Enrichment.

1. INTRODUCTION

Since the Fourth Plenary Session of the 19th Central Committee of the Communist Party of China (CPC) in 2019 listed "data" as a new type of production factor, the importance of data in the transformation of the digital economy has become more and more significant. According to China's National Industrial Information Security Development Research Center, China's data factor market will reach 101.89 billion yuan in 2022, and is expected to continue to grow at a compound growth rate of 29%, exceeding 200 billion yuan in 2025 and over 780 billion yuan in 2030.[1] In the context of data marketization, personal data refers to personal information or personal information data stored in a non-anonymized manner by a personal information processor,[2] which is not only a component of personality interests, but also an important data resource with economic value. However, with the extensive collection, storage and utilization of data, the risk of personal information leakage continues to increase. 2018 China Consumers Association's report shows that the number of people in China whose personal information has been leaked is as high as 85.2%;[3] In the first half of 2024, there were 16,011 data leakage incidents monitored across the network, an increase of nearly 60% compared to the second half of the year 2023, which is a very serious form.[4] The personal information in personal information leakage includes both the personal information of natural persons and personal information data processed by processors through non-anonymization.

China usually advocates remedies for information subjects by pursuing tort liability for processors of personal information, however, there are many problems with this approach. In terms of the nature of personal information, some scholars argue that personal information rights and interests are not absolute rights, and that not all violations of norms give rise to tort liability, which makes it difficult to adapt to the rule that "damage exists when a right is violated".[5] From the point of view of the "damage" element of tort liability, not all cases of personal information leakage produce certainty of damage, for example, external risk or internal anxiety, etc. are difficult to be recognized as "damage" in traditional tort law.[6] In terms of proof, the processor of personal information is usually in a strong position, and it is difficult for the victim to provide sufficient proof.[7] Even though academics have created "risk-based damage" to broaden the scope of the concept of "damage", there are still dilemmas and other drawbacks that contradict traditional theories.

Therefore, in order to adapt to the background of China's data factor marketization, improve the protection of data and personal information, and build a legal system that promotes the orderly flow of data, we should actively explore a new legal system that can solve the problem of personal information leakage. In this regard, this paper argues that the relief path centered on the law of unjust enrichment is more advantageous. On the one hand, the relief path of unjust enrichment has theoretical legitimacy. On the other hand, this path has stronger practical operation, can save evidence and judicial costs, and better protect the interests of information subjects. However, how to apply the rule to the leakage of personal information, determine the type of unjust enrichment, and explain the constituent elements and legal effects are all questions that need to be answered by legal dogmatics.

2. LEGAL DILEMMA: FAILURE OF TORT REMEDY PATHS UNDER THE MARKETIZATION OF DATA ELEMENTS

Data source supply subjects include natural persons, legal persons and unincorporated organizations,[8] of which the data source of personal data is personal information, and the precondition for information processors to excavate and realize the value of personal information data is the protection of the rights and interests of the subject of personal information.[9] Therefore, the leakage of personal information will not only damage the personality rights and interests of the subject of information, but also may lead to the misuse of data resources and the imbalance of the order of data utilization, and impede the release of data value. Based on this, Article 69 of China's Personal Information Protection Law (hereinafter referred to as PIPL) together with Articles 1165, 998 and 1183 of the Civil Code of the People's Republic of China (hereinafter referred to as the Civil Code) constitute a system of remedial norms of tort law for personal information protection. The primary function of tort law is to fill the damage,[10] where "damage" is the prerequisite for triggering the protection of tort law. Under China's current law, damage includes property loss and moral loss. Data elements are characterized by intangibility, replicability and rapid mobility, and infringement of personal information rights and interests is characterized by intangibility, concealment and uncertainty.[11] This directly leads to difficulties in identifying property loss and moral loss.

2.1. The Dilemma of Traditional Tort Remedies: The Gap between the Value of Data Elements and the Determination of Damages

2.1.1. Property Loss: The Dilemma of Ambiguity in the Economic Value of Personal Information

In the context of marketization of data elements, the economic value that data elements can exert is difficult to determine and very vague. In the field of traditional tort law, for the determination of property damage, civil law systems usually draw on the German jurist Mommsen's "difference theory", i.e., calculating the difference between the victim's property status at a specific point in time after being infringed upon and the property status at the same point in time when the infringement did not occur to determine the damage.[12] This also explains the need for disinterestedness, objective certainty, and remediability in the traditional tort theory of damages. In personal information leakage cases, if there are downstream torts (e.g., fraud, Internet gambling) that result in actual property losses, "damage" is easier to determine and there is nothing wrong with applying tort law for remedies. However, if there is only a leakage of personal information without downstream infringement, it is difficult to generate a claim for damages in tort.[13] Because it is difficult to determine the flow of personal information, how it is utilized, the specific civil rights and interests infringed upon, and the amount of the infringement, it is difficult to determine "damages" based on the leakage alone.

Personal information data can not only help enterprises to discover new business opportunities and develop new business models, but also help decision makers to regulate the market and social governance.[14] In the era of big data, the collection and utilization of massive amounts of personal information can unleash huge economic benefits, but in practice, personalinformation is often overlooked due to its meager economic value. Some scholars have pointed out that the value of a single ordinary person's data is $0.007, and that the value of a rich person's data who travels a lot is $1.78.[15] Therefore, few people file lawsuits due to the leakage of personal information, and the court often ignores this benefit. Even when courts do recognize economic loss, there is great uncertainty about the amount of damages. For example, in Ling Moumou v. Beijing Weibao Vision Technology Co., the court awarded compensation in the amount of 1,000 RMB.[16] In Zhao Mou v. Beijing Chain Home Real Estate Brokerage Co., the court awarded compensation of 100,000 RMB.[17] Huge fluctuations in the amount of compensation are not conducive to the protection of persons, but also weaken the stability and authority of the law.

2.1.2. Mental Loss: The Challenge of Proving the Element of "Serious" Mental Damage

Article 1034 of the Civil Code and Article 4 of PIPL both define personal information as information recorded electronically or by other means that is associated with an identified or recognizable natural person, explaining the characteristics of "recognizability" and "association," which are closely related to personal dignity and personal freedom. This is closely related to the dignity and freedom of the human personality.[18] If personal information is leaked, the information subject is likely to suffer from harassment, advertisement pushing and other problems, so it is not difficult to understand that personal information leakage will cause anxiety and tension.

Article 1183 of China's Civil Code stipulates the "seriousness" requirement for moral damages, raising the threshold for moral damages. However, in practice, it is often difficult for victims to prove the "seriousness" of the element and thus lose the path to compensation for moral damages. This, coupled with the fact that the determination of moral damage is also subject to individual differences, further emphasizes the uncertainty and non-objectivity of "damage". From the legal practice, the court is also very cautious about the determination of moral damages. Zhu v. Beijing Baidu Netcom technology co., ltd, the court pointed out that the plaintiff can not be based only on fear, high mental tension and other subjective feelings that mental damage.[19] This article screened 58 judgments concluded from 2020 to 2024 in PKULAW.COM with "personal information protection disputes" as the cause of the case, and extracted 28 judgments in which the plaintiffs claimed "moral damages", as shown in Table 1 and Figure 1.

Table 1. Statistics on the Court's Support for Moral Damages in Personal Information Protection Disputes (2020-2024)

No.	Case No.	moral damages claimed [¥]	The final result of the court's judgment
1	(2021) Lu 1723 Civil First No. 2713	20000	Unsupported
2	(2021) Min 02 Civil Final No. 5202	49000	Unsupported
3	(2021)Liao 07 Civil Final No. 3638	1000	Unsupported
4	(2021) Yue 03 Civil Final No. 9583	10000	Unsupported
5	(2021) Lu 1191 Civil First No. 2149	2000	Unsupported
6	(2021)Lu 1191 Civil First No.2124	2000	Unsupported
7	(2021)Lu 1191 Civil First No.2209	2000	Unsupported
8	(2021) Jing 01 Civil Final No. 9543	4000	Unsupported
9	(2021) Jing 0105 Civil First No. 53312	30000	Unsupported
10	(2021)Xiang0903 Civil First 1506	20000	Unsupported
11	(2021)Jing 0105 Civil First No.61803	2000	Unsupported
12	(2021) Jing 0117 Civil First No. 2764	2000	Unsupported
13	(2022) Yue 01 Civil Final No. 1833	20000	Unsupported
14	(2022) Gan 0111 Civil First No. 4656	20000	Unsupported
15	(2022)Gan 12 Min Final No.1101	6000	Unsupported
16	(2022) E 09 Civil Final No. 1991	1000	Unsupported
17	(2022)Lu 02 Civil Final No. 11156	8000~10000	Supported 3,000 yuan
18	(2022)Hu 01 Civil Final No. 8935	8000	Unsupported
19	(2022) Su 0508 Civil First No. 5316	30000	Unsupported
20	(2022) Min 01 civil final 5983 no.	5000	Supported 1000 yuan
21	(2022)Lu 1402 Civil First No.2953	3000	Supported 2000 Yuan
22	(2022)Lu 1603 Civil First No. 404	6000	Supported
23	(2022)Lu 1191 Civil First No.227	5000	Unsupported
24	(2022)Yu 0611 Civil First 426	16500	Supported 300 yuan
25	(2021)Jing 0108 Civil First No. 47032	200000	Unsupported
26	(2022)Yu 0726 Civil First 3840	100000	Supported 8000 yuan
27	(2022) Zhe 0192 Civil First 4259	5000	Unsupported
28	(2021)Jing 0491 Civil First No. 47643	10000	Unsupported

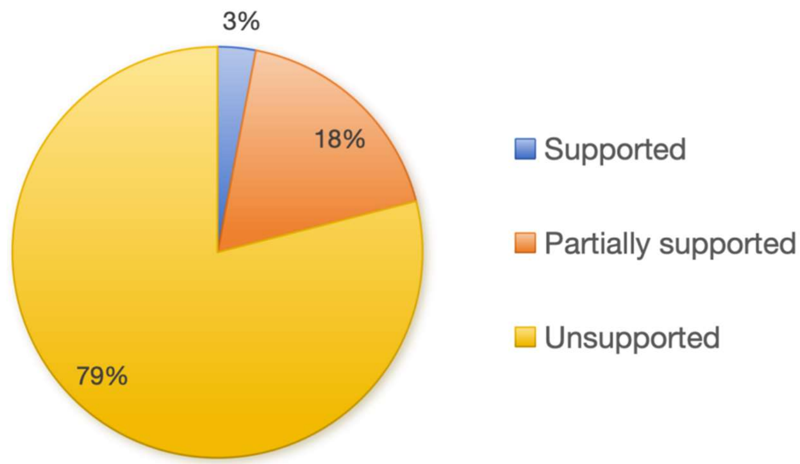

Figure. 1. Statistics on the Court's Support for Moral Damages in Personal Information Protection Disputes (2020-2024)

Through empirical analysis, it can be seen that in the past five years, in the personal information protection disputes, the proportion of the court's full support and partial support for moral damages accounted for only 3% and 18%, respectively, while the proportion of total non-support was as high as 79%, and in the non-support cases, the court rejected the claims on the grounds of "insufficient evidence" and "not causing serious consequences" in 77% of the cases, which empirically demonstrates that the application of compensation for moral damages in tort is facing greater challenges.

2.2. Limitations of the New "Risk-based Damage" Theory: Theoretical Difficulties in the Era of Data Elements

As an important source of data supply for data elements, the natural person as an information subject is difficult to receive due legal protection while providing production factors for the society. In this regard, academics have put forward the new theory of "risk-based damage". The theory is based on the risk society theory of German thinker Ulrich Beck. The "risk" in the theory of risk society refers to man-made risks, that is, with the development of science and technology, the number and level of risks faced by human beings have greatly increased.[20] In the author's view, the theory has a number of explanatory dilemmas.

First, risk theory emphasizes that technology itself has the negative impact of modernity, and therefore needs to be regulated by risk measures.[21] Artificial intelligence technology, algorithmic technology is the main technical basis for the collection and processing of personal information, but also an important carrier for the release of the value of data elements. Although the academic community has studied the background of risk society and the construction path of risky damage, the negative impact inherent in artificial intelligence and algorithmic technology has not yet been argued. Therefore, the introduction of "risky damage" directly from the theory of risk has a lack of argumentation, and the principle of technology neutrality has been widely used in the legal system, playing the role of balancing the interests of all parties and serving the development of technology. Therefore, before the inherent attributes of algorithms and AI technology are characterized, the direct introduction of "risky damage" may hinder the development of technology and suppress the freedom of individual behavior.

Second, institutional design under the risk society theory aims at preventing risks, but risk-based damage is difficult to achieve that goal. The elements of the precautionary principle include: (1) the expectation of harm; (2) uncertainty, i.e., the consequences of the harm are not clearly perceived; (3)

the existence of precautionary measures; and (4) the dynamic nature of risk perceptions and the choice of precautionary measures, which are altered or dismantled as soon as the uncertainty of the risk is removed.[22] Scholars in favor of "risk-based damage" usually use preventive measures in the field of environmental torts that meet the above four elements as their arguments. However, in the era of big data, once personal information is leaked, it is difficult for the information subject to predict and control its flow, so how can we talk about preventive measures and changes in preventive measures? Therefore, the logical legitimacy of claiming "risky damage" based on risk society theory alone is questionable.

Third, "Risk-based damages" will "risk-based approach" into the traditional tort damages framework,[23] break through the objective certainty of "damage". However, only when a legal problem cannot be solved within the existing legal system, there is a need to break with the existing legal framework and theories, otherwise it will bear the risk of shaking the stability of the law. The core feature of the lack of objective truthfulness of "risky damage" is completely inconsistent with the characteristics of damage determination in traditional tort law, but scholars who support the introduction of "risky damage" have not sufficiently argued the following two issues: (1) whether the existing legal system is unable to solve the problem of personal information leakage; and (2) whether it is necessary to break the traditional tort law theory under the balance of interests.

3. INNOVATIVE PERSPECTIVE: EXPLORING THE NEW PATH OF REMEDY FOR UNJUST ENRICHMENT IN PERSONAL INFORMATION LEAKAGE

When the tort law cannot effectively deal with the personal information leakage occurring in the context of the marketization of data elements, this article tries to solve the problem through the system of unjust enrichment in the existing law. By utilizing the function of unjust enrichment system through the perspective of legal doctrine, it can maintain the stability of the law, reduce the burden of argumentation in practice, and make up for the lag of legal norms in the face of rapidly developing practice while seeking relief for personal information leakage.[24] However, it is necessary to prove the legitimacy of this method in terms of value and operability in practice.

3.1. The Justification of Unjust Enrichment Relief Path in System Value

First, the system of unjust enrichment is consistent with the concept of fairness and justice.[25] Once personal information is leaked, the personality interests of natural persons will suffer irreparable and incalculable losses. If the victim is not protected at this time only because of the legislative technology or the problem of proof, it is obviously contrary to the concept of civil law to maintain fairness and justice. Therefore, providing relief through unjust enrichment, which imposes a lower burden of proof on the victim, can better achieve a balance of interests among all parties. Second, the system of unjust enrichment has a complementary function to the basis of civil law claims, and can exclude unfair results.[26] Article 122 and Articles 985-988 of the Civil Code, systematically provide for the unjust enrichment system. The small number of articles means greater room for interpretation and flexibility of application, enabling it to effectively respond to new problems in the digital age. When the tort law fails to provide relief to the information subject, it can reasonably supplement the basis of civil law by shifting the attention to the beneficiary, i.e., the information processor. By calculating the profits gained from the use of personal information or data composed of personal information, the rights and interests of the information subject can be protected, and the basis of civil law claims can be reasonably supplemented.

Third, the system of unjust enrichment aims to regulate the change of property without legal cause, and has the function of adjusting and stabilizing the order. This refers to: (1) correction of the lack of legal relations of the transfer of property; (2) protection of property belonging to the continued role of the protection of rights.[27] In the era of big data, personal information has a meager but not zero value, and there may also be a premium for personal information of celebrities in particular. The subject of information can request the return of profits to those who illegally use their information and profit from it, so as to show that the personal information rights and interests are still essentially attributable to the subject of information, and to play the function of the unjust enrichment system to stabilize the property and social order.

3.2. Operability of the Unjust Enrichment Relief Path in Practice

First, the system of unjust enrichment does not need to determine the "loss", but only need to analyze the "gain" of the beneficiary, it is easier to prove. Tort law aims at "filling the loss", while unjust enrichment aims at "removing the gain".[28] Under the tort approach, it is difficult for a plaintiff to prove that the mere disclosure of personal information will result in actual damages, and it is difficult for the court to support such a claim. When applying the path of unjust enrichment, the plaintiff only needs to prove that the defendant has profited from the infringement or utilization of plaintiff's rights, and then plaintiff can claim for the return of the unjust enrichment, just like the extraterritorial California's unjust enrichment rule, as long as the defendant lacks a justifiable reason for using the plaintiff's resources to make profits, regardless of the plaintiff's damages or not, court should support the claim for unjust enrichment,[29] which is more favorable to the information subject in terms of the cost of proof and the possibility of the rights remedy.

Second, although there is no jurisprudence in China that applies unjust enrichment to resolve this issue, inspiration can be gained from comparative law. In the United States, the idea of using the unjust enrichment system to solve the problem of personal information leakage has already appeared in the academic circles.[30] In practice, the United States also has relevant jurisprudence to support unjust enrichment as a remedial path for personal information leakage. Research shows that in the past three years, in 49 relevant cases in the United States, 78% of the cases held the attitude of supporting the plaintiff, of which 24 cases the court directly supported the claim of unjust enrichment, and only 22% held the attitude of opposing.[31] It can be seen that unjust enrichment has the possibility of application in personal information leakage cases.

Third, even if the leakage of personal information is classified, the unjust enrichment system can still be applied. In the author's view, personal information leakage can be divided into "active leakage" and "passive leakage" two kinds of cases: the former refers to the processor without the consent of the information subject actively disclosure of information and profit; the latter refers to the processor did not fulfill the obligation of safety and security of the information was invaded by a third party and the leakage of profit. Either situation can be regulated by the Unjust Enrichment, which will be discussed in detail below.

4. THE PRECISE APPLICATION OF UNJUST ENRICHMENT FOR INFRINGEMENT OF RIGHTS AND INTERESTS IN PERSONAL INFORMATION LEAKAGE

Currently, the general theory classifies unjust enrichment into payment-type unjust enrichment and non-payment-type unjust enrichment. Although China's Civil Code does not explicitly provide for both, it can be seen through the setting of the provisions that the basis of the right to claim payment-type unjust enrichment is Article 985 of the Civil Code, and the basis of the right to claim non-payment-type unjust enrichment is Article 122 of the Civil Code.[32] The so-called payment refers to the conscious increase of another person's property based on a certain purpose, and if one party's acquisition of benefits is not based on the other party's intention, it cannot constitute payment of unjust enrichment.[33]

In the cases of personal information leakage, the subject of information must not have the meaning of "consciously and purposefully increasing the property of others", so it does not constitute a payment type of unjust enrichment. The non-payment type of unjust enrichment includes infringement of rights and interests type of unjust enrichment, expense type of unjust enrichment and claim type of unjust enrichment. Among them, the expense type of unjust enrichment needs to incur the expense of the injured person to the beneficiary, and the claim type of unjust enrichment generally occurs in the debt settlement scenario, both of which do not meet the scenario characteristics of personal information leakage. The infringement type of unjust enrichment refers to the infringement of the content of the rights belonging to others and profit, causing damage to the interests of others, and there is no legal reason for the unjust enrichment, the nature of the personal information leakage case should be recognized as non-payment type of unjust enrichment and the infringement type of unjust enrichment.

4.1. Application of Constituent Elements: Profit, Infringement, No Legal Cause

Against the background of the increasing economic value of data elements, enterprises and other market players have an increasing demand for data elements, and by mastering the data, they are able to grasp the market dynamics and obtain economic benefits. In the scenario of "active leakage", the information processor takes the initiative to utilize the personal information or personal information data belonging to the information subject to seek benefits, and its constitutive elements are relatively clear; in the scenario of "passive leakage", the information processor fails to perform the security measures to safeguard the data, and the information processor fails to perform the security measures to protect the data. In the scenario of "passive leakage", the information processor fails to fulfill its safety and security obligations, resulting in the leakage of personal information or personal information data illegally accessed by a third party. However, in the case of "passive leakage", how to explain that the information processor has utilized the rights and interests of information subject is very important, which is related to the question of whether the infringement of rights and interests type of unjustified enrichment can be applied to this situation.

Article 122 of the Civil Code stipulates: "If another person obtains an undue benefit without a legal basis, the person who suffered the loss has the right to request the return of the undue benefit." Combining the theory and Article 122 of the Civil Code, the constitutive elements of the rights and interests infringement type of unjustified enrichment can be categorized into: (1) the beneficiary gains; (2) the benefit is obtained due to the infringement of other people's rights and interests; and (3) there is no legal basis. This article will analyze the application of the unjust enrichment system in personal information leakage accordingly.

4.1.1. Determination of Beneficiary's Benefit

The "benefit" of the infringement of rights and interests is the same as that of the payment type of unjust enrichment.[34] In the law of unjust enrichment, there are three types of "benefit", namely, "positive increase in property, relief from restraint, and the use of another's rights and services". Among them, the increase of "positive property" can be manifested in various forms, including the acquisition of absolute rights, the acquisition of claims, possession, the possibility or expectation of disposal, etc.; the "relief from restraint" is manifested in the loss of debt without cause, etc.; the "utilization of the rights and services of others" refers mainly to the use of the resources of others for the purpose of obtaining a benefit, which is mainly reflected in the objective value of those resources.[35] This categorization is worthy of reference, as its quantitative character easily solves the problem of identifying "benefit".

In the case of "active leakage" of personal information, the information processor will generally make a profit through data transactions and other forms. In this case, "profit" is equal to the information processor's utilization of the information subject's "personal information rights and interests" or even "privacy rights", and the objective value generated by the utilization of these rights or interests is the profit that should be returned. In the case of "passive leakage" of personal information, the information processor fails to fulfill its safety and security obligations, resulting in the disclosure of the information by a third party. If the information processor receives a benefit, the above rule still applies. However, if the information processor did not benefit, a question appears: since no benefit, how to apply the rules of unjust enrichment? In this regard, some scholars introduced the American "excess payment theory" to make up for the explanatory theory. The theory of overpayment means that a part of the price or labor paid by the information subject to the information processor should be used for the protection of information security; if there is a leakage of personal information, the security measures of the processor are not up to the standard, which means that the payment of the information subject is unfairly overpaid, and the information processor constitutes an unjustified enrichment.[36] The author believes that this path of interpretation is reasonable, but still need to clarify the following issues: the "payment" in the theory of overpayment is not different from the payment in the law of unjust enrichment, it refers to the factual behavior of "giving", because the information subject does not necessarily act with the "consciousness and purpose" of allowing the information processor to protect his or her personal information, Article 9 of the PIPL provides for the statutory security obligations of the information processor, which also supports the absence of the subject's private intention. Besides, if the victim is able to determine the identity of the third party, they can also claim the return of unjustified gains.

4.1.2. Obtaining a Benefit for Infringing on Another's Rights and Interests

Welling describes this element as "at the expense of ......" and defines it as the only characteristic of non-payment of unjust enrichment, which should be based on the theory of "attribution of interest", as long as the benefit obtained by the beneficiary is distributed to the creditor by the legal order, the benefit is obtained at the expense of the creditor.[37] China's understanding of this element also adopts this theory, that "as long as the benefit is obtained by infringing on the rights and interests attributable to others, it can be considered that others have suffered loss based on the same fact of cause".[38] In the author's view, the "attribution of rights and interests" is reasonable.

In the case of "active leakage", the information processor makes profit by selling or betraying personal information, but the economic value of the information should be attributed to the information subject, therefore, the behavior meets the element of "obtaining benefit by infringing on the rights and interests of others". In the case of "passive leakage", according to the "overpayment theory", the information processor is obliged to safeguard personal information during the period when it is kept by the information processor, and the information subject enjoys the right of "personal information being protected". If the personal information is leaked at this time, it is essentially an infringement by the information processor of the information subject's right to "personal information protection", which also meets this element; as for the third party, it involves the utilization of personal information for profit, and its unlawful acquisition and utilization meets the requirements of the "infringement of the rights and interests of others" principle, the element of "obtaining benefits by infringing on the rights and interests of others" is also met.

4.1.3. No Legal Reason

If the "attribution of rights and interests theory" is supported, then the acquisition of benefits by infringing on the rights and interests of another person is not justified by the loss suffered by the other person, and constitutes the absence of a legal cause.[39] However, the "illegality theory" opposes the "theory of attribution of rights and interests" and asserts that infringement of another's rights and interests without legal justification means infringement of another's rights and interests.[40] In the author's opinion, the "illegality theory" points to the illegality of benefit acquisition, but does not explain the wrongfulness of benefit retention,[41] while the "attribution theory" clearly exposes the cause of the wrongfulness of benefit retention. And the "illegality theory" blurs the line between unjust enrichment and tort. Therefore, in terms of interpretation, "no legal reason" in Chinese law refers to the profit itself by infringing on the attribution of another person's rights and interests.

4.2. Application of Legal Effects: Return of Profits and Compensation Mechanisms in Data Factor Markets

A complete legal norm consists of two parts: constituent elements and legal effects, and the legal effects of paid and unpaid unjust enrichment are the same. Article 122 of the Civil Code of China, together with Articles 985-988, constitutes the legal effects of unjust enrichment, which is mainly applicable to the issue of "gain" return and compensation for the leakage of personal information in the market of data elements.

First, according to Article 122 of the Civil Code, the legal effect of the infringement of rights and interests type of unjust enrichment is the "return of unjust enrichment". Since the element of "gain" in the constituent elements of different types of unjust enrichment is the same, the "return of unjust enrichment" can be understood as the "gain" in the constituent elements. Therefore, in the case of leakage of personal information, the "gain" is the "utilization of another person's rights and services," which can be calculated as the objective value of the personal information, and the scope of return is also based on this.

Secondly, Article 986 of the Civil Code stipulates the rule of defense of loss of gain for a good faith beneficiary. That is, when the recipient is acting in good faith, he/she is only obliged to return the existing benefit, and is not required to return the original object or compensate for the value of the benefit if it doesn't exist, because if he/she is required to return the gain at this time, his/her status is inferior to that of before the gain, which is obviously not fair and reasonable.[42] It corresponds to Article 818, paragraph 3 of the German Civil Code: "The obligation of return or compensation for value is excluded to the extent that the recipient no longer benefits." However, as to how to judge the "acquired benefit" here, China advocates that the calculation method is "to judge the whole property of the recipient in an abstract and general way, and to decide whether there is an interest by comparing the total amount of the existing property resulting from the process of acquiring the interest with the total amount of the property that should have existed if nothing had happened".[43] This is in line with the meaning of Professor Cui Jianyuan's statement that "the entire property of the recipient should be judged in an abstract and general manner".[44] This understanding can solve the contradiction in law. In the leakage of personal information, the "use of the rights and services of others" is a special "interest", and its specificity is reflected in the "loss of acquisition". Taking the "active leakage" of personal information as an example, a good faith information processor sells or rents the information, and the utilization of the act is over, and if it is allowed to apply the defense of loss of profits, there is no remedy for the victim's rights. Therefore, the "gained benefit" should be recognized in accordance with the abstract and general criteria, at which time the "gained benefit" still exists, and the price gained by renting, selling, or otherwise leaking the information should still be returned. In the case of "passive leakage", according to the "excess payment theory", the information processor shall return the excess price obtained from the failure to fulfill the security obligation.

Thirdly, under Article 987 of the Civil Code, the malicious beneficiary is required to return the gain and compensate for the loss, based on the fact that the malicious beneficiary does not have any trust in the gain that is worth protecting.[45] According to the meaning of the text, if the malicious beneficiary is unable to make up for the loss even after returning the profit, the victim has the right to claim "damages". It is worth noting that the "damages" here is not a claim for damages in tort law, which does not depend on "fault" but only judges whether the beneficiary has knowledge or not. In the case of "active leakage", the information processor is basically a malicious beneficiary, and should return the profit, and if the return cannot equalize the loss, it should be compensated additionally. In the case of "passive leakage", if the information processor knows that the other party is infringing on the personal information or has the possibility of infringing on the personal information but fails to stop it, he or she is a malicious beneficiary and shall be held liable accordingly.

Fourthly, according to Article 988 of the Civil Code, if the beneficiary has transferred the acquired benefit to a third party without compensation, the person who suffered the loss may request the third party to undertake the obligation of return within the corresponding scope. As mentioned above, in the case of personal information leakage, gain is lost as soon as it is gained, so there is generally no case where the gain is transferred to a third party without compensation. However, if the beneficiary transfers the price or substitute to a third party, Article 988 of the Civil Code is directly applicable.

5. CONCLUSION

The traditional tort law and "risky damage" to the personal information leakage of relief has limitations, facing the "damage" identified difficulties, the burden of proof is too heavy, theoretical dilemmas and other problems, the new type of relief program centered on the law of unjust enrichment has both theoretical legitimacy and practical operability. Whether it is "active leakage" or "passive leakage", the unjustified enrichment law is able to provide effective remedies. In essence, at a time when the demand for data elements is increasing, if the unjust enrichment law can be activated to give full play to its complementary function, it can not only bring inspiration to the problem of personal information or personal data leakage, but also provide a new perspective for the relief of other data infringement problems, and help the development of digital economy.

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