

# On the Application Dilemma and Coping Path of Informed Consent Rules

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## Abstract

Under the background of the promulgation and implementation of the Civil Code of the People's Republic of China (hereinafter referred to as the Civil Code), the informed consent rules are valued by most people as the key rules of information collection and processing. However, given that the informed consent rules are only general provisions in writing, they cannot regulate the specific circumstances of the law, resulting in difficulties in the specific application process. Therefore, in order to more reasonably apply the principle of informed consent to enhance the national security of personal information, breaking the dilemma of informed consent rules will be the inevitable focus and difficulty to be solved in the field of personal information protection in our country. And by perfecting the network service provider notice obligation and some measures, will be able to help the optimization of relevant standards, effective information overall the rights and interests protection and the rights and interests of information managers, further handle personal information security and the relationship between our national big data background, to promote our national application data and database data of rapid economic and social development.

## Keywords

**Personal Information Protection; Informed Consent Rules; Applicable Dilemma; Coping Path.**

## 1. Introduction

In the construction of the personal information protection system stipulated by the current law, the informed consent rules have been regarded as the top priority of personal information protection. The reason why the informed consent rule is so important is that it allows the information subject to manage and freely choose their personal information. However, when the era of big data came, the application of informed consent rules, which should be important on the Internet was not perfect and controversial in many aspects. Therefore, the establishment of informed consent rules to meet the development requirements of big data is an urgent problem to be solved in the security of personal information.

By exploring the basic theory of informed consent rules, the thorough study of the informed consent rules, summarizes the applicable difficulties of informed consent rules in today's information age, and try to provide some ways to adapt to the informed consent rules, so that the informed consent rules to guarantee the function of the information subject personal information.

## **2. Basic Theory of Informed Consent Rules in Personal Information Protection**

### **2.1. The Connotation of the Informed Consent Rules**

Informed consent is the basic exercise method of the right to personal information, and the maintenance of the right to personal information cannot be separated from informed consent. Under the wave of big data analysis, the protection of personal information is becoming more and more prominent. In order to improve the protection mechanism of personal information, China introduces the principle of informed consent, and the latest Civil Code and the Personal Information Protection Law both choose to guarantee and manage personal information under the guidance of this principle.

#### **2.1.1. Connotation of the Informed Consent**

"Informed" refers to the information processing to inform obligation, according to article 1035 of the civil code, information processing clearly inform the premise of the obligation should be "open processing information rules" and "express the purpose, way and scope of the information", the presumption of information subject of informed and informed.

"Consent" as a expression of meaning, has a normative meaning. Article 13 of the Personal Information Protection Law stipulates that "obtaining individual consent" is one of the preconditions for personal information processing; Article 14 stipulates that the information processor shall fully assume the obligation of notification to the information subject, the information subject informs the information processor, and when the actual content changes, the information processor shall obtain permission again; Article 15 and Article 16 stipulate the information subject to exercise the right to withdraw the license and the effect.

#### **2.1.2. Concept of the Informed Consent Rules**

The principle of informed consent originated in the traditional western medicine category of clinical science in the middle of the last century. An informed consent was born, as it requires that medical workers must respect the free will of patients and subjects in the life science research and implementation of the healthcare industry. After the middle of the 20th century, the Internet and database data technology developed rapidly, and the principle of informed consent gradually weakened in the inherent space of medical clinical, and began to play its function in the space of personal information protection.

From the perspective of personal information protection, informed consent rules, also known as "informed consent rules", refers to the information processor in the processing of information content, must fully inform the relevant information subject on the relevant information content is obtained, processing and use, and solicit the relevant information subject explicitly consent rules. This rule mainly includes two requirements: one is the notification requirement that the information processor must inform the information subject how the personal information will be processed to ensure that the information subject knows the personal information in the future, and the consent of the information subject before the information processing activities.

### **2.2. The Legal Basis for the Existence of the Informed Consent Rules**

In recent years, there have been many criticisms and controversies about the informed consent rule, but the rule is generally accepted in both legislation and implementation. Consensus cannot realize not only reflect the uneven measurement of rights and interests in the system setting, but also highlight the lag of the current legal design and application. The exploration and analysis of the legal basis of the informed consent rule is the key to improve the practice of the rule. It can not only provide legal support for adhering to the rule, but also provide a perfect way.

### 2.2.1. Deep Liberal Thought

Locke believes that man is his own master, is the owner of his own intentions and work management. This view liberates people's minds and hopes that individuals can realize themselves, manage themselves and specific things related to themselves, and also clearly lists personal information as the scope of "specific things related to themselves".

Under Kant's philosophical view of "man is a purpose", people think independently and rationally, can think about the purpose of their own activities, and take their intention through careful observation and reflection. Respect an independent person, we should give him enough space and the right to choose, and consciously strive to achieve the ability of independent choice.

As can be seen from the above, the informed consent rules originated from the individual freedom of Locke and Kant, and following the informed consent is to identify and affirm the individual autonomy and personal dignity.

### 2.2.2. Information Asymmetry Theory

In today's society, different subjects have different understandings of information, which leads to the unbalanced and incorrect distribution of relevant information in the basic structure of today's society. In the mutual communication between the information processors and the relevant information subjects, considering that the information processors have the advantages of core technology, information and resources, so the relevant information subjects also have corresponding disadvantages. The relevant information subjects are not so easy to know how to deal with the specific situation with the help of various abilities outside of the information processing ability, so there is no way to use the information processing ability to predict the behavioral consequences.

If you want to minimize the loss caused by the relevant information asymmetry in the protection of personal information, a more reasonable protection and control mechanism should be needed, including the application of the informed consent rules. With the help of the obligation of information collectors to disclose truthfully, the basic structure of relevant information should be further improved to understand the extent that relevant information can be used, and then change the situation that both parties feel unequal due to the asymmetry of relevant information.

### 2.2.3. Theory of Self-determination on Information

The theory of information self-determination was proposed by German scholar Stmler in 1971. He pointed out that information subjects can decide the extent to which people around them know their own thoughts and activities. The specific connotation of the right of information self-determination is that the information subject belongs to the ownership subject, and the personal information belongs to the object of ownership. This right is mainly reflected in two different forms: first, the relevant information subject enjoys the database data dividend of the era of big data, reaches an agreement on how to deal with what happens if it is processed, and accepts the consequences of the relationship with authorization and information processing; second, the other, the relevant information subject strictly protects its own information security and does not agree to deal with it, while the information processor cannot process the relevant information.

Just as free law, the right to self-determination of information is by no means an absolute right beyond the legal constraints. When the way of processing personal information has a specific situation that is not protected by law, the basic opinions of the relevant information subject can be exempted. The right to information self-determination is not about restricting people's thinking, making it difficult to spread information and making relevant information cannot be copied, but what are the derivative conditions for the choice of informed consent. The informed consent mode is the right of the notification of the information collector and the consent of the

information subject to constitute the selection of reasonable relevant information, so as to ensure the fact that meaning is conveyed to the public, so as to more effectively authorize others to choose personal information more effectively.

### **3. Dildilemma in the Application of Informed Consent Rules**

Informed consent rules encounter many problems at present, and the macro factors that cannot give full play to their original functions are the change of The Times. However, by observing the micro factors behind the macro factors, we can see that the difficulties they encounter are reflected in the following three points: there are defects in the notification method, the effectiveness of consent is insufficient, and the operation cost of the rules is too high.

#### **3.1. There are Defects in the Notification Method**

##### **3.1.1. Formatted Notification by Operators Reduces Users' Right to Know**

Privacy policy is often a model formulated by Internet operators in advance, which should be determined as a format agreement in nature. Users' right to negotiate decisions is very limited, and it cannot reverse the phenomenon of unfair identity between the two. In fact, many operators seem to have the duty to inform, but there is a big gap between the professional and lengthy privacy policy provisions and the limited cognitive ability, so for most Internet consumers, it is impossible to fully know how their own information is being collected and used. The formatting of notification avoids the user's demand for the right to know, and only forms a logical structure outside. As a result, the situation of information separation occurs internally, and the users' right to know cannot be realized with the help of the operators' performance of the notification obligation.

##### **3.1.2. "Information Asymmetry" Harms the Basis of Consent**

The current law stipulates that Internet operators can openly collect, express the purpose, means and scope of the adoption of rules, and obtain the consent of the collected persons on the existing basis. From a certain point of view, the legal protection of private information is that the two parties learn from the information about the access and utilization of private information should be generally equal. However, in the actual situation of private information acquisition, compared with the collection, the party involved in the collection will always have more information, can fully grasp the access and use of information, and have a better understanding of the relevant risks. Even if the national legislation to the information disclosure system added the former obligations and responsibilities, let it to the other party is access to information specific way, main purpose, possible consequences are simple, but because of its, the privacy terms provided by lengthy, tedious, ordinary people often unable to understand, also can not save the contracting parties substantially huge information gap.

#### **3.2. Insufficient Validity of the Consent**

##### **3.2.1. The Paradox of Network Information Protection**

The principle of informed consent originates in the era of small data, and its theoretical derivation and institutional construction will inevitably be unrestricted. However, these specific situations gradually disappear in the era of big data and expand into the "informed consent dilemma". In the era of big data, considering the today's society mass information and transaction speed, information subject is not so easy to combine personal freedom to make effective and complete agreement, even if the information collectors have obtained the subject of information related permission, also because of the indifference of the information subject to authenticity further reduced. This violates China's current Cybersecurity Law, the Law of the People's Republic of China on the Protection of Consumer Rights and Interests and other relevant laws and regulations.

Therefore, the current Internet protection policy for personal information has the following paradox: on the one hand, since most information collectors assume the obligation to disclose the information truthfully, privacy agreements can be seen everywhere; on the other hand, most information subjects still deeply feel the trouble of personal information leakage. Therefore, if the collection of illegal content is excluded, a large part of the information subject obviously does not know what is "agreed to". As the expert said: In the information world, the individual's control is extremely weak and small, and the individual's consent is gradually proved to be unable to control the flow and life cycle of personal information, and cannot complete the protection of individual rights.

### **3.2.2. Multi-link Data Flow Further Weakens the Validity of Consent**

Many of the content of the computer user agreement covers the application authorization e-commerce platform operators to the third party database data transmission license, but if all the relevant licensee meet such conditions, the effect may meet the relative nature of the contract and decision-making process information inadequate double barriers, cannot meet the requirements of clear informed consent and goals.

First of all, determine the content of the computer selection contract authorization and from the database transmission data conditions form the legal effect, not limited to electronic trading platform operators and computer users, there are the corresponding sex, performance in the third party to rely on the transfer necessary conditions, obtain or exercise certain rights in this contract. The key is that, relative to the agent platform and computer users, the legal remedy of third-party related information may be limited by the contract. If such reauthorization is not controlled, on the one hand, it will violate the right of computer users to free choice and consent, and on the other hand, it is not conducive to the accountability of victims' personal information infringement.

Second, because the content of the computer user agreement awareness and attention is low, the content of the recipient in most cases is impossible, there is no way to know that he from personal data database direct authorized purposes, or for what purpose, so in the case of insufficient information expressed the meaning is flawed. And in another perspective, the disciplinary behavior of computer users themselves lacks similar assumptions, given that the authorized third parties have not yet been specialized. If the necessary conditions for reauthorization are established, it means that the operators of e-commerce platforms have replaced the computer users and have become the absolute control of the data in the database. Similarly, computer users will be somewhat deprived of their proprietary rights to data. If the national legislation does not control these powers, it will seriously destroy the balance of rights in the computer selection contract. However, if the relevant law requires that consent from computer users should be required in all major links, it is feasible to ensure full consent and protect the public will of relevant information about computer users, but it will not be infeasible due to high transaction costs.

## **3.3. The Operation Cost of the Rules is Too High**

### **3.3.1. The Cost of Information Controllers and Information Subjects is Too High**

Relevant information can be obtained by the controller and basically composed of relevant information. In most cases, the consent of the subject of the information must be obtained first. Those who are able to control the information must bear a higher utilization rate of funds and the cost of computer knowledge products than in the past to deal with all kinds of information subjects. From making informed consent and sent to the specific address, learning each related information, clear the basic composition of relevant information, how to collect and classify information, the series of specific process, not only must bear the necessary computer technology and capital, but also face the huge losses. Of course, the information related to personal privacy cannot be compared with the cost of economic development products, and



even if the economic cost is caused by the application of the informed consent rules, the basic principles of informed consent cannot be abandoned and destroyed. However, the principle of informed consent may still encounter some financial difficulties in the protection of personal information.

### **3.3.2. The Social Costs of Informed Consent are Too High**

The social cost of informed consent refers to the cost of economic development products because the relevant information cannot flow freely. Personal information is considered to be a sign that cannot identify the special basic composition, and has a very close and direct connection with the personality rights and interests of a natural person. In addition, personal identity information has a high social and economic value in today's society, and has become the most important tool to deal with interpersonal relationship, and gradually has the public attribute of today's society. It can be seen that personal information also has the current personal attribute and social attribute, resulting in fierce competition over the absolute control of the relevant information subjects: on the one hand, the relevant information of basic consent, the economic development cost of obtaining consent, and the problem of processing personal identity information according to the maintenance of social public interests; on the other hand, considering the use of database data is not so easy to predict to what extent consent can affect, which causes the sharing of information resources cannot be increased.

## **4. Coping Path to the Dilemma of the Informed Consent Rule**

### **4.1. Improve the Notification Obligation of Network Service Providers**

#### **4.1.1. The Network Service Provider Shall Strictly Abide by the Matters Notified by the Law**

Notice of specific content must cover the personal identity information of the name or date of birth and the specific way of message, how to deal with the information content, processing purpose, processing, information processing and storage time, in the most efficient, the most specific way to let everyone enjoy the rights of the relevant laws. It shall not only include the general information, but also inform the recipient of the address or the date of birth and the specific delivery method of the message. If the information content should be addressed, the address or the date of birth and the specific consent of each person. If the recipient, the consent of the recipient must be obtained.

#### **4.1.2. Network Service Providers Shall Inform Them in Strict Accordance with the Form Prescribed by Law**

First, make sure that the notification text format should be particularly prominent and easy to find and read. The information processing party must strictly abide by the relevant provisions of the Information Security Technology and Personal Information Security Code, and link the specific personal information security policies to the home page of the smartphone open page and the home page of the social network platform.

Second, the notification language must be concise and easy to understand, in order to further improve the reading experience. Notices and matters of attention should be listed separately and not mixed with other matters, so that readers can be clear at a glance. Over the last decade, global academia and industry have recognized how to address the misleading, incomprehensible, and poorly readable problems in the collection of personal information. Telephone notifications, spreadsheets, charts, small labels and other specific information forms of standardized disclosure, shorten the length of the article, so that the collection of personal information is easier to understand, the specific content is more intuitive and prominent.

Third, the specific forms of notification should be innovative to meet the reasonable demands of different groups of people. Considering the different needs of different populations and

different systems of knowledge, the appropriate degree of details, standardization and some problems that processing personal information may cause also vary. For example, law enforcement personnel and judicial personnel require detailed content and accurate description; generally, the specific content of personal information is short and concise, concise and easy to understand. The existence of multiple needs makes the collection of personal information unable to coordinate the relationship between clear and specific, concise and all-round, popular and professional. In order to achieve all-round results, we must respond to the reasonable demands of different groups of people, and the information processor must innovate in the specific way of thinking. In addition, the collection of personal information should have a clear purpose and should pay attention to specific circumstances to ensure that the relevant information does not constitute false consent in essence and is the most authentic and effective.

## **4.2. Agree, the Rules are Substantive**

### **4.2.1. Consent Must Be in Accordance with Personal Wishes**

Since there is no way to get rid of the dependence on material information, the dividend benefit of abandoning information is passive, but it is not mandatory and still voluntary consent, unless the relevant information is clearly beyond demand. How to solve this problem? This paper holds that the availability and use of relevant information is the most basic condition for the emergence of database data dividend income, either to give the necessary relevant information or cannot obtain the relevant information. With the passage of time, digital development intervention in the rapid development of economy and society has become a reality and a single choice, and the related information right will disappear virtually. At this time, pushing people into the digital Internet wave is closely related to the information controller, but there is no way to get rid of and accept the attributes of today's society itself.

### **4.2.2. Consent Must Be Built on an Informed Basis**

Voluntary must rely on an informed basis, computer users must have a comprehensive understanding of the availability, use and transfer of personal identity information, and the complete information of the expression, which can be called voluntary consent. Knowing or not depends not only on the extent to which the controller of the database can fulfill the notification obligation, but also on the potential of individuals to absorb and absorb relevant information. The reason for this is that the relevant information technology is advanced and targeted, and the digestion and absorption potential of each person who can control the specific content of the database data is also affected by various factors such as age. In most cases, the controller does not know the specific situation of the basic composition of personal identity information, let alone the ability to digest and absorb personal information. Therefore, it is not practical to separate the database data without making sure of the difference of the controller's ability to absorb the personal identity information according to the content of the computer user agreement. The judgment of whether you are informed should be based on the content of the information that can be clearly informed, and on the basis of understanding the thinking ability of the information subject.

## **4.3. Reduce the Economic Costs Incurred by Consent**

### **4.3.1. Reduce the Cost of Informing Consent from the Technical Path**

The protection of relevant information should not only be based on the clear provisions of relevant laws, but also be inseparable from the awareness of social responsibility of network service providers. Internet service providers must overcome the limitations of relevant information and solve the problem of information cost from the perspective of technical comparison. In most cases, Internet service providers will protect relevant information through the form of setting privacy policies. In terms of defining personal privacy, privacy rights are

generally divided into two categories: ordinary authority and sensitive authority. In some ways, ordinary permission is the most common administrator authority, which can be directly authorized during installation; sensitive permission is directly authorized from the pyramid structure when installing other permissions. With obtaining personal privacy information, can take the use of dynamic direct authorization control mechanism, the computer user can communicate and interaction in the popover -- whether you choose euphemistic agree or refuse, when the computer user refused a permission administrator, he will no longer given to refuse this right, to limit his access to application software. This can not only facilitate the collection and analysis of network service providers, but also ensure the true meaning of the basic composition of the relevant information. In theory and practice, the application of software must also comply with the system provisions when collecting personal identity information. Network operators of application software must strictly abide by the basic principles of administrator authority, and shall not obtain information beyond the functions and uses of the retrieval system itself. In this way, relevant information can mainly constitute the protection of personal privacy, and can also can reduce the product cost of information collectors to obtain personal identity information.

#### **4.3.2. Coordinate the Service Function of the Information Collector and the Choice of the "Consent" of the Information Subject**

With the passage of time and the emergence of the sharing economy model, sharing information content has become a new and distinct fashion and trend. While emphasizing the protection of personal information, we should also consider the free flow of information content. However, in the specific process of improving the informed consent rules in the protection of personal information, all parties should have relatively reasonable core values for the basic composition of relevant information and information collectors, and take into account various factors in the process of implementation. In the whole specific process of obtaining and adopting the use of information content, information collectors, users and information subjects are involved. Information subjects basically represent a part of their own greater interests. If within the scope of personal information protection, the commonly used informed consent rules are designed to protect the personal dignity of individuals, but information collectors will assume more serious obligations and responsibilities, which is not conducive to the safety of social public resources. In today's society, if too much emphasis on information access and user rights, dilute consent rules, narrow the scope of consent rules, to seek personal identity information caused by social resource benefit maximization, it will improve the legal risk of access to and selection of information and moral unrest in today's society, seriously violated the rights of personality, the object or information main body.

## **5. Conclusion**

To sum up, informed consent rules are the most appropriate rules for people to protect their legitimate rights and interests, prevent certain risks and protect greater interests. It contains the profound value of rights and the people-oriented humanistic concept, and is the embodiment of the informatization of autonomy in the governance system and governance ability. The potential differences of relevant information promote the logical self-consistency of equality between the two subjects. Many disputes over the existence and abolition of informed consent rules stem from the collision between the interests of personal information protection and the selection of relevant information circulation. The point of this paper is that both the protection of personal information and the circulation and use of information are positions of positive value, and the circulation of relevant information must be based on the protection of personal information, so as to achieve the balanced development and harmony between the two.



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