

# The dilemma and countermeasures of the informed consent principle under face recognition technology

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**Abstract:** *The principle of informed consent depends on the right to self-determination of individual information, which is the basis of personal information protection and the core principle of personal information protection. In the era of rapid development of face recognition technology, the principle of informed consent gradually fell into a dilemma and became a mere formality. Because the application of this principle in face recognition technology is limited to the formal consent and wrong status and other factors, it is difficult to effectively protect the legal rights of the information subject. Based on this, this paper analyzes the dilemma of the principle of informed consent under the current face recognition technology, and gives corresponding suggestions to improve the principle of informed consent.*

**Keywords:** *the principle of informed consent, face recognition technology*

## 1. Overview of the principles of informed consent

### 1.1 Connotation of the informed consent principle

The principle of informed consent means that the personal information processor cannot process his personal information without fully informing and obtaining the consent of the natural person, unless otherwise stipulated by laws and administrative regulations.<sup>[1]</sup> When collecting personal information, the information processor is the obligor of the information subject, and has the obligation to let the information subject clearly recognize the processing method of personal information. If the information subject refuses to apply, it can delete the relevant information that has been obtained or applied. The principle of informed consent is that the information subject can enjoy the right of self-determination on personal information. The information subject has the right to know how personal information is handled and realize its legitimate rights and interests. It originated from the "information self-determination right" proposed by German scholar Malman Grim in 1971, which has been included in the Basic Law of the Federal Republic of Germany. In Malman Grim's opinion, information self-determination refers to the right of the information subject to independently and completely control the information he has and protect his privacy from the outside world.<sup>[2]</sup> The principle of informed consent originally originated in the medical field, which refers to the need to disclose the designated medical plan, behaviors and measures, and respect the autonomy of patients. It is not only to solve medical disputes and other problems, but also to respect the patients' personal rights. With the continuous development of information technology, this principle has been gradually introduced into the field of personal information protection, and has become the core principle in the law of personal information protection. Informed means that the information processor needs to fulfill the obligation of notification and obtain the consent of the information subject, which is the premise of processing personal information. Consent is the intention of the information subject to allow the information processor to process his personal information, and to protect the right to self-determination of personal information. At the same time, inform this behavior to ensure that the intention of the information subject is true.

According to the "Personal Information Protection Law", face recognition information belongs to sensitive personal information, the "personal Information Protection Law" article 29, laws and regulations require to obtain individual separate consent, written provisions, from its provisions. The judicial interpretation of face recognition, item 3 of Article 2, stipulates that without the consent of the information subject belongs to the infringement of the rights and interests of the natural person's personality. The information processor should inform the face information and personal information

together, and take separate notification methods respectively. The principle of informed consent emphasizes the consciousness of the information subject, embodies the principle of autonomy of will in the field of private law, adheres to the principle of informed consent, and has the legitimacy from the theoretical basis analysis.

## ***1.2 Theoretical ale of informed consent***

### ***1.2.1 Information-consciousness theory***

The principle of informed consent intends to control its own information through the consciousness of the information subject in order to realize the protection of personal information. Therefore, the right to self-determination of information becomes the core content of the principle of informed consent. However, the decision of the information subject is not free and difficult to achieve, and it is difficult for the information subject to control personal information effectively. The "theory of self-determination of personal information" originated from the German "census" in the "small census" decided by the German Federal Constitutional Court in 1969, and the concept of self-determination should be limited by certain conditions. For example, the ruling stated that "not all personal information is related to personality, but personal information that is irrelevant, unrelated to personality belongs to the public domain, and the individual has no right to prevent others from handling it." [3] Therefore, the right to self-determination of personal information does not emphasize the absolute control of information processors over personal information. Under certain conditions, it is necessary to accept others to process personal information, such as for major public interests. In contrast, the "consent" behavior made by the information subject, as the expression form of information consciousness, should also be restricted by certain conditions.

### ***1.2.2 Theory of benefit balance***

In economic concepts, interest refers to the benefits of meeting people's needs. But in reality, in resource allocation, there is only relative equality. However, the law can balance it relatively and make up for the deficiency of the adjustment in the social and economic structure, which is an important means to realize the resource redistribution. In addition, the balance of interest conflicts through law can effectively control the market economy and stabilize the society. [4] Law balances the conflicting interests to effectively realize the purpose of controlling and stabilizing the society. As scholars point out, "the main function of law is to reconcile the conflicting interests, whether the interest is for the individual or for the society." In the era of big data, the use of personal information can be seen in different fields. Personal information has become a new resource in the modern society, and the processing of personal information has also met the needs of all aspects. As a new kind of social resource, facing the interest conflicts caused by the demands of different subjects, it is necessary to reconcile the interest conflicts through personal information protection legislation, so as to realize the relative balance of interests. Accordingly, as the core content of the law of personal Information protection, the principle of informed consent emphasizes the effective control of the information subjects over their own information to realize the protection of the rights and interests of the information subjects, but also takes based on the theory of interest balance and takes into account the interests of other subjects generated by personal information.

### ***1.2.3 Information asymmetry theory***

Due to the unequal knowledge reserve and technical level of the information subject and the information processor, the status of the two subjects in the aspect of information technology is not equal. Although in law, both parties are equal subjects in their rights and obligations. However, due to the technical advantages and information advantages of the information processor, the information processor is in a favorable position. In the context of the era of big data, personal information shows an explosive growth trend, and the scale of data is constantly expanding. The personal information market has become a new economic growth point that enterprises are increasingly concerned about. However, as far as the current situation is concerned, the legal rules of personal information market and data trading circulation market are not perfect, the personal information processing behavior conducted by information processors cannot be effectively supervised and standardized, and the information subject is often in a disadvantageous position. Although the awareness of personal information protection of information subjects is constantly improving, their daily activities still rely on various networks and platforms. Based on the strong dependence on the network, the information subject is forced to undertake the improper personal information processing behavior. Therefore, in order to solve the impact of the unequal status of the two, it is particularly important to formulate an effective treatment

mechanism. Based on this, the principle of informed consent has changed the problems of status asymmetry and information asymmetry between the two parties to a certain extent. This principle mainly actively protects the rights of the information subject, that is, the information processor fully performs the obligation of notification, and ensures the clear consent of the information subject, so as to balance the status between the information processor and the information subject.

## 2. Informed consent principle dilemma

In recent years, our country to accelerate the legislation of personal information protection, article 1035 of the civil code and the personal information protection law article 14 of the informed consent principle, the face recognition judicial interpretation further deepened the processing face information applies the specific requirements of informed consent, such as "strong consent invalid rules", "separate unified rules". But in practice, the right of informed consent of the information subject is often suspended. It is embodied in the following aspects:

Forced acquisition of information processors. Due to the easy accessibility of face recognition, the collection of face recognition information is not collected with the consent of the information subject, such as private capture, private extraction of photos, deceptive means, based on the convenience of the information processor. In reality, many schools in the use of face recognition system did not solicit the opinions of staff, students and other, even more, has never been through the collection of face recognition information, directly from the existing student information input face information or replacement upgrade. Even if teachers and students do not choose the face recognition channel in and out, this does not affect the students' face information in the system. There is also a disguised force, that is, face recognition is the only way or the only way. Nowadays, many scenic spots, tourists do not know and scenic spot to inform obligation, the face recognition as the only way into the garden, in "guo and Hangzhou wildlife world co., LTD., service contract dispute", Hangzhou zoo for the convenience of the park in the entrance use face recognition technology, only by sending messages to inform visitors face recognition as the only way into the garden, this excluded consumer other choices, and told by message, it is very easy to be as spam shielding, even if visitors don't want to accept this way, there is no refund choice, this is to force visitors to accept, essence is a disguised force.

The notification obligation of the information processor is not fully fulfilled. First of all, face recognition information is closely related to personal relations. If face information is leaked and illegally used, it may cause property or mental damage to the information subject. Therefore, the information subject has the right to know the risk of information leakage before deciding whether to agree, which requires the information processor to fully fulfill the obligation of notification. However, the legal norms concerning the notification obligation of information processors are too broad and are not applicable to the actual situation. In real life, information processors have a clear understanding of the process of the collection and processing process of face recognition information, and have a more comprehensive understanding of the risks caused by the information disclosure.[5]If the information processor fails to fulfill the obligation of reminding and informing, it is difficult for the information subject to know their rights and obligations, and its legitimate rights and interests may be violated. Secondly, even if the information processor performs the notification behavior, whether the information subject accepts it and understanding the meaning of the notification is also the key. In practice, software operators will provide privacy agreement terms to users before collecting face information, which are often complex and lengthy, and greatly reduce the user experience. In order to register as soon as possible and enjoy the service, users quickly check the consent button and directly ignore the terms and their legitimate rights and interests. Even if the user can read the terms carefully, the terms of the agreement generally involve legal and technological terms, and it is a question whether the user can really understand the text. Finally, in the era of Internet prevalence, information from various platforms is circulated to each other. For example, in order to ensure the normal use of WeChat function, binding personal information on the account, when we use the secondary function of WeChat, WeChat often synchronize the user information, will not get the consent of the user, more will not inform the information flow, these make the user's right to know is not fully guaranteed.

The information subject's right to consent is weakened. Face information belongs to sensitive personal information. If it is used uniformly in the Civil Code, it is difficult to effectively protect the security of face information. However, the Personal Information Protection Law stipulates in Article 29 that "separate consent of individuals shall be obtained for the processing of sensitive personal information; if laws and administrative regulations stipulate that written consent shall be obtained for the processing of sensitive personal information, such provisions shall prevail. "Separate consent is a

special form of consent, which means that when processing face recognition information, we need to extract the processing purpose, processing methods and other matters from other personal information or privacy clause agreement, and separately list the consent of the information subject, so as to maximize the knowledge of the information subject. Face information is different from other sensitive personal information, once it is leaked, it causes greater harm to the subject of information. In order to protect the legitimate rights and interests of citizens, it is more appropriate to adopt a stricter principle of written consent. However, through time discovery, "information asymmetry" and "information overload" make it difficult for the information subject to truly realize the risks faced by dealing with face information, hindering the information subject to make consent rationally, and "consent" is a mere formality.[6] In addition, if each processing of face information requires separate consent, written consent is inefficient, and can not meet the real needs.[7] In addition, in practice, information processors usually use binding with other authorization, stop installation and use, and other ways to force or disguised force the information subject to agree to process face information, which is contrary to its true meaning and is not equivalent to effective notification.[8]

The informed consent system for minors is not protected. When capturing face information, the camera does not distinguish between the age of the information subject. Online games, for example, at present, many minors are obsessed with online games, even if our country law, processing minors face recognition information to the consent of the guardian, but in the use of face recognition way landing game, cannot guarantee whether under the guardian of the use, minors face information collected by operators, once the information is leaked or illegal use, or due to the prejudice of face recognition technology algorithm and unfair treatment, will seriously damage the physical and mental health of minors, and even affect its future into social life. Through the comprehensive analysis, it can be seen that this regulation only applies to the information that does not belong to the privacy in personal information. The privacy of face recognition information is low, but it has a great impact on minors. Therefore, the informed consent system for minors should be clearly stipulated. At present, the legal norms are too broad to ensure the effective exercise of the minor informed consent system in reality. Stricter regulations are needed to better protect minors.

### **3. Proposals to address the dilemma of informed consent principles**

In the context of the application of face recognition technology, the information collection of face recognition technology is different from other information collection, because it is easy to collect and difficult to detect, leading to the principle of informed consent is suspended. Therefore, mobile phones with face information should adopt stricter principles of informed consent and adhere to the principle of written informed consent.[9] In the common principles of informed consent, consent must be specific and specific. With the corresponding should be to inform the specific, can not be ambiguous. Only in this way can the information subject clarify their rights and obligations and effectively avoid the risk of information leakage. General consent may weaken the effect of information control and self-awareness of information subjects. It cannot effectively meet the protection of the rights and interests of the information subjects. Article 29 of the Personal Information Protection Act requires the subject of face recognition information to give a separate consent on the basis of the general informed consent rules. When the information processor obtains the general consent of the information subject, it does not conform to the principle of informed consent, which infringes on the rights of the information subject. Specifically, the information processor needs to clarify the purpose, method and use of the information processor in processing face information. As far as possible to make the information subject for the face information processing behavior to make a real expression of meaning and special consent.

Face information has high sensitivity and personal dignity, and its processing mode cannot be equivalent to other personal information. Therefore, the subject of information consent and the clear consent capacity should be standardized. Article 31 of the Personal Information Protection Law stipulates that the personal information of minors under the age of 14 should obtain the consent of the parents or other guardians of minors. This is the embodiment of the theory of civil capacity in the personal information protection law. The unified system of guardians should be improved for the protection of informed consent of minors. First of all, different ways are adopted to obtain guardian consent in combination of the risks of minors' personal information in different scenarios. Low risk can be obtained by verification code, mobile phone SMS consent. For scenarios with high risk, consent should be informed through video phone calls. Secondly, to avoid the guardian's "consent fatigue". A negative list can be set up to avoid useless information processing. To some extent, it can reduce the occurrence of frequent guardian consent, leading to guardian "consent fatigue" and making adverse

choices. Finally, the simple and easy to understand informed consent terms are set up to ensure the reading convenience of the guardians. In the practice of informed consent principles, most dilemmas are due to the complicated and lengthy informed consent terms. In view of this dilemma, the purpose, way and collection direction of information collection can be informed in a concise and clear way, so as to facilitate the understanding of the guardians. Make choices that to the minor. However, the underage fever aged from 14 to 18 is in the critical period of growth. Once the infringement of face information occurs, the harm caused should not be underestimated, and more attention should be paid to the consent ability of such groups.

There are structural contradictions between the principle of informed consent and the application of face recognition technology.[10] Because the face recognition technology is easy to collect, not easy to find and other characteristics. Making it difficult to inform the information subject of information collection, and strengthening the notification obligation of the information processor, is the basic way to solve this contradiction. The information subject agrees to process face information, which needs to be fully informed, which requires the information processor to continuously fulfill the obligation of notification, especially after fulfilling the initial notification obligation, it should be informed of the situation and risks in the whole process of information processing. In addition, the notification obligation should pay attention to its validity. The complexity and length of the information is one of the reasons for the loss of effectiveness. Therefore, the information should not be too lengthy and difficult to understand, and the expression of popular norms should make the information subject easier to understand.

#### 4. Conclusions

In summary, in the context of big data. Whether personal information or face information is no longer just an identity identification, but also contains intangible assets, is the common wealth of the whole society. However, the protection intensity of personal information is far lower than the protection of other property. Therefore, the application of the principle of informed consent for personal information protection is indispensable. By strengthening the self-determination right of information subjects for their own information, the intensity of protection of personal information can be improved. Multiple conflicts of interests and the impact of emerging information technologies lead to the application of informed consent principles. The application of the principle of informed consent is mainly manifested in the lack of clear provisions and processing standards for the anonymous information; the information processor can avoid the application of the principle with the anonymous information, including the lack of specific regulatory regulations and the inspection specification of the informed consent principle. In order to change the application of informed consent principle, it is difficult for the information subject to make correct judgment and true intention without clear understanding of the user agreement. To solve the above dilemma, The application of the principle of informed consent should first start with the optimization of anonymous information protection, Drawing on the practical experience of relevant legislation outside the region, Analyzing the adaptation between outside the domain experience and China, Optimize anonymized information protection; next, The specification of standard terms needs to improve the regulatory mechanism, Set up a special regulatory authority, The Internet information Office takes the lead to perform its regulatory responsibilities, Strengthen the supervision of the standard terms of the information processors, At the same time, set up the corresponding standard of terms inspection standards, Ensure that the information processor formulates fair and reasonable standard terms; last, The true and effective expression of meaning of the information subject must be made on the premise that the information subject fully understands the content of "consent", Protect the informed choice of the information subject in the process of information collection, And to refine the terms of the "consent", Ensure the operability of the consent terms.

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