

Protection of Raw Data under Japanese Law

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YUASA and HARA

What does the “ownership of data” mean???

- Aggregate of
 - Rights and obligation under contracts, **only for contracting party.**
 - Traditional “property right” (e.g. patent, copyright), **if applicable.**
 - Traditional interest protected by special laws for regulation or control of certain conduct (ex. protection of trade secret from unauthorized access), **if applicable.**
 - Traditional interest protected by general laws (e.g. tort in Civil Code), **if applicable.**

In some cases, unstructured data are not protected in any manner.

“Property Right” approach and “Conduct Control” approach (1)

- “Property Right” approach

Ex. patent, copyright

- Artificially designed right with analogy from real rights of tangible material.
- The original owner is that who creates the result.
- The property right is assigned and transfer to a subsequent owner
- Injunction is available as analogy of “property right”.
- Monetary recovery is based on tort.
(Injunction is not available under tort.)

“Property Right” approach and “Conduct Control” approach (2)

- “Conduct Control” approach

Ex. Unauthorized access under Unfair Competition Prevention Act

- Regulation and restriction on certain conducts specified by a special act.
- Regulation does NOT depend on concept of ownership of property right.
- When a party duly manages certain information and suffers from infringement of its business interest, the party can seek remedies.

(The concept of “ownership” is not utilized.)

- Remedy of injunction is created by legislation of the special act of tort.
- Monetary recovery is based on tort.

Recently, a new system for protection of so-called big data was enacted under this approach (“Shared Data With Limited Access” or “Data for Limited Provision”).

“Property Right” approach

- Patent

A data structure is patent-eligible.

Unstructured data are **not** patent-eligible.

(e.g. accumulated data through monitoring or transaction)

- Copyright

Copyright is **not** applicable to unstructured data, because such data do not fall under production in which thoughts or sentiments are expressed in a creative way.

“Conduct Control” approach – Trade Secret

- Trade Secret (Article 2(6) of the Unfair Competition Prevention Act

Unauthorized acquisition, use and disclosure to a third party are prohibited.

If unstructured data fall under trade secret, those who duly manage trade secret can use the remedies (injunction and monetary recovery).

The requirements for trade secret are:

- (i) Useful for business activities,
- (ii) Controlled as a secret and
- (iii) Not publicly known.

If unstructured data are shared by a number of parties even with permission, do such data fall under “trade secret”, especially for the requirements (ii) and (iii)?

“Conduct Control” approach – Shared Data with Limited Access (1) (Data for Limited Provision)

- Trade Secret (Article 2(7) of the Unfair Competition Prevention Act

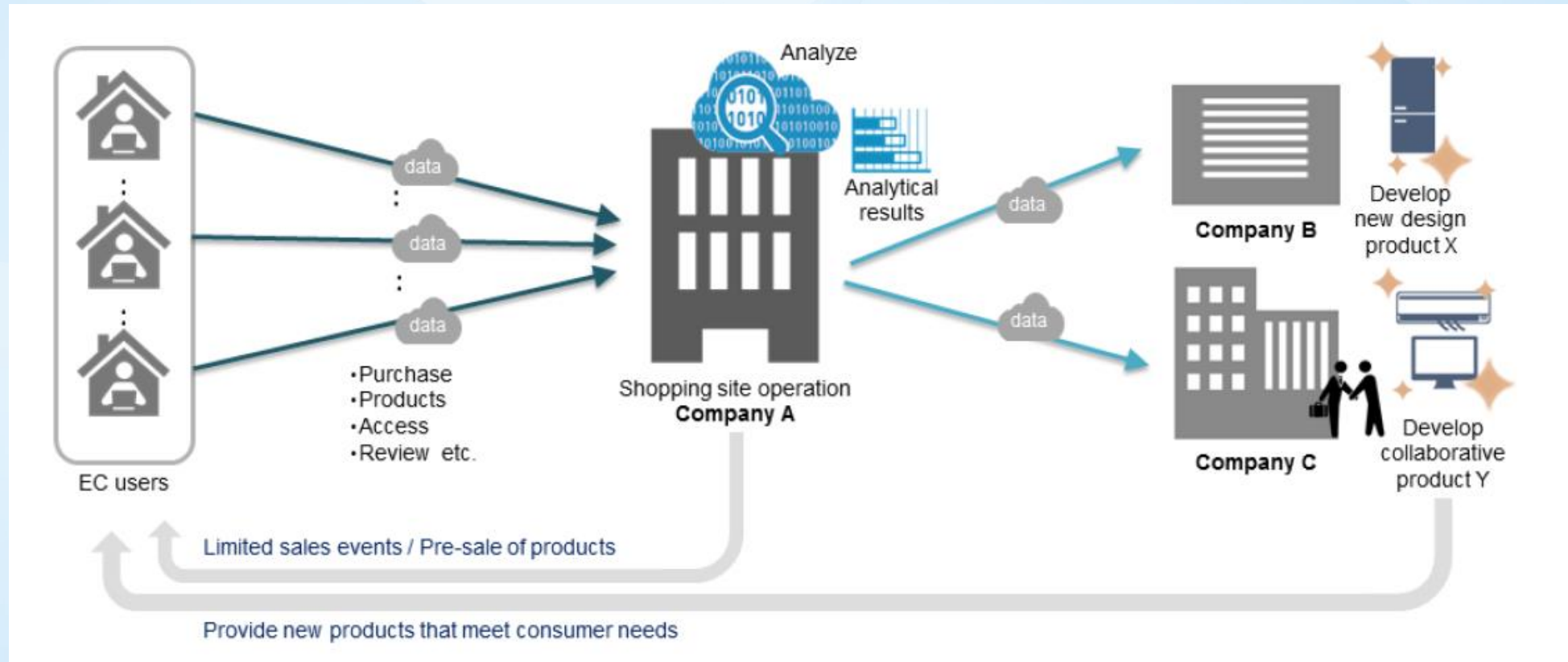
The requirements for Shared Data with Limited Access are:

- (i) Technical or business information (excluding information that is kept secret) which is:
- (ii) **accumulated in a reasonable amount by electronic or magnetic means**
- (iii) as information provided to **specific persons** as business.

Prohibit conducts are the same as those for trade secret, except that mental element (with knowledge) is required for Shared Data with Limited Access.

“Conduct Control” approach – Shared Data with Limited Access (2) (Data for Limited Provision)

- Platforms can share accumulated data with customers under this provision.



(website of METI:

<https://www.meti.go.jp/english/policy/economy/chizai/chiteki/data.html>)

“Conduct Control” approach – Shared Data with Limited Access (3) (Data for Limited Provision)

- Trade secret

Information is managed as secret.



- Shared Data with Limited Access

Information is shared with others under certain conditions.

(* Some practitioners and academia criticized this explanation; even the information is shared, the parties involved assume confidentiality obligation and thus the information is managed as secret.)

Antitrust Act

- Access to Data

- An entity has a strong marketing power in a certain market, and collects data through its business activity.
- The collected data are essential for the market, and it is difficult for other entities to collect alternative data.
- If the entity restrict third party's access to the collected data without reasonable grounds, such restriction causes exclusionary private monopolization and individual refusal to deal.

- Collection of Data

- If one party forces the other party to assign and transfer data which have high scarcity value, such transaction can fall under restrictive trading.

Thank you!

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