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上海
上海市银城中路 68 号
时代金融中心 16 楼和 19 楼
邮编: 200120
电话: +86 21 3135 8666
传真: +86 21 3135 8600

北京
北京市建国门北大街 8 号
华润大厦 4 楼
邮编: 100005
电话: +86 10 8519 2266
传真: +86 10 8519 2929

香港
香港中环皇后大道中 5 号
衡怡大厦 27 楼
电话: +852 2592 1978
传真: +852 2868 0883

伦敦
1F, 3 More London Riverside
London SE1 2RE
United Kingdom
T: +44 (0)20 3283 4337
D: +44 (0)20 3283 4323

www.llinkslaw.com

SHANGHAI
16F/19F, ONE LUJIAZUI
68 Yin Cheng Road Middle
Shanghai 200120 P.R.China
T: +86 21 3135 8666
F: +86 21 3135 8600

BEIJING
4F, China Resources Building
8 Jianguomenbei Avenue
Beijing 100005 P.R.China
T: +86 10 8519 2266
F: +86 10 8519 2929

HONG KONG
27F, Henley Building
5 Queen's Road Central
Central, Hong Kong
T: +852 2592 1978
F: +852 2868 0883

LONDON
1F, 3 More London Riverside
London SE1 2RE
United Kingdom
T: +44 (0)20 3283 4337
D: +44 (0)20 3283 4323

master@llinkslaw.com

Protections and Sharing of Medical Information from Aspects of Individuals, Enterprises and the State

By Xun Yang | Nora Wu

In recent years, medical institutions, medical research institutions and drug manufacturing and distribution companies have been paying increasing attentions to the collection and use of personal medical health information, of which the value is also increasing in commercial activities. This paper, by taking reference to author's experience in providing advice on data protection and intellectual property protections for relevant institutions, discusses the conflicts and sharing of medical information from the aspects of individuals, enterprises and the state.

如果您需要本出版物的中文本,
请与下列人员联系:

郭建良: +86 21 3135 8756
Publication@llinkslaw.com

For more Llinks publications,
please contact:

Roy Guo: +86 21 3135 8756
Publication@llinkslaw.com

Llinks Law Offices
www.llinkslaw.com

I. Fundamental Characteristics of Medical Information

Medical information refers to personal information related to personal life and health, medical diagnosis and treatment. It is prescribed in civil laws and administrative regulations, and possesses great value in commercial activities. In particular, medical information has the following characteristics: firstly, personal dependence: no matter how medical information is generated, it is closely related to a

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certain individual subject. Secondly, sensitivity: the disclosure, illegal provision or abuse of medical information may put physical safeties and properties in danger, and may easily cause damages onto reputations, physical and mental health of individuals or lead to discriminatory treatments. Thirdly, big data nature: the social value of a piece of medical information is relatively limited, but the integration of medical information of a specific group may possess a great social value and commercial value. Fourthly, mandatory nature: usually, the information subject is unable to choose whether or not to provide his/her personal medical information with free wills. For example, it is impossible for patients to challenge the request for the provision of personal medical information in the course of treatments.

From the perspective of individuals, natural persons, to some extent, have the right over their personal information. Both the *General Provisions of Civil Law* and the *Cyber Security Law* definitely confirm that individuals have a certain degree of controls over their personal information. For example, Article 111 of the *General Provisions of Civil Law* stipulates, "The personal information of a natural person shall be protected by law. Any organization or individual in need of obtaining the personal information of other persons shall legally obtain and ensure the security of such information, and shall not illegally collect, use, process, or transmit, nor illegally purchase, sell, provide, or publish the personal information of other persons." However, there is no law or regulating confirming that individuals are the owner of personal information, including medical information.

From the perspective of enterprises, enterprises have certain rights to the collected and collated information, including medical information. These rights can be exclusivities for clinical data under the *Drug Administration Law*, or the rights to prevent competitors from snooping, stealing and improperly using proprietary information under the *Anti-unfair Competition Law*. However, the *Drug Administration Law* only gives administrative protections during the drug registration process, and the *Anti-unfair Competition Law* only prevents unfair competitions. They do not recognize the ownership by enterprises of medical information in any form.

From the perspective of medical institutions, relevant laws and regulations only provide for their duties to protect medical information, but not the ownership of medical information. Article 61 of the *Tort Liability Law* stipulates that, "Medical institutions and their personnel shall, in accordance with the regulations, fill in and take good care of hospitalization records, medical orders, inspection reports, surgical and anesthetic records, pathological files and nursing records, medical expenses and other medical records." In accordance with the *Regulations for Medical Institutions on Medical Records Management*, "Hospitalization medical records shall be kept by medical institutions." According to these provisions, medical institutions appear to have "a right of possession" (rather than ownership) in relation to medical information. In the JIN Zhibao v. Jiangsu Province Hospital case¹, the plaintiff, JIN Zhibao, requested Jiangsu Province Hospital to return 15 inspection reports during his hospitalization. After hearing, the court held that it is the medical institutions' duty to keep medical records and Jiangsu Province Hospital, as a medical institution, must abide by the above-mentioned regulations. Therefore, there is no such legal basis for requesting for the return of 15 inspection reports. Additionally, the case also seems to indicate that such "right of possession" prevails the individual's right on its personal information. However, with respect to the ownership of medical

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information, current legislation or judicial practice, does not provide for any useful implication.

In the light of above, despite of different academic views on personal information is, the right to personal information, including medical information, under the current legal system, cannot be simply characterised as a kind of property right or personal right, but it ought to be considered a combination of multiple rights created and restricted by law, with the dual nature of personality and property. Various civil subjects, such as individuals, medical institutions, enterprises, and even states, have certain rights and interests to medical information to certain degrees.

II. Medical Information from Multiple Aspects

Medical information, on the one hand, is related to personal life and health, and, on the other hand, is a valuable asset of medical institutions and drug and medical equipment enterprises and, from a macroscopic angle, it also concerns national economy and people's livelihood as well as national security. This, in turn, determines that medical information concerns multiple levels of legal interests, including personal, organizational and public interests. Each level of stakeholders enjoys different protections under the current laws and regulations. As a result, it is necessary to consider the rules from different aspects in the process of collection, processing, transmission and cross-border transfer of medical information.

(1) Personal Information Aspect

From the personal information protection aspect, medical information is protected as a kind of personal information and privacy under our current legal system. According to the *Cyber Security Law*, the collection of personal information should follow the principles of information, legality, minimum necessity and consent. In particular, firstly, medical institutions (including hospitals, clinics, etc.) must inform patients of the scope and purpose of the information collection and obtain the consent of patients before collecting their medical information. Secondly, the principle of legality requires a legal basis for the collection of personal information, that is, a statutory basis or the ground for the provision of services. Thirdly, hospitals or medical institutions must only collect minimum medical information necessary for the provision of services.

The above principles are facing challenges in practice. For example, in the event that hospitals and medical institutions collect medical information for the purpose of diagnosis and treatment of certain diseases, they may (based on medical information of multiple patients) discover and develop new diagnosis and treatment methods, or create inventive innovations. The use of the medical information for such development and innovation purpose may fall outside of the scope of informed consent. In addition, drug enterprises need first-hand feedback from patients, but they are not allowed to directly contact patients, and thus, they are unable to obtain informed consent to collect medical information from patients.

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(2) Dimension of Commercial Interest of Enterprise

From the aspect of enterprises, hospitals, medical research institutions, drug and medical equipment manufacturers, and remote healthcare service providers, medical logistics service providers, etc., more or less collect and use personal medical information. For these enterprises, medical information is the basis on which they provide services or engage in other business activities, and is the basis to fulfil their legal obligations. The value of medical information is relatively limited to individuals, while it may multiply after accumulation, processing, collation and combination.

Under the current legal system, the protection of interest in information is not clear. The edited and collated information may be protected as a copyrightable work. According to the *Copyright Law*, compilations assembled with original selection and arrangement may be protected as compilation work. In the *WU Hong et al v. CHEN Guangping* case², although vector graphics itself is data with little creativeness, the court still held that the compilation of information is entitled to be protected as work under the copyright law. In some cases, the court directly recognizes the independent property interests of personal information. For example, in the *Taobao v. Meijing* case³, the court of first instance held that network operators enjoy independent property rights and interests in big data they generate.

The information in the state of confidentiality can be protected as trade secrets, regardless of whether they are original information or processed information. Courts do not deny the confidentiality of information merely because it is obtained from third party sources.

In most cases, even if the information does not constitute works protected under the copyright law, or as trade secrets, the theft or abuse of the information may still be prohibited in accordance with the *Anti-unfair Competition Law*. For example, in the *Weibo v. Maimai* case⁴, the court held that users' information is important business resources, and the normative, ordered and safe use of this information is essential for Weibo to maintain its competitive advantages. In this case, the defendant's behaviors were considered violate the bona fide doctrine and business ethics, endanger the information security of platform users, and damage the legitimate competitive interests of Weibo. Therefore, the court held that Maimai's behaviors constitute unfair competition.

However, the law does not provide for the rules for determining ownership of information, which results in uncertainties for transfers of medical information from a medical institutions (as organizations that possesses a large amount of medical information, to a drug enterprises (as entities in need of great volume of medical information).

(3) State Aspect

Different from enterprises or individuals, states pay great attentions on national security, steady development of the medical industry, and sharing of interest resulting from use of medical information

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among all stakeholders, including individuals, organizations and the state. From the aspect of the state, the state concerns largely the security and stability of medical information, as well as the maximization of the usage of medical information. The disclosure and abuse of medical information are also seriously banned by the state.

There are also conflicts of value in the medical information under the dimension of state. On the one hand, for national security, state needs to provide for strong protection on medical information, such as restricting cross-border transfers of population and health related information as well as healthcare big data; and on the other hand, apart from safeguarding fundamental national interest, the principle of fairness are also observed. For instance, the intellectual property rights generated from the use of China's genetic resources are required to be shared between China and foreign countries.

However, in practice, the administrative interference of the state is more or less rough and lacks specific practical guidance. In particular, with regard to the sharing requirements of intellectual property rights for the use of genetic resources, it is not clear whether it must be co-owned (which is not advisable from the perspective of intellectual property law), or be entitled to get anything in need and benefit from the intellectual property.

III. Suggestions

Given the great commercial value and high sensitivity of medical information, as well as the multiple aspects of regulations, we advise that:

Firstly, in the course of collecting medical information, enterprises are advised to clearly set out the purpose of collection, to take into consideration the regulations on personal data protection, business secret protection, and state interest protection, as well as to establish a legitimate and feasible channel to collect information.

Secondly, when protecting medical information in possession (including original information and processed information), enterprises are advised to make full use of copyright (including derivative works), trade secrets and unfair competition to protect their commercial interests.

Thirdly, when developing commercial usage of medical information with business partners, enterprises are advised not only to consider the legal restrictions on information sharing, but also allocate the intellectual property rights generated by using the medical information reasonably among relevant stakeholders.

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Contact Details

If you would like to know more information about the subjects covered in this publication, please feel free to contact the following people or your usual Llinks contact.

Author	
Xun Yang Tel: +86 21 3135 8799 xun.yang@llinkslaw.com	
Shanghai	
David Yu Tel: +86 21 3135 8686 david.yu@llinkslaw.com	Bernie Liu Tel: +86 21 3135 8678 bernie.liu@llinkslaw.com
Selena She Tel: +86 21 3135 8770 selena.she@llinkslaw.com	Nicholas Lou Tel: +86 21 3135 8783 nicholas.lou@llinkslaw.com
Dali Qian Tel: +86 21 3135 8676 dali.qian@llinkslaw.com	Kenneth Kong Tel: +86 21 3135 8777 kenneth.kong@llinkslaw.com
David Wu Tel: +86 21 6043 3711 david.wu@llinkslaw.com	David Pan Tel: +86 21 3135 8701 david.pan@llinkslaw.com
Elyn Jiang Tel: +86 21 6043 3710 elyn.jiang@llinkslaw.com	
Beijing	
David Yu Tel: +86 10 8519 2266 david.yu@llinkslaw.com	Bernie Liu Tel: +86 10 8519 2266 bernie.liu@llinkslaw.com
Yuhua Yang Tel: +86 10 8519 1606 yuhua.yang@llinkslaw.com	
Hong Kong(in Association with Dennis Fong & Co., Solicitors)	
David Yu Tel: +86 21 3135 8686 david.yu@llinkslaw.com	Sandra Lu Tel: +86 21 3135 8776 sandra.lu@llinkslaw.com
London	
Yuhua Yang Tel: +44 (0)20 3283 4337 yuhua.yang@llinkslaw.com	

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¹ 参见南京市中级人民法院(2015)宁民终字第 699 号民事判决书。

See Nanjing Intermediate People's Court (2015) NMZ No. 699.

² 参见福建省高级人民法院(2006)闽民终字第 504 号民事判决书。

See Fujian Provincial Higher People's Court (2006) MMZ No. 504.

³ 参见浙江省杭州市中级人民法院(2018)浙 01 民终 7312 号民事判决书。

See Zhejiang Hangzhou Intermediate People's Court (2018) Z01 MZ No. 7312.

⁴ 参见北京市海淀区人民法院(2015)海民(知)初字第 12602 号民事判决书。

See Beijing Haidian District People's Court (2015) Hai (Zhi) CZ No. 12602.