PUBLIC OR PRIVACY?
DUAL PROCESS THEORY AND FAIR USE OF DISCLOSED PERSONAL INFORMATION IN CHINESE JUDGMENTS*

LOU Chanhou**

Table of Contents

* Thanks to the scholars, especially Professor Cass Sunstein, for the cross-disciplinary discussion on "Nudge Theory" from the perspective of "Dual Process Theory" at the 53rd Administrative Law Symposium of the Duke University Law Journal on March 3, 2023.

** LOU Chanhou (卢震豪), Ph.D. Candidate at Tsinghua University School of Law, Visiting Scholar at Duke University School of Law, luzh20@mails.tsinghua.edu.cn.

PUBLIC OR PRIVACY? DUAL PROCESS THEORY AND FAIR USE OF DISCLOSED PERSONAL INFORMATION IN CHINESE JUDGMENTS

LOU Chanhou

Abstract

Current academic discourse in China predominantly centers on the fair use of personal information within the frameworks of either the Civil Code or the Personal Information Protection Law (PIPL), often overlooking the coordination challenges that arise between these two legislative instruments. Such an oversight complicates the statutory interpretation of contentious matters such as "fair use" versus "post-hoc refusal" concerning disclosed personal information. This gap in understanding is evident in judicial divergences observed in cases involving the secondary publication of judgments, such as the Yi Case and the Liang Case. To address this lacuna, this paper proposes the integration of cognitive science's "Dual Process Theory" into legal studies. The theory provides a nuanced understanding of how various actors—including judges, platforms, users, and information subjects, as well as the legal frameworks of the Civil Code and the PIPL—contribute to shaping a network focused on the fair use of disclosed personal information. The paper posits that while "fast fair use" under the PIPL can counter "post-hoc refusal," "slow fair use" under the Civil Code cannot. Through the cognitive node and the judicial "Four Factors," the actors interact and construct their own roles in this network. The Dual Process Theory offers an empirical lens to understand behavioral preferences in the secondary publication of personal information, such as the trend of excessive deletion of personal information from judgments, and allows for the refinement of intermediary factors to create a positive feedback mechanism.

Keywords: Personal Information; Fair Use; Dual Process Theory; Public Disclosure of Judgments

I. INTRODUCTION

In China, numerous legal databases and credit reporting agencies have taken proactive measures to remove personal information from their repositories contained in judicial rulings. Despite the cognizance that such expungement could impair user experience and thus precipitate user attrition—thereby impacting commercial profitability—these entities elect this course of action.[1] Additionally, "China Judgments Online," a platform administered by the Supreme People's Court of the People's Republic of

[1] For instance, *Faxin* (法信) commercial legal database, whose copyright is held by the People's Court Press Co., Ltd.—a state-owned enterprise directly affiliated with the Supreme People's Court of the People's Republic of China—has taken measures to anonymize the names of the parties involved in the judgments. Additionally, the database omits the names of the judges and the courts responsible for rendering these decisions. *See* FAXIN, https://www.faxin.cn/index.aspx (last visited Oct.28, 2023). Similar anonymization practices are also employed by other platforms, such as Wolters Kluwer (威科先行) Chinese legal database. *See* WOLTERS KLUWER, https://law.wkinfo.com.cn/ (last visited Oct.28, 2023).

China and frequently utilized by enterprises for the secondary usage of judicial decisions, has withdrawn numerous such rulings.[2] These practices can be largely ascribed to the compliance risks stemming from personal information protection regulations in China.

To illustrate, a credit reporting platform republished a ruling, referred to here as Judgment X, involving an individual named Alex. Subsequently, a search query using Alex's Chinese name would grant access to Judgment X on the platform. Objecting to this secondary usage, Alex instituted legal proceedings against the platform, asserting the unauthorized use of his personal information from Judgment X. The local judiciary concurred with Alex's stance, issuing a directive, termed here as Judgment Y, which mandated the platform to cease the republishing. However, this ruling faced academic scrutiny from scholar Bob, who cited Judgment Y in a published article within a specialized academic journal. In retaliation, Alex initiated a follow-up lawsuit against the journal, contending that his personal information from Judgment Y had been used in the article without his explicit authorization. This empirical vignette, derived from extant Chinese legal cases,[3] accentuates the intricate complexities inherent in adjudicating the legitimate reemployment of personal information divulged in Chinese judgments. These complexities engender substantial impediments in formulating reasonable expectations, thereby heightening compliance risks.

Due to the complex and lengthy privacy policies on online platforms, the legitimacy of user consent for personal information is being questioned.

---

[2] Unlike *Faxin*, which operates with a commercial profit motive, *Zhongguo Caipan Wenshu Wang* (中国裁判文书网) [Chinese Judgments Online] is a government-operated platform directly regulated by the Supreme People's Court and is freely accessible to the public. Therefore, third parties obtain judgments from this platform and exploit them for their own business use. *See* CHINESE JUDGMENTS ONLINE, https://wenshu.court.gov.cn/ (last visited Oct.28, 2023). On November 21, 2023, the General Office of the Supreme People's Court issued a notice titled "Regarding the Construction of the National Courts' Judgment Database," which mentioned that "the National Courts' Judgment Database is planned to be operational online in January 2024, supporting the national court staff in searching and retrieving judgments through a specialized network for four-level courts." Although this judicial policy document does not specify whether the existing China Judgments Online will be replaced, some believe that the "National Courts' Judgment Database" mentioned in the document is different from "China Judgments Online", as the former is only accessible to judges, while the latter is open to the public. This judicial policy document to some extent explains the reasons behind the reduced rate of judgment disclosure on China Judgments Online. See Zuigao Renmin Fayuan Bangongting Guanyu Jianshe Quanguo Fayuan Caijue Wenshu Ku de Tongzhi (最高人民法院办公厅关于建设全国法院裁判文书库的通知) [Notice on the Construction of the National Courts' Judgment Database] (promulgated by the Gen. Office of the Sup. People's Ct., Nov.21, 2023) (China).

[3] Liang Mo Su Beijing Huifa Zhengxin Keji Youxian Gongsi Wangluo Qinquan Zeren Jiufen An (梁某诉北京汇法正信科技有限公司网络侵权责任纠纷案) [Liang v. Beijing Huifa Zhengxin Technology Co., Ltd.], (2019)京0491民初17247号 (Beijing Internet Ct. 2019); Beijing Shi Di Si Zhongji Renmin Fayuan (北京市第四中级人民法院), (2021)京04民终71号 (Beijing Fourth Intermediate People's Ct. 2021). Yi Mo Su Suzhou Berta Shuju Jishu Youxian Gongsi Renge Quan Jiufen An (伊某诉苏州贝尔塔数据技术有限公司人格权纠纷案) [Yi v. Suzhou Berta Data Technology Co., Ltd.], (2018)苏0591民初2244号 (Suzhou Industrial Park People's Ct. 2018); Jiangsu Sheng Suzhou Shi Zhongji Renmin Fayuan (江苏省苏州市中级人民法院), (2019)苏05民终4745号 (Jiangsu Suzhou Intermediate People's Ct. 2019); Yi Mo Su Suzhou Daxue An (伊某诉苏州大学案隐私权纠纷案) [Yi v. Suzhou University], Jiangsu Sheng Suzhou Shi Huqiu Qu Renmin Fayuan (江苏省苏州市虎丘区人民法院), (2023)苏0505民初8240号 (Jiangsu Suzhou Huqiu District People's Ct. 2023).

As articulated by Wendy Gordon, the market's failure, particularly in relation to the ostensible free will of consumers, has broadened scholarly discourse to encompass new forms of legitimacy, such as "fair use" as delineated in United States copyright law.[4] Likewise, scholars have argued for theories that could legitimize the processing of personal information even without individual consent. For example, American scholar Helen Nissenbaum proposed the "Contextual Integrity Framework," [5] and Salome Viljoen critically deconstructed the "Data-Individual Mediation" (DIM) with her "Relational Theory."[6] In Chinese academia, Cheng Xiao was one of the early scholars to discuss this concept in relation to the Civil Code of the People's Republic of China ("Civil Code"),[7] terming it "fair use of personal information."[8] Lou Chanhou has further argued in previous works that Chinese judges' understanding of fair use of personal information may stem from the doctrine of fair use in copyright law and has proposed a "dual-list model" in the Civil Code to validate the fair use of personal information.[9] However, these early Chinese theories have not yet addressed the "coordination issue" between the Civil Code and the Personal Information Protection Law of the PRC ("PIPL"),[10] as they have not considered that the subsequently enacted Personal Information Protection Law, centered on Article 13, has provided normative material for the fair use of personal information.

As judicial practice reveals divergent opinions on whether "the secondary public disclosure of judicial decisions by commercial platforms constitutes fair use of personal information," academia has started to focus on scenarios where personal information is used without consent even when it has been publicly disclosed. Since both of the aforementioned laws grant data subjects the right to refuse ex post, a legal question arises: Can third parties like business platforms make fair use of disclosed personal information in published judgments, even if the individual explicitly

---

[4] Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 8 COLUM. L. REV. 1600 (1982).

[5] HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY AND THE INTEGRITY OF SOCIAL LIFE (2009).

[6] Viljoen critiques the "Data as Individual Medium" (DIM) theory, which is based on either human dignity or property rights, in favor of a "Data as Democratic Medium" (DDM) theory grounded in social relations. As a result, the consent rules that are attached to DIM are deconstructed. *See* Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573 (2021).

[7] Minfa Dian (中华人民共和国民法典) [Civil Code of the People's Republic of China] (promulgated by the 13th Nat'l People's Cong., May 28, 2020, effective Jan.1, 2021) (Chinalawinfo).

[8] Cheng Xiao (程啸), *Lun Woguo Minfa Dian Zhong de Geren Xinxi He Li Yong Zhi Du* (论我国民法典中的个人信息合理使用制度) [*On the Fair use of Personal Information in China's Civil Code*], 4 ZHONGWAI FAXUE (中外法学) [PEKING UNIVERSITY LAW JOURNAL] 1001 (2020).

[9] Lou Chanhou (卢震豪), *Woguo Minfa Dian Geren Xinxi Heli Shiyong de Qingxing Qingdan yu Pinggu Qingdan Yi Douyin An Wei Li* (我国〈民法典〉个人信息合理使用的情形清单与评估清单——以"抖音案"为例) [*Scenario Checklist and Evaluation Checklist of the Fair use of Personal Information in China's Civil Code—Taking the "Douyin Case" as an Example*], 11 ZHENGZHI YU FALÜ (政治与法律) [POLITICAL SCIENCE AND LAW] 136 (2020).

[10] Geren Xinxi Baohu Fa (中华人民共和国个人信息保护法) [Personal Information Protection Law] (promulgated by the Standing Comm. 13th Nat'l People's Cong., Aug. 20, 2021, effective Nov. 1, 2021) (Chinalawinfo).

refuses afterward? In other words, can an individual's post-hoc refusal overrides a third party's fair use?[11]

Regarding this issue, scholars like Zhang Xinbao advocate an "irreversible" stance, asserting that post-hoc refusal generally cannot overturn fair use in the PIPL.[12] However, their argument predominantly focuses on the PIPL, neglecting the "coordination issue" with the Civil Code. To elucidate, Article 1036.1.2 of the Civil Code consolidates the provisions of Article 13.1.6 and Article 27 of the PIPL within the same clause. Specifically, it categorizes the concept of "post-hoc refusal", akin to Article 27, as an exception to the "fair use" provision paralleled in Article 13.1.6. Thus, from a systemic interpretation perspective, "post-hoc refusal" in Article 1036.1.2 of the Civil Code serves as an exception to the "fair use" sub-clause. This implies that the view which suggests the exceptional "post-hoc refusal" cannot oppose the "fair use" *per se* in the Civil Code encounters a logical inconsistency in doctrinal legal studies. Cheng Xiao may have recognized this issue, initially advocating for the "irreversible" stance in conjunction with the PIPL but later changed his view.[13] He now argues that post-hoc refusal applies exclusively in cases where individuals

[11] Article 1036.1.2 of the Civil Code stipulates the concept of "fair use" of publicly disclosed personal information, stating: "In the processing of personal information, the actor does not bear civil liability under the following circumstances: ... (2) Reasonable processing of information that the natural person has disclosed themselves or that has otherwise been lawfully made public, except in cases where the natural person explicitly refuses or where the processing of the information infringes upon their significant interests; …" The PIPL continues similar provisions but divides the content into two separate articles, namely Article 13.1.6 and Article 27.

[12] Article 13.2 of the PIPL stipulates that: "In accordance with other relevant provisions of this law, the processing of personal information shall obtain individual consent; however, consent is not required in circumstances provided for in Items 2 to 7 of the preceding paragraph."This explicitly incorporates the principle of fair use without consent within the statutory framework. Thus, the legal issue here is the interplay between the fair use and the post-hoc refusal in the context of disclosed personal information, so as to target the interpretation of Article 13.1.6. Zhang and Chang selectively overlooked Article 13.1.6 from the 7 items and stated that: "When the processing complies with Article 13.1.2 to Article 13.1.5 and Article 13.1.7 [Author's Note: Article 13.1.6 is not mentioned] of the PIPL, individuals do not have the right to refuse. As for other situations involving the processing of personal information in judicial decisions, they do not fall under this exception." It implies that Article 13.1.6, which delineates post-hoc refusal rights, diverges distinctly from the other six criteria outlined in Article 13.1. Zhang and Chang argue that while Articles 13.1.2 to 13.1.5 and Article 13.1.7 collectively form an affirmative framework that does challenge post-hoc refusal, Article 13.1.6 is uniquely positioned. The critique of this research centers on Zhang and Chang's insufficiently nuanced interpretation of Article 13.1.6 and Article 27 of the PIPL, along with Article 1036 of the Civil Code. This oversight suggests a need for a more comprehensive analysis within his research to fully articulate the implications of these statutory provisions. See Zhang Xinbao (张新宝), Chang Yusha (昌雨莎), *Yigongkai Caijue Wenshi Zhong Geren Xinxi de Baohu yu He Li Liyong* (已公开裁判文书中个人信息的保护与合理利用) [*Protection and Fair use of Personal Information in Publicized Judicial Decisions*], 3 HUADONG ZHENGFA DAXUE XUEBAO (华东政法大学学报) [JOURNAL OF THE EAST CHINA UNIVERSITY OF POLITICS AND LAW] 6, 20 (2022).

[13] "In situations where the processor may not handle publicized personal information after explicit refusal by the individual, such scenarios are not applicable to the conditions stipulated in Article 13.1.2-7 of the PIPL. That is to say, the processor does not need to obtain the individual's consent when handling lawfully publicized personal information, but the individual may explicitly refuse. If the processor's handling of personal information was not based on individual consent in the first place, then an explicit refusal by the individual will not affect the legality of the processing behavior." *See* CHENG XIAO (程啸), GEREN XINXI BAOHU FA LIJIE YU SHI YONG (个人信息保护法理解与适用) [UNDERSTANDING AND APPLICATION OF THE PERSONAL INFORMATION PROTECTION LAW] 256 (2021).

have actively disclosed information and explicitly rejected "secondary disclosure."[14] In other words, he sidesteps the contentious clash between post-hoc refusal and fair use, opting instead to narrow the scope of post-hoc refusal. However, he admits that such limitations, due to the lack of a current statutory basis, can only be rectified through the "quasi-legislative function" of judicial interpretation by the Supreme People's Court. This acknowledgment suggests that academia has not yet found a clear answer through a case-by-case interpretation by local judges for the issue of post-hoc refusal and fair use under the "coordination issue" between the two laws.

In the author's view, this academic research needs to inquire: How are the Civil Code and the PIPL integrated into a unified knowledge network concerning the fair use of personal information? This study posits the existence of a potential "cognitive" node. If we transcend departmental laws and grasp the overall spectrum of legal knowledge, it becomes evident that the "fairness" in the fair use of personal information consistently takes precedence over "legality". This underscores a judge's discretionary balancing act tailored to the specifics of each case scenario. This approach differs from the legal effect produced by "legality," which emphasizes direct subsumption into the constitutive elements of legal provisions.

Therefore, such discretionary balancing precisely requires the judge's cognition of non-elemental types of information, with the Civil Code and the PIPL offering two distinct sets of cognitive standards. Essentially, the Standing Committee of the National People's Congress responded to the question "Why is there a need for the Personal Information Protection Law when there is already a Civil Code?" by stating: "In compiling the Civil Code, legal protection of personal information is stipulated as an important civil right. Although China's personal information protection legal system is gradually taking shape, it faces challenges in keeping pace with the rapid development of informatization and the increasing social need for a better life. Consequently, a specialized law (the PIPL) should be enacted based on the existing legal framework."[15]

This question highlights the distinction between internal and external viewpoints in legal studies. From an internal perspective of doctrinal legal analysis, there are arguments suggesting that the PIPL functions as a special

---

[14] "In the future, restrictive interpretations should be given to the applicable requirements of 'explicit refusal by the individual' in Article 1036.2 of the Civil Code and the first sentence of Article 27 of the PIPL through judicial interpretation. For example, it should only apply to situations where the individual has made the information public themselves and explicitly refused others' processing at the time of publication. As for information that was made public without explicit refusal or was passively made public, individuals may only refuse when the processing is unreasonable." *See* Cheng Xiao (程啸), *Lun Gongkai de Geren Xinxi Chuli de Falue Guizhi* (论公开的个人信息处理的法律规制) [*On the Legal Regulation of the Handling of Publicized Personal Information*], 3 ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCIENCE] 82, 95(2022).

[15] Liu Junchen (刘俊臣), *Guanyu Zhonghua Renmin Gongheguo Geren Xinxi Baohu Fa (Caoan) de Shuoming—2020 Nian 10 Yue 13 Ri Zai Di Shi San Jie Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Di Er Shi Er Ci Huiyi Shang* (关于〈中华人民共和国个人信息保护法（草案）〉的说明——2020年10月13日在第十三届全国人民代表大会常务委员会第二十二次会议上) [*Explanation on the 'Draft of Personal Information Protection Law of the People's Republic of China'—Presented at the 22nd Meeting of the Standing Committee of the 13th National People's Congress (NPC) on October 13, 2020*], *ZHONGGUO RENDA WANG* (中国人大网) [NPC OFFICIAL WEBSITE] (Aug. 20, 2021), http://www.npc.gov.cn/npc/c2/c30834/202108/t20210820_313092.html.

law within the Civil Code's framework.[16] Though this "special law" theory has been criticized—for example, the PIPL not only governs equal civil relations addressed by the Civil Code but also sets out obligations of public law bodies, such as the government, in protecting personal information—the debate predominantly unfolds within an internal perspective.[17] This often leads to a disregard for the interaction between legal texts and their external environments.

The author cites the legislative interpretation by the Standing Committee of the National People's Congress as a legal phenomenon, aiming to illustrate, from an external perspective, the functionalism of law within its environment. Specifically, it scrutinizes the role of law in the context of "the rapid development of informatization". What is this contextual function here? The legislative interpretation, as a legal phenomenon, provides a perception that seizes the discourse of "rapid" or "fast," which has an inspiring impact on the author. The "rapid development of informatization" here perceives that the cognitive standard of the PIPL aligns with the requirement of "fast," distinguishing it from the "slow" cognitive standard of the Civil Code.[18]

The distinction between "fast and slow" introduces the concept of "Dual Process Theory" from cognitive science. In a broad sense, some may liken the fair use by non-specific third-party members of the public and the individual's post-hoc refusal to the choice presented in the "trolley problem," which merely indicates utilitarianism. However, Scholar Joshua Greene in the field of cognitive science critiques absolute-utilitarianism and analyzes the value judgments inherent in the "trolley problem." He proposed the theoretical model of "Dual Process Theory," employing fMRI

---

[16] *See* Wang Liming (王利明), *Lun "Geren Xinxi Baohu Fa" yu "Minfa Dian" de Shiyong Guanxi* (论《个人信息保护法》与《民法典》的适用关系) [*On the Applicability Relationship between the "Personal Information Protection Law" and the "Civil Code"*], 1 HUXIANG FAXUE PINGLUN (湖湘法学评论) [HUXIANG LAW REVIEW] 25, 25-35 (2021); Shi Jiayou (石佳友), *Geren Xinxi Baohu de Sifa Weidu — Jian Lun "Minfa Dian" yu "Geren Xinxi Baohu Fa" de Guanxi* (个人信息保护的私法维度——兼论《民法典》与《个人信息保护法》的关系) [*The Private Law Dimension of Personal Information Protection — Also on the Relationship between the "Civil Code" and the "Personal Information Protection Law"*], 5 BIJIAO FA YANJIU (比较法研究) [JOURNAL OF COMPARATIVE LAW] 14, 14-32 (2021).

[17] *See* Cheng Xiao (程啸), *Lun "Minfa Dian" yu "Geren Xinxi Baohu Fa" de Guanxi* (论《民法典》与《个人信息保护法》的关系) [*On the Relationship between the "Civil Code" and the "Personal Information Protection Law"*], 3 FALÜ KEXUE (XI'BEI ZHENGFA DAXUE XUEBAO) (法律科学(西北政法大学学报)) [LEGAL SCIENCE (JOURNAL OF NORTHWEST UNIVERSITY OF POLITICAL SCIENCE AND LAW)] 19, 19-30 (2020); Zheng Xiaojian (郑晓剑), *Lun "Geren Xinxi Baohu Fa" yu "Minfa Dian" zhi Guanxi Dingwei ji Guifan Xietiao* (论《个人信息保护法》与《民法典》之关系定位及规范协调) [*On the Relationship and Normative Coordination between the "Personal Information Protection Law" and the "Civil Code"*], 4 SUZHOU DAXUE XUEBAO (FAXUE BAN) (苏州大学学报(法学版)) [JOURNAL OF SOOCHOW UNIVERSITY (LAW EDITION)] 55, 55-63 (2021).

[18] As the author proposes, the "Dual Checklist Model" advocates that the fair use of personal information under the Civil Code should undergo dual scrutiny through both a "Scenario Checklist" and an "Evaluation Checklist". Consequently, this computational cost leads to a "slow" cognitive standard. *See* Lou Chanhou (卢霞豪), *Woguo "Minfa Dian" Geren Xinxi Heli Shiyong de Qingxing Qingdan yu Pinggu Qingdan Yi "Douyin An" Wei Li* (我国《民法典》个人信息合理使用的情形清单与评估清单——以"抖音案"为例) [*Scenario Checklist and Evaluation Checklist of the Fair use of Personal Information in China's "Civil Code"—Taking the "Douyin Case" as an Example*], 11 ZHENGZHI YU FALÜ (政治与法律) [POLITICAL SCIENCE AND LAW] 136 (2020).

technology to examine cerebral responses to moral dilemmas, notably switch and footbridge scenarios.[19] This research indicated divergent neural correlates for two types of moral reasoning: a slow and rational process often yielding utilitarian outcomes, and a fast and emotion-driven response typically favoring harm aversion principles.[20]

Therefore, this model posits two cognitive standards: one is a fast process, which is intuitive and has a lower cognitive load; the other is a slow process, which is logical and has a higher cognitive load.[21] Nobel laureate in Economics Daniel Kahneman and Harvard Law Professor Cass Sunstein have collaboratively applied this theory to analyze behavioral economics' "Prospect Theory" and its legal counterpart, "Nudge Theory." This application illustrates the potential for this interdisciplinary theory to explain legal phenomena.[22]

From a legal perspective, it is worthwhile to base our analysis on this theory and integrate it with sociologist Bruno Latour's "Actor-Network Theory" (ANT) to focus on translation at cognitive nodes.[23] This approach allows us to analyze how non-human entities like the Civil Code and the PIPL, and "judges" extending beyond traditional judges to include platforms and users, construct the network of fair use of personal information through inter-subjectivity.

As a result, this article introduces a "Dual Process Theory" for the fair use of publicly disclosed personal information, seeking to clarify the following proposition: "Fast fair use" under the PIPL can override post-hoc refusal, but "slow, fair use" under the Civil Code cannot. To elucidate the legal reasoning behind this assertion, the author analyzes analogous cases involving judicial divergence on the "secondary public disclosure of judicial decisions." Through this case-based approach, the author demonstrates the actor-network of fair use.

II. JUDICIAL DIVERGENCE IN SECOND-HAND DISCLOSURE

Judgments published online contain personal information. Influenced by the notion that "publicity is the norm, non-disclosure is an exception," the 2016 Supreme People's Court Regulation generally mandates the

---

[19] *See* Joshua D. Greene, et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCIENCE 2105 (2001).

[20] *Ibid*.

[21] *See* KEITH E. STANOVICH, RATIONALITY AND THE REFLECTIVE MIND (2011).

[22] This analysis underscores the differing perspectives of classical economics and behavioral economics in explaining phenomena. Therefore, in the context of rapidly developing informatization, it becomes crucial to ask: How does an individual's cognition affect the functionalism that the PIPL seeks to address in response to this rapid development? This question aligns with the general reader's experience with online platforms. For instance, when users rapidly scroll through so-called "privacy policies" on a new platform and click on the "I have read the privacy policy" button, they are engaging in a "fast cognitive process" to use the new product, rather than employing a "slow cognitive process" to review each aspect of the privacy policy meticulously. This type of cognition is not unrelated to the rapid development of informatization, as it contributes to the evolution of user traffic and product data. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); DANIEL KAHNEMAN, CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009).

[23] *See* BRUNO LATOUR, REASSEMBLING THE SOCIAL: AN INTRODUCTION TO ACTOR-NETWORK-THEORY (2007).

disclosure of names and other specific details.[24] This raises issues of compliance with personal information when judgments are made publicly accessible online. Scholars Zou Shaokun and Hou Xiaoyan, referring to Article 1036 of the Civil Code, argue that the public disclosure of such judgments by courts constitutes fair use.[25] However, third-party secondary disclosure poses a more complex legal challenge. Early attention has been given by Yang Jinjing, Qin Hui, and He Haibo to commercial entities that reorganize and process these judgments for easier public access and deeper analysis.[26] They advocate for a distinction between free usage by regular users and compensated usage by commercial entities. In the latter scenario, commercial platforms may republish judgments for profit, such as turning them into "litigation risk" indicators for their users. Therefore, when users wish to do business with someone, they can search for that person's litigation history, such as whether they have been a defendant or a loan debtor in a civil dispute.

The secondary public disclosure of judgments (and the personal information therein) typically occurs without the consent of the concerned parties, mainly due to the high transaction costs of obtaining such consent. Moreover, this secondary disclosure lacks the public interest "perception" evident in initial disclosures made by courts and backed by judicial interpretation. Consequently, when individuals file lawsuits against commercial platforms for unauthorized secondary disclosures, a contentious issue arises: "Does the commercial platform's secondary disclosure of judgments constitute fair use?" On this matter, local courts have shown judicial divergence. For instance, provincial courts in Suzhou and Beijing have issued contrasting rulings on similar cases.

Next, the author will analyze these two analogous cases to uncover the reasons for the divergence, thereby demonstrating the shortcomings of the current fair use theory, which proves inadequate in appropriately explaining the proper use network co-constructed by multiple actors, including the Civil Code, the PIPL, courts, platforms, and users. Notably, these two cases occurred before the enactment of the Civil Code and the PIPL. Hence, they did not apply these two statutes. However, this unique historical context precisely reflects how the judiciary weighed fair use against post-hoc refusal in their judgments based on the laws in the pre-PIPL era. Consequently, these case studies first controlled the variable of post-PIPL statutory actors, thereby observing how judges, as actors, constructed this

---

[24] Zuigao Renmin Fayuan Guanyu Renmin Fayuan zai Hulianwang Gongbu Caijue Wenshu de Guiding (最高人民法院关于人民法院在互联网公布裁判文书的规定) [Provisions on the Publication of Judgments on the Internet by People's Courts] (promulgated by the Sup. People's Ct., Fa Shi [2016] No. 19) (Chinalawinfo).

[25] Zou Shaokun (邹劭坤), Hou Xiaoyan (侯晓焱), *Minfadian Shidai Woguo Gongkai Caijue Wenshu Geren Xinxi Baohu Tisheng Lujing* (民法典时代我国公开裁判文书个人信息保护提升路径) [*Pathways to Enhance the Protection of Personal Information in Public Judgments in the Era of the Civil Code*], 20 FALÜ SHIYONG (法律适用) [JOURNAL OF LAW APPLICATION] 19 (2020).

[26] Yang Jinjing (杨金晶), Qin Hui (覃慧), He Haibo (何海波), *Caijue Wenshu Shangwang Gongkai de Zhongguo Shijian—Jinzhan, Wenti yu Wanshan* (裁判文书上网公开的中国实践——进展、问题与完善) [*Chinese Practice of Publishing Judgments Online—Progress, Issues, and Improvements*], 6 ZHONGGUO FALÜ PINGLUN (中国法律评论) [CHINA LAW REVIEW] 125 (2019).

network in the pre-PIPL era. In the post-PIPL era, such judicial divergences might be obscured by the uniform application of statutes. The current decline further influences this obscuration in the rate of judgments made publicly available in China, making it challenging for the author to find publicly available judgments addressing similar issues in the post-PIPL era. Therefore, the two cases mentioned above are more appropriate samples for studying this issue.

Firstly, the author analyzes the case decided by the Suzhou courts, involving the plaintiff Yi against Beierta Company (from now on referred to as the "Yi Case").[27] The court of first instance (Suzhou Industrial Park Primary Court) adopted an absolute restriction stance, ruling that any secondary disclosure without the consent of the concerned parties is illegal. The appellate court (Suzhou Intermediate Court) took a modified restriction stance, using the party's request to delete the judgment as a distinguishing node. Secondary disclosure before this point, even without informed consent, is not illegal; however, continuing secondary disclosure after this point, due to the platform's rejection to delete upon request, is unlawful. Specifically, "Beierta Company (the defendant platform), upon receiving a deletion request from Yi (the plaintiff), failed to remove the relevant judgments and announcements promptly. This contravened Yi's intent to control the dissemination of already disclosed information and violated the principles of legality, legitimacy, and necessity. Thus, it should be considered a significant infringement on Yi's personal information rights."[28] In other words, before an individual's post-hoc refusal, the platform's secondary disclosure constitutes fair use and is not illegal. However, it becomes unlawful if the platform persists in secondary disclosure without deletion after such refusal. In sum, the Suzhou courts acknowledge that post-hoc refusal can counteract fair use, thereby supporting the plaintiff Yi's legal claim.

In contrast, the Beijing courts in the case involving the plaintiff Liang against Huifa Zhengxin Company (from now on referred to as the "Liang Case")[29] rejected the plaintiff Liang's lawsuit. In this analogous case, both the court of first instance (Beijing Internet Court) and the appellate court (Beijing No. 4 Intermediate Court) took a position perceived as more accommodating towards the platform's actions. They argued that the platform's rejection to delete upon request and the continued secondary disclosure is not illegal. The courts reasoned, "If data disclosed through judicial channels cannot be further disseminated or utilized by other social entities, it would undermine the judicial disclosure system and harm the public interest that this system is intended to protect, such as the right to

---

[27] Yi Mo Su Suzhou Berta Shuju Jishu Youxian Gongsi Renge Quan Jiufen An (伊某诉苏州贝尔塔数据技术有限公司人格权纠纷案) [Yi v. Suzhou Berta Data Technology Co., Ltd.], (2018) 苏0591民初2244号 (Suzhou Industrial Park People's Ct. 2018); (2019) 苏05民终4745号 (Jiangsu Suzhou Intermediate People's Ct. 2019).

[28] Yi Mo Su Suzhou Berta Shuju Jishu Youxian Gongsi Renge Quan Jiufen An (伊某诉苏州贝尔塔数据技术有限公司人格权纠纷案) [Yi v. Suzhou Berta Data Technology Co., Ltd.], (2019) 苏05民终4745号 (Jiangsu Suzhou Intermediate People's Ct. 2019).

[29] Liang Mo Su Beijing Huifa Zhengxin Keji Youxian Gongsi Wangluo Qinquan Zeren Jiufen An (梁某诉北京汇法正信科技有限公司网络侵权责任纠纷案) [Liang v. Beijing Huifa Zhengxin Technology Co., Ltd.], (2019)京0491民初17247号 (Beijing Internet Ct. 2019); (2021)京04民终71号 (Beijing Fourth Intermediate People's Ct. 2021).

know and the right to supervise. On the other hand, it would result in the exclusive monopoly of such data by judicial authorities, which contradicts the concept of public ownership and sharing of judicial data. Therefore, other data-using entities may, under certain conditions, reutilize data disclosed judicially."[30] Hence, the viewpoint of the Beijing courts aligns more closely with the previously mentioned "irreversible" argument, meaning that post-hoc refusal cannot counteract fair use.

It is worth noting the temporal context. Since neither of the two analogous cases applied the Civil Code or the PIPL,[31] this contrast reveals that courts in different regions have interpreted the same pre-Civil-Code era laws differently. While we cannot rule out that the judges' cognition was influenced by the legislative direction of the Civil Code, such influence has not yet manifested in judgments. In contrast, the "Liang case" reveals Beijing judges' caution towards new laws: "Given that personal information is a new type of right and interest, there are as yet no clear and specific regulations for its protection path and exemptions. Formulating relevant rules is also exploratory, presenting a certain degree of uncertainty. Therefore, we should prevent 'missing the forest for the trees' by making premature judgments."[32] To some extent, this reflects the dilemma faced by Beijing judges. Imagine that when the Beijing No. 4 Intermediate Court judge made the second-instance judgment in April 2021, he was already aware that the bill of the drafted Civil Code had stipulated post-hoc refusal as an exception to fair use. Therefore, this exception could hinder the judge's "irreversible" argument, as the bill explicitly states that post-hoc refusal can counteract fair use. He could only be relieved that the case had yet to apply the Civil Code. Therefore, the Civil Code's literal meaning favors the Suzhou courts' stance.

However, beyond the universal legal principles pursued by the Civil Code, the Suzhou court also provided a reason based on the case's specific circumstances. The Suzhou court recognized that the plaintiff, Yi, had a unique name. It stated: "The judgments and announcement documents in the case show the situation where Yi had disputes with the company where she was employed or the counterparty to the contract. The full name "Yi xx xxx xxxx" (the Pinyin anonymized) with four Chinese characters is relatively long, and compared to the names of most people with two or three Chinese characters, its uniqueness and distinctiveness are more obvious. Combined with the content of the documents, it is easy to identify Yi's

[30] Liang Case, (2021)京04民终71号(Beijing Fourth Intermediate People's Ct. 2021).

[31] The judgment in the "Yi Case" (held on June 10, 2020) was rendered before the enactment of the Civil Code, while the judgment in the "Liang Case" (held on April 15, 2021) came after the Civil Code took effect but before the PIPL was implemented. However, based on the point of case acceptance rather than the point of judgment, both cases are governed by Article 111 of the General Provisions of the Civil Law concerning abstract rules for the protection of personal information, as well as Article 41, Paragraph 1 of the Cybersecurity Law, which adheres to the three principles of "legality, legitimacy, and necessity." See Minfa Zongze (中华人民共和国民法总则) [General Provisions of the Civil Law] (promulgated by the 12th Nat'l People's Cong., Mar. 15, 2017, effective Oct. 1, 2017) (Chinalawinfo); Wangluo Anquan Fa (中华人民共和国网络安全法) [Cybersecurity Law] (promulgated by the Standing Comm. 12th Nat'l People's Cong., Nov. 7, 2016, effective June 1, 2017) (Chinalawinfo).

[32] Liang Case, (2021)京04民终71号 (Beijing Fourth Intermediate People's Ct. 2021).

identity. Therefore, it can be determined that the defendant company, by reprinting relevant documents, has disclosed Yi's personal information."[33] If we analogize the identifying functions of names and trademarks, the concept of "Distinctiveness" in trademark law may be employed to analyze the distinctiveness referred to here. That is to say, the name symbol "Yi xx xx xxx xxxx" could more distinctly assist the actor in identifying the plaintiff; whereas given names like Xiu Ying and Jian Hua, which are more commonly used, inherently possess a natural anonymity function.[34] Consequently, even with other personal information such as county or township, they may not necessarily enable precise identification and retrieval of the specific individual's judgments involved in the case.

The Suzhou court introduces an implicit doctrine: the more significant the distinctiveness of an individual's name, the stronger the legitimacy of post-hoc refusal to counter fair use. However, the court's understanding of distinctiveness is inferred from the length of the name, transforming an abstract concept into a more concrete and easily cognizable criterion. While the court does not explicitly acknowledge this, a long name does not necessarily confer distinctiveness. Moreover, the court did not consider that the name "Yi xx xx xxx xxxx " could be a transliteration of a name from a minority ethnic group, which inherently tends to be longer than the typical two- or three-character Han names. However, this length does not preclude the possibility that it might be a low-distinctiveness name commonly used within a minority ethnic group. The translation from the principle of fair use to the criterion of name length unveils the diverging judgments on the legitimacy of secondary disclosure based on the individuality conferred by names. This tension within the specific case circumstances ironically counters the pursuit of universal legal principles articulated in the Civil Code. It highlights the complexities of applying overarching legal principles to unique circumstances, thereby questioning the idea of a one-size-fits-all legal framework for fair use of disclosed personal information.

By contrasting the "Yi Case" and the "Liang Case," this paper elucidates the cognitive divergences in judicial reasoning. However, the focus extends deeper to appreciate the harmonious efforts made by the courts in both locations in establishing "cognitive standards." In other words, both courts strive to find standards that can be rapidly cognized. For instance, the Beijing court's doctrine of "irreversible" obviates any discretionary variables that might impact the "post-hoc refusals cannot counter fair use," thus facilitating fast cognition. Likewise, the Suzhou court's emphasis on the length of names also manifests a process of fast cognition. Far from being content with case-specific resolutions, both courts seek to offer a low computational cost (owing to fast cognition) of reasonable expectations. This is intended to aid subsequent actors in rapidly

---

[33] Yi Case, (2019)苏05民终4745号 (Jiangsu Suzhou Intermediate People's Ct. 2019).

[34] According to the "2021 National Name Report" officially released by China, the most frequently used names among the registered population are *Xiu Ying* (秀英) for females and *Jian Hua* (建华) for males, with usage numbers of 2.169 million and 1.215 million people, respectively. These statistics underscore the prevalence of certain names within the population. *See* Ma Chang, Hao Ping (马昌、郝萍), *2021 Nian Quanguo Xingming Baogao Fa Bu* (《2021年全国姓名报告》发布) [*Publication of the "2021 National Name Report"*], PEOPLE'S DAILY ONLINE (Jan. 24, 2022), http://society.people.com.cn/n1/2022/0124/c1008-32338403.html (last visited Oct. 29, 2023).

cognizing and judging scenarios in a rapidly evolving information landscape, thereby collectively participating in weaving the network of fair use.[35] For example, platforms and individuals can quickly cognize whether secondary disclosure of personal information in a specific case constitutes fair use, thereby autonomously balancing legal risks and rewards. In time, these arrangements could become customary, lending normative support to future judicial decisions.

However, this paper emphasizes the dynamic role of statutory actors like the Civil Code and the PIPL in the network governing the fair use of personal information. Although the cases in question predate and, hence, do not apply to the Civil Code or the PIPL, their importance in delineating the interplay between fair use and post-hoc refusal remains critical from the perspective of the evolution of the network. Although the author has found it challenging to locate publicly available judgments dealing with similar issues in the post-PIPL era, the author has observed a relevant legal dispute phenomenon. This dispute did not proceed to the judgment stage but concluded with the plaintiff withdrawing the case. Furthermore, this dispute is closely related to the "Yi Case" and can be considered a derivative dispute.

On October 10, 2023, Yi filed a civil lawsuit at the Huqiu District People's Court of Suzhou City, Jiangsu Province, against the sponsor of "Journal of Suzhou University (Law Edition)," Suzhou University.[36] The lawsuit was based on the reason that an academic paper published in the journal's 2021 issue 4 cited the judgment of the Yi Case in its text and mentioned the names of the parties involved in the case in the footnotes,[37] thereby infringing Yi's right to privacy. On November 13, 2023, the Huqiu District People's Court held a hearing, but Yi did not attend the court session and mailed a withdrawal application to the court before the hearing.[38] Consequently, the court issued a civil ruling allowing Yi to withdraw the lawsuit against Suzhou University. Although the defendant's context of use was academic commentary in a journal rather than commercial exploitation on a platform, these differences are not enough to negate Yi's intention. That is, Yi hoped to apply the logic of winning the Yi Case in the pre-PIPL era similarly in post-PIPL era disputes, especially in the jurisdiction of the Suzhou courts, meaning that Yi's post-hoc refusal could counteract the journal's fair use. Regrettably, since the case was

[35] As a counterexample, due to judicial discrepancies adversely affecting reasonable expectations, some platforms have overly redacted personal information on judgments or even removed the documents to avoid the risk of legal liability. This illustrates the functional value of court rulings in providing reasonable expectations.

[36] Yi Mo Su Suzhou Daxue An (伊某诉苏州大学案隐私权纠纷案) [Yi v. Suzhou University], (2023) 苏0505民初8240号 (Jiangsu Suzhou Huqiu District People's Ct. 2023).

[37] The judgment is Jiangsu Sheng Suzhou Shi Zhongji Renmin Fayuan (江苏省苏州市中级人民法院) [(2019) 苏05民终4745号] (Jiangsu Suzhou Intermediate People's Ct. 2019). *See also* Wang Haiyang (王海洋), Guo Chunzhen (郭春镇), *Gongkai de Geren Xinxi de Rending yu Chuli Guize* (公开的个人信息的认定与处理规则) *[Identification and Processing Rules of Publicized Personal Information*], 8 SUZHOU DAXUE XUEBAO (FAXUE BAN) (苏州大学学报(法学版)) [JOURNAL OF SOOCHOW UNIVERSITY (LAW EDITION)] 64-76 (2021).

[38] Yi Mo Su Suzhou Daxue An (伊某诉苏州大学案隐私权纠纷案) [Yi v. Suzhou University], (2023) 苏0505民初8240号 (Jiangsu Suzhou Huqiu District People's Ct. 2023).

concluded due to withdrawal, we cannot observe the stance of post-PIPL era judges on this issue in the substantial trial phase.

A scenario comparable to this journal case in the academic context is the "Li Case" from 2016 in the pre-PIPL era. In the "Li Case, " Li, like Yi, claimed that "People's Judiciary" magazine infringed on Yi's right to privacy by quoting personal information about Yi confirmed in the judgments in its published article. However, both the first-instance court (Beijing Dongcheng District People's Court) and the second-instance court (Beijing No.1 Intermediate People's Court) ruled that "People's Judiciary" magazine did not constitute infringement, as "although the article's case description includes Li's date of birth, marital and childbearing status, and other personal information, this part of the personal information was established as fact in the public hearings of the first and second instance of the involved administrative litigation and has been confirmed by effective judgments."[39] Thus, it is evident that the viewpoints of the 2016 "Li Case" and "Liang Case" are relatively similar, and Beijing courts adjudicated both. Therefore, even though legal studies can be distinguished from the internal viewpoint into pre-PIPL and post-PIPL periods, these cases are interconnected in the sense of a knowledge genealogy within that network from the external viewpoint.

In summary, this paper analyzes how courts, judges, platforms, users, and individuals collectively and intersubjectively construct a network of fair use through the milieu of secondary disclosure of judgments.[40] It also highlights the implicit preference for a "fast cognition process." Moving forward, the paper will integrate these two legal actors, the Civil Code and the PIPL, to specifically analyze how "fast fair use" should be anchored within the nodes of the PIPL, thereby weaving "slow fair use" into the Civil Code.

---

[39] (2016) 京02民终5010号 (Beijing No. 2 Intermediate People's Ct. 2016). *See also* (2016) 京0101民初1540号(Beijing Dongcheng District People's Ct. 2016).

[40] In Latour's view, the network in Actor-Network Theory (ANT) is formed by connections generated through the actions of different actors, with the nodes of the network being the actors themselves. The more active the actors, the closer their connections, and the more complex the network becomes. Thus, the argument for the "construction" of the network points to the "connections" between actors. When the judges of the "Liang Case" made the second-instance judgment in April 2021, they were already aware that the effective Civil Code (which was not applicable to the "Liang Case" specifically) had provisions for the relationship between post-hoc refusal and fair use, yet they implicitly remarked, "The formulation of relevant rules is also in an exploratory stage, presenting a certain degree of uncertainty." This connection between the Beijing judge and the Civil Code (as a non-human actor) was quickly excavated by the academic community, sparking a connection concerning this issue between the Civil Code and the PIPL, and establishing a link between judicial divergence at the Beijing and Suzhou courts. Due to the publication of academic papers, the secondary disclosure of judgments shifted from the commercial use on platforms to academic paper in journals. As the plaintiff in the "Yi Case" held by Suzhou courts, Yi engaged in 2023 through litigation with the "Journal of Suzhou University (Law Edition)" that published the relevant academic paper, extending the knowledge genealogy to the issue of whether quoting personal information in judgments in the 2016 "Li Case" constitutes infringement. The platforms' concern over being sued by individuals like Yi could lead to a decreased rate of disclosure of current judgments, and this action of reducing the disclosure rate causes the academic community to rely more on the judicial decisions of the "Liang Case" and "Yi Case," as well as to pay more attention to the outcome of the 2023 "Yi Dispute." Hence, it is evident that the connections generated by the actions of these actors form the network of fair use.

III. FAIR USE NETWORK CONSTRUCTED BY LEGAL ACTORS

In the context of legal doctrinal studies, one might argue that although both the Civil Code and the PIPL address the notion of "fair use," their understandings of "fairness" differ fundamentally. This discrepancy in underlying logic arises from the fact that the Civil Code and the PIPL adhere to "slow cognitive processes" and "fast cognitive processes," respectively. In comparative law, American scholar Robert C. Post's critique of the EU's "Google Spain Case" offers an instructive bifurcation: distinguishing between Data Privacy and Dignitary Privacy.[41] Data Privacy operates on "Instrumental Logic" and is governed by predecessor legislation to the General Data Protection Regulation (GDPR); In contrast, Dignitary Privacy follows "Normative Logic" and is regulated by Article 7 of the Charter of Fundamental Rights of the European Union, as well as traditional tort law.[42] This implicitly invokes the "Dual Process Theory," which reflects the mapping of "fast and slow" cognitive processes in human psychology onto other actors. Post's explanation employs a "translational" technique, inviting actors like the Charter of Fundamental Rights of the European Union to participate in the construction of a knowledge network. Following a similar logic, it becomes imperative to include the Civil Code and PIPL in our analysis and to examine how their mapping is translated.

Firstly, the concept of fair use in the Civil Code encapsulates the attributes of "slow" cognition. Historically, during the pre-hypertext search era, the compilation of legal codes, such as the Pandect system, utilized hierarchical relationships to reduce the computational costs of legal retrieval. Consequently, with the advent of keyword searches in hypertext, the computational paradigm following the legal code tradition turned into a "slow cognitive process." Although Article 998 of the Civil Code introduces "dynamic systems theory," seemingly offering a dynamic perspective, its emphasis on considering factors like "the profession, scope of influence, and degree of fault of the actor and the victim, as well as the purpose, method, and consequences of the action," unmistakably contributes to, rather than reduces computational costs. This reinforces the attribute of "slowness." Scholar Yang Xu overlooks this. He advocates for the fair use of personal information based on Article 998 of the Civil Code.[43] This might be analogous to the saying "the pot calling the kettle black," as it reveals a lack of consideration for the institutional cost of computational load. In comparison to Article 1036, Article 998 of the Civil

[41] Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L. J. 981 (2017). The "Google Spain Case" refers to Case C-131/12, Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González, ECLI:EU:C:2014:317 (May.13, 2014).

[42] *Ibid*.

[43] Yang Xu (杨旭), *Zhengdang Liyi Tiaokuan de Zhongguo Fa Gouzao — Jiyu Minfa Dian Di 998 Tiao* (正当利益条款的中国法构造——基于《民法典》第998条) [*The Chinese Legal Construction of the Legitimate Interests Clause—Based on Article 998 of the Civil Code*], 1 FAZHI YU SHEHUI FAZHAN (法制与社会发展) [LAW AND SOCIAL DEVELOPMENT] 113 (2022).

Code is less likely to provide actors with a low computational load standard for intuitively judging whether an action constitutes fair use.

Secondly, the PIPL manifests the traits of "fast" cognition. Without reiterating the rationale of "rapid development of informatization" explained by the Legal Affairs Committee of the National People's Congress, as mentioned earlier, one can also consider this from a translational perspective. That is, since Article 1 of the PIPL implicitly emphasizes the value of information flow, namely "promoting the fair use of personal information," it would not be content with the traditional judicial path that leaves the determination of fair use to litigation. This high computational load model would hinder information flow. Therefore, the PIPL transforms "the state's social constraint technology on individuals" into "a technology of self-control for individuals." For example, individuals can use intuitive rules like "no driving if drinking" to judge the legality of their actions in advance, thereby managing compliance proactively, rather than waiting for a judge to determine its legality in subsequent litigation.[44] Hence, what the PIPL translates into is a set of "fast cognitive processes."

So, what is this "fast cognitive process"? Cheng Xiao, who participated in the drafting of the PIPL, recalled the second draft of the law, where Article 28 had once stipulated that fair use should be judged through the purpose of publicly disclosed information.[45] If we provisionally call this the "Purpose Dichotomy," then it aims to clarify: if the purpose of public information is clear and secondary use goes beyond that purpose, then it is deemed unreasonable; if the purpose is unclear, then a standard of reasonable caution should be applied, otherwise, it would be considered unreasonable.[46] However, Article 28, which embodies the "Purpose Dichotomy," was not retained in the legislation and was removed. The Constitutional and Legal Affairs Committee of the National People's Congress explained this deletion, stating: "Some members of the Standing Committee, as well as local departments, enterprises, and experts, suggested further aligning the relevant clauses of the draft with the provisions of the Civil Code. After the study, the Constitutional and Legal Affairs Committee recommends the following modifications to the second draft: one is to revise Article 28 to allow data handlers to process legally disclosed personal information within a reasonable scope, except where explicitly refused by the individual; for actions that have a significant

---

[44] LIU HAN (刘晗), XIANG DIAN DA SHI: FALÜ SHI ZHONG SIWEI FANGSHI (想点大事：法律是种思维方式) [THINKING BIG: LAW IS A WAY OF THINKING] 134 (2020).

[45] Article 28 of the second draft of PIPL stipulates: "When processing publicly disclosed personal information, the personal information processor should comply with the purpose for which the personal information was made public. If it goes beyond the reasonable scope related to that purpose, consent should be obtained in accordance with the provisions of this law. If the purpose for which the personal information was made public is unclear, the personal information processor should handle the publicly disclosed personal information reasonably and prudently. When engaging in activities that have a significant impact on the individual using publicly disclosed personal information, consent should be obtained in accordance with the provisions of this law." See Geren Xinxi Baohu Fa (Cao'an Er Ci Shen Yi Gao) (个人信息保护法（草案二次审议稿）) [*Personal Information Protection Law (Second Review Draft)*], (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 29, 2021), art. 28, CLI.DL.17900 (Chinalawinfo).

[46] CHENG XIAO (程啸), GEREN XINXI BAOHU FA LIJIE YU SHI YONG (个人信息保护法理解与适用) [UNDERSTANDING AND APPLICATION OF THE PERSONAL INFORMATION PROTECTION LAW] 252-256 (2021).

impact on individual rights and interests, consent should be obtained."[47] In other words, due to the "alignment" between the PIPL and the Civil Code, this "Purpose Dichotomy," which is not stipulated in the Civil Code, could not be included in the PIPL. However, this perspective overlooks the fact that "alignment" does not imply equivalence. Moreover, it fails to recognize that these two laws should serve different cognitive functions of "fast and slow."

The legislative deletion has not changed the academic community's adherence to the concept of "Purpose Dichotomy." Even as the Deputy Chairman of the Constitutional and Legal Affairs Committee of the National People's Congress, scholar Zhou Guangquan discusses the preconditions for legal judgments regarding the crime of violating citizens' personal information, he continues to uphold this concept.[48] Zhou asserts that if the handling of information aligns with its original purpose, regardless of the quantity of information processed, it does not constitute a crime. On the other hand, it could be considered criminal if the use of the information clearly contradicts its original purpose, changes the purpose significantly, or uses the disclosed information unlawfully. This indicates that the "Purpose Dichotomy" could serve as a "fast cognitive process" standard for fair use under the PIPL, as actors can more easily discern the purposes of other actors in disclosing information. This is facilitated by Article 7 of the PIPL, which states that "the handling of personal information should be conducted in an open and transparent manner, with publicly disclosed rules that clearly state the purpose, method, and scope of the handling." Therefore, as the PIPL is implemented, the purpose (or aim) of disclosing personal information becomes relatively easy to discern. In individual cases, actors can form reasonable expectations about secondary disclosures of personal information by directly judging whether their actions align with the initial disclosure's purpose. Consequently, the self-

[47] Quanguo Renmin Daibiao Dahui Xianfa he Falü Weiyuanhui guanyu <Zhonghua Renmin Gongheguo Ge Ren Xinxi Baohu Fa (Cao'an)> Shenyi Jieguo de Baogao (全国人民代表大会宪法和法律委员会关于《中华人民共和国个人信息保护法（草案）》审议结果的报告) [Report on the Review Results of <Personal Information Protection Law (Draft)>], 2021 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ 1131.

[48] Zhou Guangquan endorses the "Purpose Dichotomy" and highlights a case in his paper concerning the influence of tort law in the Civil Code on criminal law. In this case, from May to July 2020, an individual named Wu downloaded disclosed enterprise registration information from websites like Tianyancha and Qichacha, organized and classified this data, and sold over 18,000 pieces of information, earning more than 10,000 yuan. Wu was summoned by police on suspicion of the crime infringing upon citizens' personal information, and the case was later transferred to the Procuratorate in Taizhou Medical High-tech Zone, Jiangsu Province, for review and prosecution. However, the enforcement of the Civil Code from January 1, 2021, brought new dimensions to the case. The Procuratorate, referencing Article 1036 of the Civil Code, suggested that Wu's act of selling legally public information should not be considered a crime of infringing upon citizens' personal information, as there was no evidence of refusal or significant harm to the rights of the information owners. Consequently, on January 7, 2021, the police lifted Wu and dropped the case. Zhou Guangquan uses this case to illustrate the similarities between criminal and tort law, particularly in scenarios of 'disclosed personal information,' where the "Purpose Dichotomy" serves as a bridge connecting these two areas of law. *See* Zhou Guangquan (周光权), *Qinfan Gongmin Geren Xinxi Zui de Xingwei Duixiang* (侵犯公民个人信息罪的行为对象) [*The Object of Conduct in the Crime of Infringing Citizens' Personal Information*], 3 QINGHUA FAXUE (清华法学) [TSINGHUA UNIV. L. J.] 25 (2021).

reference of the PIPL needs to uphold the reasonable expectations formed by actors through this "fast cognitive process."

There arises a legitimate inquiry regarding the cognitive process when the purpose is unclear. Does the cognitive process then shift from the "fast" mode under the PIPL to the "slow" mode under the Civil Code? If viewed from the standpoint of cognitive science's "Dual Process Theory," this shift from fast to slow cognitive processing is quite similar to the mechanisms of legal stratification theory. Both follow the principle of "simple before complex." Therefore, this shift from "fast" under the PIPL to "slow" under the Civil Code is woven into the network through this cognitive principle of "simple before complex," and is mapped onto legal stratification theory. It is crucial to note, however, that this stratification can only be binary; it may mean that there is some intermediary between the two processes to interpret the significance of scenarios where the "purpose is unclear."

In the author's view, this intermediary may manifest in the cognition of judges as actors. If the legislative history from the Civil Code to the PIPL is placed within the grand narrative of the "new frontier" of cyberspace, then the understanding of new frameworks and even new rules in cyberspace often occurs in litigated cases that judges must adjudicate. Therefore, judges often translate the reasoning for resolving new issues in individual cases into abstract, universalized pragmatics, which in the Chinese context manifest as a "quasi-legislative form" of judicial interpretation. Before the Civil Code came into effect, the Supreme People's Court issued a judicial interpretation concerning online infringement in 2014, which was retained through amendments in 2020. As analyzed in the previously mentioned cases, both Suzhou and Beijing courts applied this judicial interpretation, especially the criteria concerning whether secondary disclosure based on "information released according to official documents made by state authorities and publicly implemented official acts" is infringing.[49] This criterion can perhaps be referred to as the "Four-Factor Theory," which includes: incongruence of content, addition of defamation or insult, modification or resequencing leading to misunderstanding, and invalidity of source attribution. According to the judicial interpretation, the more these four factors are satisfied, the less likely it is for the act to be considered reasonable. This highlights that judges, as pivotal actors in the legal network, have the capacity to integrate nuanced case-specific reasoning into broader, more abstract frameworks. These frameworks, in turn, offer guidance for interpreting and applying legislative norms, thus shaping the legal understanding of what constitutes "fair use" in the context of personal information and online disclosures.

[49] Article 13 from the 2014 Judicial Interpretation and Article 9 from the 2020 amendment, both of which discuss the "Four Factors Theory." *See* Zuigao Renmin Fayuan guanyu Shenli Liyong Xinxi Wangluo Qinhai Renshen Quanyi Minshi Jiufen Anjian Shiyong Falü Ruogan Wenti de Guiding (最高人民法院关于审理利用信息网络侵害人身权益民事纠纷案件适用法律若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Involving the Infringement of Personal Rights and Interests through Information Networks] (promulgated by Sup. People's Ct., Aug 21, 2014, effective Oct 10, 2014) art. 13, CLI.3.235297 (Chinalawinfo); (amended 2020 by Judicial Interpretation No. 17 [2020]) art. 9, CLI.3.349751 (Chinalawinfo).

In terms of the "Dual Process Theory," the "Four-Factor Theory" serves as an intermediary between "fast cognition" and "slow cognition." While factors such as incongruence of content and addition of defamation or insult are relatively easy for the actor engaging in secondary disclosure to self-recognize and control, the absence of any one of these factors is not sufficient to definitively lead to a conclusion of non-liability. Thus, the "Four-Factor Theory" bears a closer resemblance to the dynamic systems theory referenced in Article 998 of the Civil Code, which relies on the judge as the actor for equitable balancing. Even if such case-specific balancing is difficult for the actor engaging in secondary disclosure to anticipate intuitively. In other words, the "Four-Factor Theory" mixes self-cognition with judicial control, and thus, in terms of computational load, it falls somewhere between the low load of the PIPL and the high load of the Civil Code. Therefore, the entry of judicial interpretation into the field weaves the "Four-Factor Theory" between the "fast" and "slow" cognition associated with the PIPL and the Civil Code. This judicial construct adds a layer of complexity, accommodating both self-regulatory and judicial mechanisms to evaluate what constitutes "fair use," thereby enriching the legal network that navigates the balance between individual rights and public interests in the digital age.

To elaborate further, the intermediary "Four Factors Theory" conveys information that places the PIPL and the Civil Code at opposite ends of the legal spectrum. This information manifests in their respective legal effects. According to Article 13 of the aforementioned judicial interpretation, the legal effect of the "Four Factors Theory" is to "assume tort liability." This intermediary factor is then flipped by each of the two laws. On one hand, Article 1036 of the Civil Code stipulates the legal effect as "not bearing civil liability," thereby reversing the "liable" status to a "non-liable" one. On the other hand, Article 13 of the PIPL obliquely expresses the legal effect as "may process personal information." In comparative law, Article 6 of the European Union's General Data Protection Regulation (GDPR) similarly enumerates situations of fair use but explicitly states the legal effect as "lawfulness."[50] Thus, does the "may" in the PIPL translate to "lawfulness"? This depends on the relationship between "liability" and "lawfulness," that is, whether "liability" and "non-liability" can construct themselves through the transposition of "lawfulness" and "unlawfulness."[51] To phrase it in the language of legal doctrine, the question is whether there exists a legal distinction between "unlawfulness" and "liability," and then, through the absence of "liability," to elucidate the presence of "unlawfulness" in Article 13 of the PIPL.

Overall, Chinese scholars are divided on the conclusion of whether "the composition of tort liability involves unlawfulness." There are three primary viewpoints: First, the Opposition Argument rejects the independent status of unlawfulness and insists that unlawfulness should be

[50] "Processing shall be lawful only if……" See GENERAL DATA PROTECTION REGULATION (2018).

[51] Therefore, the absence of "liability" does not automatically lead to the presence of "unlawfulness," nor does it clarify it. The absence of liability might mean that the act was lawful, or it might mean that while unlawful, other elements required for liability were not met.

subsumed under fault.[52] Second, the Affirmative Argument advocates for the independent status of unlawfulness and adopts a hierarchical "unlawfulness-liability" approach. As Wang Zejian points out, "If an act does not possess unlawfulness, it is not prohibited by law; thus, even with intentional or negligent conduct, one does not bear tort liability."[53] Third, the Compromise Argument posits that unlawfulness and fault are "two sides of the same coin." As Jiang Bixin suggests, the former leans toward formal legalism, while the latter leans toward substantive legalism.[54] Further, Wang Yi argues for situational judgment—unlawfulness gains independent value in scenarios where strict liability principles, such as cessation of infringement, are applied.[55]

In the author's view, the treatment of unlawfulness and liability should be distinct,[56] opposing to the absorption of unlawfulness into fault should be upheld, as should resistance to uniformly setting unlawfulness as a constitutive element for all types of tort liability. Additionally, the flattening and lack of hierarchical considerations in the Compromise Argument should also be rejected. The author contends that, within the context of the fair use of disclosed personal information, differentiating between unlawfulness and liability is desirable for two reasons: First, such differentiation aligns with legislative intent. As previously noted, Article 998 of the Civil Code adopts elements from dynamic systems theory, enumerating factors such as the degree of fault, as well as the purpose, manner, and consequences of the act.[57] This indicates a consideration of

---

[52] Cheng Xiao opposes "making illegality one of the constitutive elements of infringement of personal information rights," specifically objecting to the use of "processing personal information in violation of the provisions of this law" as a constitutive element. The rationale is that "the determination of fault has long adopted an objective judgment standard, i.e., illegality is considered as fault." *See* CHENG XIAO (程啸), GERENZIXUN BAOHU FALÜ LIJIE YU SHI YONG (个人信息保护法理解与适用) [UNDERSTANDING AND APPLYING THE PERSONAL INFORMATION PROTECTION LAW] 526–529 (2021).

[53] WANG ZEJIAN (王泽鉴), RENGE QUANFA: FASHI YIXUE, BIJIAOFA, ANLI YANJIU (人格权法：法释义学、比较法、案例研究) [PERSONALITY RIGHTS LAW: LEGAL HERMENEUTICS, COMPARATIVE LAW, CASE STUDY] 335, 343, 394 (2013). WANG ZEJIAN (王泽鉴), QINQUAN XINGWEI (侵权行为) [TORTS] 86 (2009).

[54] Jiang Bixin (江必新), Hu Yunteng (胡云腾), Wang Yi (王轶), *Xing Xing Min Jiao Cha Yi Nan Wen Ti Yan Jiu* (刑行民交叉疑难问题研究) [*Research on Difficult Issues in the Intersection of Criminal and Civil Law*], 6 ZHONGGUO FA LU PING LUN (中国法律评论) [CHINA LEGAL REVIEW] (2021).

[55] Ibid.

[56] Tort law and criminal law share analogous objectives: identifying and rectifying wrongdoing, deterring potential offenders, and discouraging vigilantism. The theory of "unlawfulness and liability" often discussed in criminal law studies can be applied to analyze tort liability in civil law due to the similar function for these analogous objectives between criminal law and tort law. The criminal law scholar Zhang Mingkai's "Judicial Perspective of Hierarchy Theory" to support this argument. Compared to the "four (horizontal) elements theory," Zhang argues that "unlawfulness and liability" is a "hierarchical theory" within criminal doctrine. Zhang's argument implies that the functionality of hierarchy theory is to reduce computational costs. That is, if a judgment is made at the level of unlawfulness, there is no need to proceed to the level of liability, thereby saving on computational costs. Similarly, the hierarchical theory in tort law also serves to reduce these computational costs. Hence, the theory of "unlawfulness and liability", although discussed within the realm of criminal law studies, is not exclusive to it. Due to its function of saving computational costs, this theory, in a functionalist perspective, can bridge criminal law and tort law. *See* Zhang Mingkai (张明楷), *Jieceng Lun de Sifa Yunyong* (阶层论的司法运用) [*The Judicial Application of Hierarchy Theory*], 5 TSINGHUA FAXUE (清华法学) [TSINGHUA UNIV. L. J.] 20-39 (2017).

[57] Yang Xu (杨旭), *Zhengdang Liyi Tiaokuan de Zhongguo Fa Gouzao—Jiyu Minfa Dian Di 998 Tiao* (正当利益条款的中国法构造——基于《民法典》第998条) [*The Chinese Legal Construction of*

the unlawfulness of the act. Especially in light of the fact that plaintiffs in the aforementioned cases were seeking the deletion of judgments, thereby constituting a form of injunctive relief, the value of unlawfulness becomes evident. Second, this viewpoint is supported by the judiciary. In the first-instance judgment of the "Liang Case," the Beijing Internet Court endorsed the hierarchical judgment in the Affirmative Argument, stating, "The unlawfulness of the act is one of the constitutive elements of tort liability, and determining an act as unlawful is a prerequisite for confirming it constitutes a tort." [58] Although Cheng Xiao adopts the Opposition Argument concerning unlawfulness, his explanation related to the PIPL indicates that "refusal by the party concerned will not affect the legality of the personal information processing," thereby highlighting the "lawful-unlawful" hierarchy.[59] This stands apart from the judicial interpretation mentioned earlier concerning "liability" and even from the Civil Code's provision for "non-liability." Therefore, through this interaction, what Article 13 of the PIPL points to is "lawfulness."

If one were to apply the "Dual Process Theory" for examination, the bifurcation between "lawfulness" and "liability" in legal effects can be seen as a mapping of the "fast cognitive process" in the PIPL and the "slow cognitive process" in the Civil Code. This implies that, compared to the high computational load required for elements such as "fault" in relation to "liability," the computational load for "lawfulness" under the PIPL is significantly lower. Therefore, the PIPL dissects the provision for fair use of disclosed personal information stated in Article 1036.1.2 of the Civil Code into two separate clauses,[60] specifically provided under Article 13.1.6 and Article 27 of the PIPL.[61] This action also demonstrates the intent to reduce computational load. In other words, the "fast cognitive process" of the PIPL for calculating "lawfulness" is self-regulatory for information processors. The inclusion of post-hoc refusal by the information subject is included in the computation, it introduces

the Legitimate Interests Clause—Based on Article 998 of the Civil Code], 1 FAZHI YU SHEHUI FAZHAN (法制与社会发展) [LAW AND SOCIAL DEVELOPMENT] 113 (2022).

[58] Liang Mo Su Beijing Huifa Zhengxin Keji Youxian Gongsi Wangluo Qinquan Zeren Jiufen An (梁某诉北京汇法正信科技有限公司网络侵权责任纠纷案) [Liang v. Beijing Huifa Zhengxin Technology Co., Ltd], (2019) 京0491民初17247号 (Beijing Internet Ct. 2019).

[59] CHENG XIAO (程啸), GERENZILIAO BAOHU FALU LIJIE YU SHIYING (个人信息保护法理解与适用) [UNDERSTANDING AND APPLICATION OF PERSONAL INFORMATION PROTECTION LAW] 256 (2021).

[60] Article 1036.1.2 of the Civil Code stipulates: "In the processing of personal information, the actor does not bear civil liability under the following circumstances: ... (2) Reasonable processing of information that the natural person has disclosed themselves or that has otherwise been lawfully made public, except in cases where the natural person explicitly refuses or where the processing of the information infringes upon their significant interests; …"

[61] Article 13.1.6 of the PIPL stipulates: "A personal information processor may process personal information under one of the following circumstances: ... processing personal information within a reasonable scope that has been publicly disclosed by the individual themselves or has otherwise been lawfully made public, in accordance with the provisions of this law..." Article 27 of the PIPL stipulates: "Personal information processors may process personal information within a reasonable scope that has been publicly disclosed by the individual themselves or has otherwise been lawfully made public, except when the individual explicitly refuses. When processing publicly disclosed personal information has a significant impact on the individual's rights and interests, consent should be obtained in accordance with the provisions of this law."

uncertainty. For instance, as revealed in the earlier "Yi Case," the prominence of an information subject's name varies, and using the length of the name to judge its prominence is also inaccurate. Hence, it becomes difficult for information processors to reasonably foresee in advance whether the information subject in a specific case would refuse. Based on this uncertainty, the PIPL's calculation of "lawfulness" in Article 13 omits the algorithm for "post-hoc refusal." Consequently, the so-called "fast fair use" substantiated by Article 13 of the PIPL should be able to counter "post-hoc refusal." In contrast, Article 1036.1.2 of the Civil Code includes "post-hoc refusal" as a proviso for the fair use of disclosed personal information; this action is also not contradictory because it aligns with the encoding of the Civil Code's "slow cognitive process." Therefore, the so-called "slow fair use" under the Civil Code cannot counter "post-hoc refusal."

Continuing with the application of "Dual Process Theory" to scenarios involving the use of disclosed personal information in judgments, as seen in the "Yi Case" and "Liang Case". This will help analyze how these two types of fair use achieve a tradeoff with post-hoc refusal. This means, if a judge were to apply the "Dual Process Theory" for uniform judicial application, how would the judge resolve the judicial divergence in the Yi and Liang Cases and provide a reasonable expectation of behavioral rules?

First, the judge would apply Article 13.1.6 of the PIPL to determine if someone's use of disclosed personal information in judgments constitutes fair use. For this assessment, the "fast cognition" standard of an ordinary person is used to judge the "Purpose Dichotomy", implying that a party should not be overly burdened to investigate the initial purpose of disclosure when reusing this information (for example, it should be permissible for parties to rely on the perceived initial disclosure purpose based on the website's interface at that time). Considering the interface of the China Judgments Online website, several elements enable quick cognition by an ordinary person: firstly, the homepage prominently features the emblem of the People's Courts of China and the URL suffix "court.gov.cn", with explicit markings stating "Copyright owned by the Supreme People's Court of the People's Republic of China".[62] These signals indicate that an ordinary person can quickly perceive the website as officially operated, thus validating the initial public disclosure of the judgments.

Second, by searching and accessing specific judgments, the website's footer lists five notices, the first of which states that "the judgments published here are entered and reviewed by the relevant courts and are made public according to legal principles and the principles of judicial openness."[63] Hence, the purpose of disclosure is clear: judicial openness. Additionally, the notices stipulate that "the information in this database is free to access, and it is strictly prohibited for any individual or entity to use this information for illegal profit. Without permission, no commercial websites may create mirrors (including full or partial) of this database."[64] This means that the China Judgments Online does not categorically prohibit

[62] *Chinese Judgments Online*, https://wenshu.court.gov.cn/ (last visited on Nov.30 2023).
[63] Ibid.
[64] Ibid.

commercial platforms from reusing disclosed personal information but excludes scenarios like "profiting illegally" and "creating website mirrors without permission." This interpretation aligns with the Supreme People's Court's response to Proposal No. 1374 at the Second Session of the 13th National People's Congress addressing concerns about whether China Judgments Online leaks personal privacy.[65] The Supreme Court, in principle, does not anonymize parties in public judgments because it "does not align with the value orientation of judicial openness – promoting the construction of a social credit system... Establishing comprehensive credit records in all fields, forming a nationwide credit information network, perfecting the public credit information system, and creating a long-term mechanism for fostering a legal environment for integrity construction, is a common practice worldwide."[66] Thus, the construction of judicial openness does not exclude, and indeed might rely on, the credit report market.

Continuing the analysis from the perspective of "Purpose Dichotomy," an ordinary person's quick cognition of the purpose of personal information disclosure on the China Judgments Online is clear: judicial openness that does not exclude market participation. Therefore, if platforms in cases like Yi and Liang used the information consistent with the above purpose, and did not violate prohibitions against "profiting illegally" (such as running credit report business without a license) and "creating commercial website mirrors without permission" (such as using web scraping techniques without the website's consent), they might constitute fast fair use and counteract post-hoc refusal. Hence, the PIPL's "fast fair use" revolves around the "quick cognition" standard of an ordinary person under the "Purpose Dichotomy", not only providing an ex-post judicial basis but also offering ex-ante behavioral guidelines for parties (such as whether platforms can reuse disclosed personal information in their operations). Therefore, it is implausible for the PIPL to allow the post-hoc refusal stipulated in Article 27, which is subject to significant variability due to the autonomy of the parties involved in individual cases, to counteract the "fast fair use" rule, a norm characterized by quick cognition and leading to stable expectations.

In contrast, the application of the Civil Code for "slow fair use" by judges is more complex. To illustrate, I will discuss this in conjunction with a real-life case, the "Wang Case".[67] Wang is a resident of an apartment community in Huaimeng District, Jinan City, Shandong Province. In 2022, a dispute over property services led to the property management company

---

[65] *Zuigao Renmin Fayuan Dui Shisanjie Quanguo Renda Erci Huiyi Di 1374 Hao Jianyi de Dafu* (最高人民法院对十三届全国人大二次会议第1374号建议的答复)[*Supreme People's Court's response to Proposal No. 1374 at the Second Session of the 13th National People's Congress*] (promulgated by Sup. People's Ct., August 2, 2019, effective August 2, 2019)(Chinalawinfo).

[66] Ibid.

[67] *Wuyegongsi Jiang Panjueshu Gongbu Zai Yezhu Jiaoliu Qun Gai Xingwei Shifou Weifa?* (物业公司将判决书公布在业主交流群 该行为是否违法？) [*Whether it is Illegal for the Property Company to Disclose the Judgment in the Apartment Community's WeChat Group?*], SHANDONG GAOFA (山东高法) [WECHAT ACCOUNT OF THE HIGHER PEOPLE'S COURT OF SHANDONG PROVINCE] April 2 2023, https://mp.weixin.qq.com/s/Uqk7kfJNUotgjJT5Jnvyug (last visited Nov.11 2023).

suing Wang, with the court ruling in favor of the company and ordering Wang to pay the overdue property fees. The property company then photographed the court's judgment and posted it in the community's WeChat group, without obscuring Wang's name, home address, or ID number. Wang believed this act was a violation of the right to privacy and sued the property company in the Huaimeng District People's Court. The court found the property company's actions to be an infringement.

Essentially, the legal issue in the "Wang Case" can be reframed as whether the property company's action constituted slow fair use under the Civil Code, and whether Wang's post-hoc refusal could counteract slow fair use. It should be noted that the defendant's use of personal information in judgments in the "Wang Case" differs from the defendants in the "Liang Case" and "Yi Case, " as the document used was a hard copy delivered by the court, not a soft copy from the China Judgments Online. Such hard copies do not undergo the same technical processing as the online versions to remove sensitive personal information like home addresses and ID numbers. Based on the ordinary person's quick cognition of "Purpose Dichotomy," the purpose of disclosing personal information in these hard copy judgments is for parties' litigation and enforcement, not for the purpose of judicial openness like the soft copies on the website.

Therefore, the defendant in the "Wang Case" does not align with the principle of consistency in purpose under "Purpose Dichotomy, "[68] thus not constituting fast fair use under the PIPL, and should be judged in accordance with slow fair use under the Civil Code. This means the property company's actions were unlawful and must be judged on the level of liability, including whether there are circumstances to exclude liability. This judgment is more stringent than excluding unlawfulness, requiring not only compliance with the list of circumstances in Article 1036 of the Civil Code but also the evaluation checklist in Article 1035, and even considering factors like the nature of the property company, the plaintiff's status as a homeowner, and the impact of posting in the apartment community's WeChat group under Article 998. Therefore, compared to the PIPL's fast fair use, which revolves around the single factor of "Purpose Dichotomy," the Civil Code's slow fair use considers too many factors. Due to this functionalism gap, namely, the lack of a quick cognition standard for parties in the "rapid development of informatization", it correspondingly lacks the capability to counteract individual post-hoc refusals. As the judgment in the "Wang Case" illustrates, even if the defendant's actions constituted slow fair use, it could not counteract the Wang's post-hoc refusal.

In summary, the author has analyzed how the actors involved in the PIPL, Civil Code, and judicial interpretations weave together a network for the fair use of disclosed personal information. Translating this rationale into the discourse of legal doctrine, it can be articulated as follows: First, individual cases should prioritize the application of Article 13.1.6 of the

[68] This means that the purpose of the court providing the property company with a hardcopy judgment containing personal information is for litigation and enforcement. However, the property company's purpose in publishing the judgment with personal information in the WeChat group is not for this purpose, as for enforcement, the property company should apply to the court with this hardcopy judgment.

PIPL to determine whether a situation constitutes fair use of disclosed personal information. As for the composition of the clause "processing within the reasonable scope as prescribed by this law," the "Purpose Dichotomy" should be applied for judgment, and in cases where the purpose is unclear, the judicial interpretation's "Four Factors" should be invoked. If the situation constitutes "fast fair use" under the PIPL, its lawfulness can counter the "post-hoc refusal" under Article 27 of the PIPL. Second, if the situation does not constitute fair use under the PIPL, then the case should proceed to apply Article 1036.1.2 of the Civil Code for judgment. Even if the situation constitutes "slow fair use" under the Civil Code, it cannot counter the "post-hoc refusal" specified in the same article.

IV. Conclusion

In summary, the author, by focusing on the context of the secondary publication of judgments and related cases, demonstrates how various actors—judges, platforms, users, information subjects, the Civil Code, and the PIPL—are involved in weaving a network for the fair use of disclosed personal information. This paper introduces the Dual Process Theory to cautiously address the "coordination problem" mentioned in the introduction. Specifically, the "fast fair use" under the PIPL is inferred through an intuitive "Purpose Dichotomy" standard. This low-computational-load "fast fair use" can counter "post-hoc refusal." In contrast, the "slow fair use" under the Civil Code aligns with the high computational load of the "slow cognitive process." Therefore, the Civil Code does not avoid the increased computational load brought about by "post-hoc refusal," and thus, this "slow fair use" cannot counter "post-hoc refusal." Between these dual processes, the judicial interpretation's "Four Factors" serves as an intermediary for the encoding of "liability," mapping out two types of legal effect encodings: "non-liability" under the Civil Code and "lawfulness" under the PIPL. Hence, the actors construct themselves through interactions at the "cognitive" node.

As an interdisciplinary concept, the Dual Process Theory can be employed to analyze the behavior of platform actors in the secondary publication of judgments, provided these platforms recognize the existence of "dual process behavior" and "dual fair use." For instance, many legal database platforms only recognize that "slow fair use cannot counter post-hoc refusal." Consequently, since mid-2021, under the guise of "database upgrades," they have excessively deleted personal information and even the judgments themselves. This suggests that platforms perceive they would lose in potential litigation, recognizing themselves to be in a loss state. As a result, they display a non-preference for risk and adopt an "excessive deletion" strategy, even though they might be aware that such a strategy could profoundly impact their business model and profitability. It appears that if "fast fair use" under the PIPL could be recognized by platforms, it might alter their strategic behavior.

As an analytical framework, future research could employ a model analogous to "Prospect Theory" to construct a two-dimensional grid

involving "risk" (high or low) and "reward" (positive or negative). This could help identify the critical point at which the shift from "fast fair use" to "slow fair use" occurs. Such empirical adjustments could refine the intermediary "Four Factors," previously discussed, in the context of fair use of disclosed personal information. Therefore, the network of actors involved in the fair use of disclosed personal information could form a self-constructing positive feedback mechanism.