

Property in Personal Data: a European Perspective on the Instrumentalist Theory of Propertisation

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I. Background, research question, and structure of the paper

Since early 1970s the US scholars have been ‘playing’ with the idea to introduce property rights in personal data.¹ Next to acknowledging already existing phenomenon of commodification of personal data, propertisation would potentially offer a solution to the data protection problem resulting from the Information Revolution. Introduction of property rights in personal data has been advocated from several perspectives: arguably it would help individuals reclaim lost control over their personal data, or acknowledge an inherent connection between an individual and data pertaining to him (natural rights theory).² Other commentators see benefits of propertisation in a rhetorical value of property talks.³ Some believe that only propertisation is able to overcome inherent limitations of the US legal and political system.⁴ The most discussed approaches to information privacy as property have been taken from the perspective of economic analysis of law.⁵ Of a special interest is a part of the economic argument, made among others by

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¹ **A. F. WESTIN**, *Privacy and Freedom*. London, Sydney, Toronto, the Bodley Head, 1967. **P. E. AGRE, M. ROTENBERG eds.**, *Technology and Privacy: the New Landscape*, Cambridge, MIT Press, 1997.

² **D. J. SOLOVE**, “Privacy and Power: Computer Databases and Metaphors for Information Privacy.”, *Stanford Law Review*, 2001, No 53, p. 1393, at p. 1446 (although he does not develop the natural law argument further); **V. BERGELSON**, “It’s Personal, but Is It Mine? Toward Property Rights in Personal Information”, *U.C. Davis Law Review*, 2003, No 37, p. 379, at p. 430; **M. J. RADIN**, “Property and Personhood”, *Stanford Law Review*, 1982, No 34(5), pp. 957-1015, at p. 959.

³ “Property talk is just how we talk about matters of great importance. [...] “If you could get people (in America, at this point in history) to see certain resource as property, then you are 90 percent to your protective goal.” (**L. LESSIG**, “Privacy as Property”, *Social Research: An International Quarterly of Social Sciences*, 2002, No 69(1), pp. 247–269.

⁴ See **J. LITMAN**, “Information Privacy/Information Property”, *Stanford Law Review*, 2000, No 52, p. 1283.

⁵ Although this is a simplification, when applied to the argument for propertisation, this article uses “utilitarian,” “economic,” and “instrumental” interchangeably;

Lessig⁶ who invokes property as a regulatory tool and an instrument to create a general, more effective system of data protection incorporating *inter alia* privacy enhancing technologies (PETs). This paper will refer to this argument as the instrumentalist theory of propertisation.

In brief, new developments in personal-data related practices both in Europe and the US have been generally attributed to several interconnected processes: emergence of the service economy, new marketing techniques, welfare state and recently, security concerns in the aftermath of 9/11 – all reinforced by technological developments.

In the circumstances of industrialisation businesses were striving to wear off detrimental consequences of mass production for the salesperson-customer relationship and tune their products and services more in accordance with customers' preferences. Targeted marketing has emerged as a solution largely based on linking demographic information to consumer behaviour and as a result giving rise to the interest in bulk quantities of those data to build a consumer profile. Simultaneously in public sector, state's functions expanded to the provision of welfare for the citizens on the grounds of family and employment status, health condition, etc. To exercise those obligations state, too, needed more personal information. The 9/11 events gave rise to major security concerns which were addressed by tremendous increase in surveillance practices and even more intensive (also secret) collection of information about (suspect groups of) individuals, data mining and profiling.

It became necessary for public agencies and private businesses alike to collect more information about individuals. These developments have resulted in both qualitative and quantitative growth of personal data collection which would not be possible without technology. Besides the fact that computers made processing of personal information faster, they also made storage of bulks of data and linking previously disintegrated records a reality and enabled data mining, profiling, and automated-processing based decision-making. Internet has provided a new and unique source of data. Along with the data routinely recorded as a result of every online transaction, the non-static nature of a web-page enables the data collectors to secretly track the way people browse the Internet (clickstream data). Internet made massive online social

⁶ Cohen also speaks of law as only a mechanism to create incentives to build a general privacy infrastructure (see Cohen 2000, p. 1437-38). Cohen refers to Phil Agre who described 'technologies of identity' which made it possible to prevent collection of personal data (P. E. AGRE, M. ROTENBERG eds, *Technology and Privacy: the New Landscape*. Cambridge, MIT Press, 1997).

networking possible by means of which people knowingly disclose their personal information and (often unknowingly) make their data available for third parties commercial collection.⁷

Given profits personal information brings and costs its collection and processing require, marketers soon realized an opportunity to avoid the costs by buying the needed data from already existing databases of other enterprises.⁸ A new branch of the information industry – the database builders - has emerged devoted to the collection of information, also via web-sites where people are offered top trade their personal data for goods, discounts, or services. A market of databases has emerged.⁹ This process is also referred to as commodification of personal information.

Despite the fact that Europe faces similar challenges of the Information Revolution, including commodification of personal data,¹⁰ so far only few European commentators have reflected on the possibility of propertisation.¹¹ This paper will try to fill in a small part of the gap and make some first tentative steps to answer the question whether the proposal to create a general system of data protection by introducing property rights is feasible in and/or compatible with the European legal system,¹² or, alternatively, if the instrumentalist theory of propertisation may be applied to Europe as well. The preliminary answer to this question is that it cannot.

With regard to the scope of the paper, three important remarks should be made. First, although “European” may have several alternative meanings, by European perspective on the idea of propertisation this research means the one unique for the framework of the European Union which is also bound by the law of the Council of Europe. Given that the EU legal system

⁷ **A. ACQUISTI, R. GROSS**, “Information Revelation and Privacy in Online Social Networks (The Facebook case)”, *ACM Workshop on Privacy in the Electronic Society (WPES)*, 2005.

⁸ **D.J. SOLOVE**, *o.c.*, p. 1407.

⁹ **D.J. SOLOVE**, *o.c.*, p. 1407.

¹⁰ For an overview of personal data practices in the US see e.g. **D.J. SOLOVE**, *o.c.*. In Europe - **L. A. BYGRAVE**, *Data Protection Law: Approaching Its Rationale, Logic and Limits*, The Hague, Kluwer Law International, 2002. On surveillance, data mining, and profiling in the context of security in Europe and the US see **P. DE HERT, R. BELLANOVA**, *Data protection from a Transatlantic Perspective: the EU and US move towards an International Data Protection Agreement?* Brussels, 2008.

¹¹ See, e.g. **J. E. J. PRINS**, “Property and Privacy: European Perspectives and the Commodification of our Identity”, *The Future of the Public Domain, Identifying the Commons in Information Law*, The Hague, Kluwer Law International, 2006, 16, pp. 223-257.

¹² By European legal system this paper will mean the legal system of the European Union.

represents a coherent legal order, defining Europe as EU offers a much better chance of developing a coherent approach to the idea of propertisation. Second, present research limits itself to legal analysis and is not aimed at establishing or verifying any causal connections which are, in the author's opinion, a domain of the sociology of law. In other words, the paper will not examine whether the measures meant by propertisation will achieve the results they are argued to be able to achieve, or whether they will be more effective than alternative legal tools. That is, it is out of the scope of this paper whether application of Lessig's proposal actually leaves Europe with a 'better' system of protection of personal data. The final remark is that the paper is only the first attempt to sketch the roadmap of analysis of Lessig's idea of propertisation in the European context and is largely exploratory.

The argument against viability of Lessig's instrumentalist theory in Europe will be made in several steps. First, the paper will explain the very idea of Lessig's theory of propertisation of personal data as explained in the book *Code and Other Laws of Cyberspace*,¹³ with a special emphasis on the economic notion of property it operates with. The conclusion will be made that economic analysis of law in general and as utilised by Lessig seems to put an equation between economic and common law concepts of property. Finally, Lessig's theory will be considered on its face and substance, *i.e.* two questions will be answered: whether without regard to the content of the property rights, propertisation in Europe is formally possible, and if yes, whether Lessig's scenario of propertisation in its substance is compatible with the reality of the European legal system. The conclusion will be made that although propertisation of personal data is a legal possibility, when executed in the European legal system it will not be able to fulfil the functions expected from it according to Lessig's theory.

II. Instrumentalist discourse on propertisation

Lessig's instrumentalist theory of propertisation is just one of at least three versions of the economic argument to introduce property rights in personal data.¹⁴ The other two versions consider property as a tool enabling market exchange which, provided transaction costs are

¹³ L. LESSIG, *Code and Other Laws of Cyberspace*, New York, Basic Books, 1999.

¹⁴ For a more detailed analysis of all three interpretations see N. PURTOVA, "Propertisation of Personal Data: Learning from American Discourse", forthcoming in *SCRIPT-ed*.

minimal, will achieve an optimal (i.e. efficient) level of privacy by balancing the value of personal information to a company against the value of the (non-disclosure of) information to the individual and the larger social value of data protection.¹⁵ Instrumentalist theory stands out since it is not concerned with efficiency but merely uses the logic of the economic analysis to propose the creation of an overall system of data protection which would comprise law, technology and market tools. Their interaction can ensure a proper level of information privacy.

In Lessig's theory, property is an engine bringing the general system of data protection into action. Lessig builds an economic argument that property rules would permit each individual to decide what information to disclose and protect "both those who value their privacy more ... and those who value it less."¹⁶ First, he argues pretty traditionally, information privacy is in essence control over personal information. Second, unlike in the real world, the architecture (or "code") of a cyberspace makes collection of information difficult to spot, and control over that information – unrealistic to exercise for lay people. Third, such an architecture is a result of human activity and, therefore, can be altered.¹⁷ Fourth, the US information processing practices are based on self-regulation, *i.e.* there is no general legislation requiring businesses to alter this architecture and use privacy-friendly technologies. Nor is there motivation to account for interests of the individuals. In absence of property interests, the companies make use of personal data for free. However, if individuals had property rights in personal data, it would force businesses to negotiate with the individuals, account for their interests, and alter the architecture, *i.e.* invest into development of PETs. The individual privacy would be better secured, not only by law but by interaction of the latter, market mechanisms and technologies.¹⁸

¹⁵ Solove brings as examples of such an approach **J. HAGEL III & M. SINGER**, *Net Worth: Sharing Markets When Consumers Make the Rules*, 1999, pp. 19-20 (advocating for an "infomediary" between consumers and vendors who would broker information to companies in exchange for money and goods to the consumer); **P. FARHI**, "Me Inc: Getting the Goods on Consumers", *Washington Post*, 14 February 1999, at p. H1.

¹⁶ **L. LESSIG**, *supra* note 13.

¹⁷ Point also made by Cohen in **Cohen** 2000, p. 1437;

¹⁸ **L. LESSIG**, *supra* note 13.

Lessig's argument operates with the reading of the legal concept of property given by Calabresi and Melamed¹⁹ and adopted by the literature on economic analysis of law. Property is defined as the opposite of the liability rule. Both are the means invoked to protect a certain entitlement. When the entitlement is protected by a property rule, it cannot be taken away except when sold by the holder voluntarily at the price set by the holder.²⁰ Whereas the property rule protects the entitlement, the liability rule allows and ensures that the transfer thereof is possible provided the holder of the entitlement is compensated for his loss against "an external, objective [i.e. set by a third party] standard of value."²¹ Based on this understanding, because no other way to transfer the entitlement (in data) but via voluntary transaction with data subjects is allowed, Lessig's model works in theory and property in personal data motivates the information industries to enter negotiations with data subjects and, as a result, implement PETs.

The validity of Lessig's theory has been questioned on numerous grounds already in the US context. Among others, Litman doubts whether the understanding of property employed by the theory at hand corresponds to the actual law,²² and how effective the whole enterprise to promote investments in PETs can be.²³ An extensive analysis of the validity of the theory in question under the US system goes beyond the scope of this paper. The following section attempts to 'test' Lessig's theory in the European context.

III. Viability of the Instrumentalist theory in Europe

The analysis of the viability of Lessig's propertisation argument in the European settings may be broken into two parts: one may consider Lessig's proposal on its face and on substance. The former approach leaves aside the content of the proposed property rights and merely focuses

¹⁹ Point also made in **G. CALABRESI, A. D. MELAMED**, "Property rules, liability rules, and inalienability: one view of the cathedral", *Harvard Law Review*, 1972, No 85.

²⁰ *Ibid.*, p. 1105.

²¹ *Ibid.* p. 1106, text in the square brackets added.

²² Based on the definition of property given in the Restatement, Litman argues that "the *raison d'être* of property is alienability; the purpose of property laws is [not to prevent but to encourage and] ... prescribe the conditions for transfer." Restatement of Property, §489 cmt. a (1944) referred to in **J. LITMAN**, "Information Privacy/Information Property", *Stanford Law Review*, 2000, No 52, p. 1283, at p. 1295, text in the square brackets added.

²³ Litman labels Lessig's argument "a fairy-tale picture": industries do not respect information privacy because it is expensive to honour privacy preferences, not to express them. (*Ibid.*, p. 1297).

on propertisation of personal data in Europe as a formal possibility. The question to be answered here is whether introduction of the property rights in personal data, whatever scope of those rights may be, is a legal option in the European Union (you focus on the EU: make clear more earlier in your paper). A mere lack of competence to create these new rights is sufficient to discredit Lessig's theory - as applied to Europe - on formal grounds. The latter - substantive - approach looks deeper into the argument and considers the actual content of the proposed rights in order to establish whether they are consistent with the European notion of property. The following analysis will proceed along these lines and consider the viability of Lessig's instrumentalist theory when applied to Europe "on its face" and "substance".

A. Lessig's instrumentalist theory on its face: is propertisation of personal data a legal option in Europe?

To establish if propertisation of personal data may be a legal option in the system of the European Union, one may think of two possible ways in which propertisation may happen. The decision to substitute the current system of data protection via regulation by property rights may be taken either on the level of the European Union or by the individual Member States. The question to be answered at this stage is the one of competence, *i.e.* if the EU and individual Member States have the legal power to make such a decision.

When examining the EU competence, let's rest our analysis on the assumption that regulation in the area of data protection lies within the scope of the EU powers. Without going into details of the basis of such regulation in the European Treaties, the existence of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data²⁴ is a good evidence of such a competence. However, the case of *propertisation* of personal data requires additional consideration since it involves not only the area of data protection, but also the subject-matter area of property rights. Whether the EU has a competence to force Member States into propertisation of personal information and to regulate (this sector of) property law is the question that needs to be answered.

²⁴ Hereinafter referred to as EU Data Protection Directive.

The first step on the way to the answer is to acknowledge that introduction of property rights in personal data on the EU level would effectively mean harmonisation of a (newly created) sector of property law. Propertisation of personal data would not be the first area where the issue of the common European law of property is discussed. According to Van Erp, “several Directorates General are working on various projects concerning harmonization of property law.”²⁵ A debate has been going on whether the structure of the Common Framework of Reference (CFR), a project meant “to restructure existing European private law and to be a “toolbox” for future European private law”²⁶ should cover assignment of claims, personal security rights, security rights in movables, related matters in property law. Although Art. 295 of the European Community Treaty²⁷ seems to ban the EU intervention in property law issues,²⁸ in practice the effect of this Article is more restricted than one would assume at first sight²⁹ and has been interpreted more likely “to address the member states’ competence in nationalization and privatization.”³⁰ Moreover, some EU legislation in the area of property law has already been passed.³¹

Given that information industry and *de facto* market in personal data have already become a large part of the European economy and personal data long have been treated as a good, a possible legal ground for creating property rights in personal information on the EU level could be Art. 95 EC. To have Art. 95 EC as legal basis, the measure has to be necessary to attain the

²⁵ **S. VAN ERP**, “European and National Property Law: Osmosis or Growing Antagonism?”, *Walter van Gerven Lectures*, Europe Law Publishing, 2006, p. 9;

²⁶ *Ibid.*, pp. 10-11.

²⁷ Hereinafter referred to as EC Treaty.

²⁸ Art. 295 EC: “This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.” For possible reasons of such treatment of property law see, e.g. **D. CARUSO**, “Private Law and Public takes in European Integration: the Case of Property”, *European Law Journal*, 2004, No 10(6), pp. 751-765. (“For the Union to signal that property rules will not be easily tinkered with is a highly symbolic gesture in the spirit of subsidiarity.”)

²⁹ **S. VAN ERP**, *o.c.*

³⁰ **M. J. MILO**, (2006). “Property and Real Rights.” *Elgar Encyclopedia of Comparative Law*. J. M. Smith, Edward Elgar: 587-602, p. 588;

³¹ For more detail, see: *Ibid.* and **S. VAN ERP**, *o.c.*

establishment and functioning of the internal market.³² To qualify as such, according to Art. 14 EC, the measure should be aimed at establishing an area where free movement of goods, persons, services and capital is ensured. A top-down introduction of uniform property rights in personal data would certainly address the issue of free movement of the data within the EU without obstacles of different legal regimes.

The question to be answered next is whether the aim of ensuring free movement of personal data can be legally achieved by a measure of such level of detail as the one of establishing property rights. As the subsequent analysis will show, the provisions on powers of the EU may be interpreted in a way allowing even such an extensive intervention as top-down propertisation. That can be decided based on the subsidiarity principle as laid down in Art. 5 EC, Art. 2 TEU and Protocol 30 to the EC Treaty on the application of the principles of subsidiarity and proportionality. Art. 5 EC reads that the Community shall take action in areas which do not fall within its exclusive competence, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effect of the proposed action, be better achieved by the Community. The idea behind is that matters should be dealt with on the level closest to the ones affected.³³ However, as many commentators of the EU law point out, the very reason of existence of the European Union will “often demand Community action to ensure the uniformity of *general approach* which is of central importance to the realization of a common market.”³⁴ The subsidiarity principle, however, may have an effect on the form of the Community action for propertisation which may be through framework directives or guidelines rather than regulations.

The remaining question of competence is whether the individual Member States may take an action independent on the EU and introduce property rights in personal data. Such an action would not be a complete novelty since, as Milo rightly points out, property law has traditionally

³² **E.C.J.**, Case C-376/98, *Federal Republic of Germany v. European Parliament and Council of the European Union*, 5 October 2000 (so-called ‘Tobacco case’).

³³ **P. CRAIG, G. DE BÚRCA**, *EU Law: Text, Cases and Materials*, Oxford University Press, 4th ed., 2008, p. 104.

³⁴ *Ibid.*; see also **A. ESTELLA**, *The EU Principle of Subsidiarity and its Critique*, Oxford University Press, 2002, pp. 113-114.

been “national law par excellence,”³⁵ since the national rules of private international law mainly rely on the principle of *lex rei sitae*,³⁶ i.e. the law applicable to an object in an international property law case is derived from the jurisdiction where the object is situated.”³⁷ However, in light of the fact that the EU has already taken action in the field of data protection in the form of the EU Data Protection Directive, the Member States will not be able to unilaterally introduce property rights in personal data the scope of which would substantially differ from the general approach to treating personal data adopted in the Directive. Any propertisation on the level of the individual Member States will have to be in line with the Directive. Even more, the Directive has been adopted with a view to leave a margin for the Member States to adopt actions which would respect the national legal systems, yet achieve the goals established in the Directive. Provided property rights introduced do not contradict those guidelines, a Member State which decided in favour of propertisation may serve as a laboratory to test the workability of the idea.

The above analysis shows that the idea to introduce property rights in personal data may be a legal option in the EU, both on the level of the Union and individual member states, although only the former may introduce propertisation altering the current general approach to data protection. The conclusion that follows is that Lessig’s proposal understood on its face withstood the test. The focus of the next section is on whether it withstands the examination on its substance.

B. Lessig’s instrumentalist theory on its substance: propertisation as an engine of the general system of data protection?

The purpose of the following analysis is to demonstrate that although Lessig’s theory withstands scrutiny on its face, it is not viable when it comes to the actual substance of the argument. To examine the value of Lessig’s theory for Europe on its substance, one has to consider the actual content of the rights labelled by the theory at hand “property rights.” As it has been explained earlier in this paper, Lessig’s argument operates with the definition of property

³⁵ M. J. MILO, *o.c.*, p. 587.

³⁶ Emphasis added..

³⁷ M. J. MILO, *o.c.*, p. 587.

given by Calabresi and Melamed³⁸ by opposing it to the liability rule. When the entitlement is protected by a property rule, it cannot be taken away except when sold by the holder voluntarily at the price set by the holder.³⁹ Therefore, property rule protects the entitlement, whereas the liability rule allows and ensures that the transfer thereof is possible provided the holder of the entitlement is compensated for his loss against “an external, objective standard of value.”⁴⁰ Because no other way to transfer the entitlement (in data) but via voluntary transaction with data subjects is allowed, property rule motivates industries to respect privacy choices of the individuals and invest in PETS thereby bringing the general data protection system into action. Thus, there are two elements of the proposed property rights essential to Lessig’s argument: in their core Lessig’s property rights are there to protect entitlement rather than transfer, but simultaneously, leave a right holder an option to waive the entitlement for established price in the process of voluntarily transaction. The subsequent two parts of the paper will examine each element against the background of the EU legal system. In general, in this section the point will be made that in the context of the European legal system, first, the right to waive entitlement to data protection although not prohibited, is not protected against state intervention. Second, the proposed scope of rights does not fit into the European understanding of property, namely, that traditionally property law has been securing commerce, *i.e.* transfer, rather than preservation of the entitlement.

1. Lessig’s approach versus the doctrine of waiver of fundamental rights

The first European-centered criticism of Lessig’s approach rests on the assumption that, legally speaking, data protection is an element of the fundamental right to privacy as secured by Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms⁴¹ and therefore enjoys full protection of a fundamental right.⁴² As a part of such protection, it is an

³⁸ G. CALABRESI, A. D. MELAMED, *o.c.*

³⁹ *Ibid.*, p. 1105.

⁴⁰ *Ibid.* p. 1106, text in the square brackets added.

⁴¹ Hereinafter referred to as ECHR.

⁴² The relationship between privacy and data protection is too complicated an issue to be fully discussed within the limited scope of this paper.

established position of jurisprudence (*Mellacher* case)⁴³ and the literature that the ECHR does not protect a right to obtain remuneration for the waiver or sacrifice of a fundamental right, as in an individual cannot claim a violation when the state prevents him, e.g. via regulation, from waiving a fundamental right.⁴⁴

An alternative view is represented by, e.g. Paul De Hert and Serge Gutwirth.⁴⁵ They consider the categories of privacy and data protection against a background of a democratic constitutional state and as a result define them as two too distinct tools of state power control to be considered as one fundamental right.⁴⁶ Cuijpers argues that data protection is not a fundamental right. Therefore, freedom of contract has precedence over the rules of the 1995 EU Directive on processing of personal data, and the right to data protection may be waived or contracted around.⁴⁷

There has been no authoritative pronouncement by the European Court of Human Rights or any other authority directly deciding in favour or against classifying data protection (both in public *and* private sector) as a fundamental right. The jurisprudence of the European Court of Human Rights is clear on including data protection into the scope of Art. 8 ECHR protection of private life when public authorities are involved. The Court's interpretation of Art. 8 ECHR right to respect of private life is said to correspond "with that of the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which came into force on 1 October 1985 and whose purpose is "to secure ... for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy with regard to automatic processing of personal data relating to him" (Article

⁴³ **E.C.H.R.**, *Mellacher v. Austria* (1989) 12 E.H.R.R. 391.

⁴⁴ **O. DE SCHUTTER**, "Waiver of Rights and State Paternalism under the European Convention on Human Rights", *Northern Ireland Legal Quarterly*, 2000, No 51, p. 487, at p. 506.

⁴⁵ **P. DE HERT, S. GUTWIRTH**, "Making sense of privacy and data protection: a prospective overview in the light of the future of identity, location-based services and virtual residence in the Institute for Prospective technological studies", in: *Security and Privacy for the citizen in the post-September 11 digital age: a Prospective overview*, European Parliament Committee on Citizens Freedoms and Rights, Justice and Home Affairs (LIBE), 2003.

⁴⁶ **DE HERT and GUTWIRTH**, p. 134.

⁴⁷ **C. M. K. C. CUIJPERS**, "A private law approach to privacy; mandatory law obliged?" *SCRIPT-ed*, 2007, No 4(4), pp. 304-318.

1), such personal data being defined in Article 2 as “any information relating to an identified or identifiable individual”.⁴⁸ ... Art. 8 is applicable “where it [personal information – N.P.] is systematically collected and stored in files held by the *authorities*”⁴⁹ [emphasis added]. However, there is no similar ruling concerning ill data processing practices in private sector.⁵⁰ This partially can be explained by the nature of the European Convention as an international treaty creating obligations for its signatories, i.e. states. To rule finally on the applicability of Art. 8 to the private sector data processing, two issues of a more ground nature have to be decided first: whether Art. 8 of the Convention creates positive obligations for the contracting parties, and if it has horizontal effect.⁵¹ Although of a principal importance, this discussion is too big and does not fit into the limited scope of this contribution. However, if, as the author believes, the fundamental right to privacy comprises data protection *also* in dealings of private parties, transactions in which individuals waive their entitlement in personal data in return for remuneration or services are not enforceable on the level on the ECHR and therefore not guaranteed against ban by the individual Member States. Although that does not exclude the possibility of waiver, it has to be taken into account.

Another important remark that can be made at this point is that unenforceability of waiver is only a policy choice enshrined in the current jurisprudence of the European Court of Human Rights in Strasbourg. As any policy decision, it can be changed following numerous proposals to drop the idea of paternalistic state and let people trade their rights and thus take more charge. However, this change has not been made yet, unenforceability of waiver is the law of the day and has to be taken into account.

2. Lessig’s approach versus European property law principles

⁴⁸ See: **E.C.H.R.**, *Amann v. Switzerland* [GC], 16 Feb. 2000, App.No.27798/95.

⁴⁹ **E.C.H.R.**, *Rotaru v. Romania*, 4 May 2000, App. No. 28341/95.

⁵⁰ Although there is a series of E.C.H.R. cases dealing with data protection on business premises, intervening actors are still public authorities (e.g. **E.C.H.R.**, *Copland v. UK*, 7 Apr. 2007, app. no. 62617/00: public school authorities monitoring applicant’s e-mail and phone calls).

⁵¹ For a more detailed discussion on the horizontal effect of the ECHR see, e.g. **D. GOMIEN, D. HARRIS, L. ZWAAK**, *Law and Practice of the European Convention on Human Rights*, Strasbourg, Council of Europe Publishing, 1996.

The last, and probably most decisive piece of criticism of the value of Lessig's theory for Europe which this paper advances is that property rights defended by Lessig do not fit into the European framework of property law. The following analysis will demonstrate how.

To say that a certain understanding of property does not fit into the European idea thereof is a rather bold statement. Indeed, it would imply existence of a uniform approach to the concept of property throughout Europe. However, there is no such uniform approach to property. Each Member State determines the scope and regime of property rights independently. Besides purely national differences in defining and treating property, there is another major obstacle on the way to uniformity, *i.e.* common law-civil law divide. This allows different theories of property rights flourish simultaneously and take place in the property discourse which otherwise would be occupied by a statutory or case-law definition.

To reflect on the multiplicity of different types of property (also varying from one national legal system to another), Harris in his book *Property and Justice* develops a spectrum of the ownership interests ranging from a 'mere property' to 'full-blooded ownership'⁵². In case of a mere property, "the idea of property comprises the notion that something that pertains to a person is, maybe within drastic limits, his to use as he pleases and therefore his to permit others to use gratuitously or for exchanged favours. ... It embraces some open-ended set of use-privileges and some open-ended set of powers of control over uses made by others."⁵³ That has been also referred to as *erga omnes* effect or trespassory rule. An example of such a mere property right according to Harris' classification may be a right of a tenant with regard to the leased apartment. Although he cannot alienate the object of the right, he still may exclude even his landlord, the 'owner,' from entering the flat. This understanding is more characteristic of common law systems. At the upper end of the ownership stands so-called 'full-blooded ownership,' a relationship between a person and a resource when the person is free to do what he pleases with his own, "whether by way of use, abuse, or transfer"⁵⁴ To describe this type of the ownership

⁵² J. W. HARRIS, *Property and Justice*. Oxford, Clarendon Press, 1996, p. 27.

⁵³ *Ibid.*, p.28.

⁵⁴ *Ibid.*, p.29.

interest, scholars refer to Blackstone and his Commentaries where he expresses the idea of the full alienability.

Despite such a wide range of different understandings of property rights, as it has been shown earlier in this paper, efforts to overcome differences and develop a pan-European property law (although only in some sectors) have already been taken. Behind those efforts lies impressive work of comparative legal scholars who, after analysis of the property laws in the European national legal systems have arrived at the conclusion that “it will certainly be possible to find common thought patterns”⁵⁵. The analysis of this paper rests in particular on the work of professor Van Erp and his lecture *European and National Property Law: Osmosis or Growing Antagonism?*⁵⁶ He explains that such drastic differences between property rules of national legal systems are often a result of historical developments, the needs of legal practice, case law and academic legal analysis.⁵⁷ However, Van Erp continues, the differences are lying on the surface, on the level of technical rules, whereas more core norms and rationales – leading principles and ground rules – are shared and those are those core norms and rationales that have to be considered.⁵⁸ To evaluate how Lessig’s property rights fit into the European legal context, let us examine them against those leading principles and ground rules.

In Van Erp’s classification, leading principles of property law are “the filters through which a legal relationship must pass, before it can be characterized as a property right”⁵⁹ and not a personal (e.g. contractual) right. The leading principles are *numerus clausus* (content and number of property rights is limited, since property rights are the rights against the world with *erga omnes* effect) and *transparency* (given that they are against the world, others must be able to know about those property rights, when possession of an object is not decisive – by means of registration).⁶⁰ Transparency principle promises to be difficult but possible to respect in case of

⁵⁵ S. VAN ERP, “European and National Property Law: Osmosis or Growing Antagonism?”, 2006, p. 13.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* pp. 14-15.

propertisation of personal data. Since the possession of data is not obvious, some kind of registry of property rights in personal data similar to the ones applied in the area of intellectual property may be created. Lessig's property rules also seem to meet the *numerus clausus* and *erga omnes* classifications, since the entitlement protected by those property rules is against the world. However, so do the liability rules – the opposite of property rules in Melamed and Calabresi's (and Lessig's) classification.

However, the main obstacle for implementing Lessig's theory in Europe on its substance lies in the ground rules of property. According to Van Erp, they describe the consequences of the establishment of a property right and "focus on how property rights relate among themselves."⁶¹ These rules are: the *nemo dat* (or *nemo plus*) rule, according to which one cannot give away more than one has; the *prior tempore rule*, according to which the oldest property right has priority over a younger property right over one object; limited rights have priority over fuller rights, and protection rules such as the right to (re)claim the object of the property right.⁶² However, behind these principles and rules lie certain policy choices, in particular, the protection of commerce above protection of the original owner.⁶³ For instance, although according to *nemo dat* rule, one cannot give away rights which he did not have, it is counterbalanced by rules on third party protection. As Van Erp explains, a third party who acquired a right and paid for it in good faith, is often protected against the original owner, who claims his right of ownership.⁶⁴ Protection of a transfer seems to have priority over the entitlement in the European system of property law. Such rationale is not compatible with the principle division drawn by Melamed and Calabresi between property rules and liability rules based on the fact that the latter protected the transfer, whereas the former protected the entitlement.

The above analysis makes it legitimate to conclude that content-wise Lessig's instrumentalist theory does not fit into the European legal context because the scope of rights in personal data it advocates for is not what is meant by property in Europe. In case property rights

⁶¹ *Ibid.* p. 16.

⁶² *Ibid.* pp. 16-17.

⁶³ *Ibid.* p. 17; see also on the principle of predictability and protection of commerce **M. J. MILO**, *o.c.*, p. 587.

⁶⁴ **S. VAN ERP**, "European and National Property Law: Osmosis or Growing Antagonism?", 2006, p. 16.

in personal data are introduced in Europe, they will not be able to play the role of that engine which brings into action Lessig's general system of data protection comprising law, market, and technology. Ironically, what does approximate the function of such an engine is already existing system of data protection via regulation. If we recall the two core elements of Lessig's property rights, they are there to protect entitlement rather than transfer, and simultaneously, leave a right holder an option to waive the entitlement. The question of waiver being considered earlier, this is the general system of protection of human rights and of data protection in particular that secures the entitlement and prevents illegitimate transfer.⁶⁵

IV. Conclusions

The ambition behind this paper was to test the viability of Lessig's instrumentalist theory of propertisation in the context of the European legal system. For the purposes of the analysis, Lessig's propertisation argument was considered from two angles: on its face and on substance. The content of the proposed property rights left aside, it was established that propertisation of personal data in Europe is a formal legal possibility, both on the level of the European Union and individual Member States. Although, only the former may introduce propertisation altering the current general approach to data protection. The substantive analysis of Lessig's argument looked deeper into the actual content of the proposed rights. It was established that although propertisation of personal data in the EU is a legal option, it is suspect since it implies the possibility of waiver of the right to data protection, whereas such waiver is not enforceable in the system of ECHR against state intervention. The last, and probably most decisive piece of criticism of the value of Lessig's theory for Europe was that property rights defended by Lessig do not fit into the European framework of property law. Despite all differences between technical rules of the national property law systems, characteristic of the European approach to property is that protection of a transfer seems to have priority over the entitlement in the European system of property law. Such rationale is not compatible with the principle division drawn by Melamed and Calabresi between property rules and liability rules based on the fact that the latter protected the transfer, whereas the former protected the entitlement. Therefore, content-wise Lessig's instrumentalist theory does not fit into the European legal context because the scope of rights in

⁶⁵ "Illegitimate" since prohibition of transfer of personal data in the information society is impossible.

personal data it advocates for is not what is meant by property in Europe. In case property rights in personal data are introduced in Europe, they will not be able to play the role necessary for Lessig's general system of data protection to function.