

# *Civil Public Interest Litigation for Children's Personal Information Protection in Commercial Activities*

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**Keywords:** Commercial activities, children, personal information protection, civil public interest litigation, institutional improvement

**Abstract:** Article 70 of the “Personal Information Protection Act” promulgated in 2021 stipulates the civil public interest litigation system for children's personal information protection. Due to the rough legislation, in the judicial practice, this system faces problems of ambiguity in conditions for public interest litigation, prosecutor qualification, liability manner and sharing of burden of proof in application. The above issues are in urgent demand for legislation improvement. This paper collects and analyzes relevant research literature, compares provisions of international conventions and draws on judicial practices to solve the above problems by considering the specific needs for children's personal information protection. It is necessary to optimize the applicable conditions of civil public interest litigation for children's personal protection, clarify that no actual damage is the prerequisite of litigation; Refine the scope of the plaintiff, extend the scope of consumer association, and clarify the conditions for China Internet Network Information Center to determine the prosecution organization; Diversity liability bearing manners, increase preventive compensatory liability manner; Set up different rules for distribution of burden of proof for the three illegal behaviors of information processors.

## **1. Introduction**

With the application of Internet + in commercial activities, personal information is increasingly collected, used and handled by relevant units and individuals. Due to commercial value of personal information, massive incidents and cases occur in practice that illegally collect and sell personal information, which infringes on the interests of relevant information subjects. In order to better protect the rights and security of personal information, China issued the “Personal Information Protection Act” on August 20, 2021. Article 70 of the law stipulates that, when infringement on extensive personal information rights and interests occur, People's Procuratorates and legal organizations can file lawsuits, which signals the establishment of public interest litigation system for personal information protection.

Children are the future of a nation, protection of whose rights and interests has always been valued in the national law and how to protect the interests and security of children's personal information is the focus of national law at present. Nowadays, in online commercial activities, personal information of children as a vulnerable group with immature mental maturity and weak self-protection ability is prone to illegal collection, usage or leakage, which impairs personal

information interests and security. Relevant cases occur from time to time. In March 2021, the procuratorial organ of Hangzhou, Zhejiang Province handled the first civil public interest litigation for children's online protection in China <sup>[1]</sup>. Under the current legal framework, there are both legal basis and mature practical experience in protection of children's personal information interests through civil public interest litigation, which is an important judicial path for protecting children's personal information. However, the legal provisions of civil public interest litigation system in China are still general and abstract, failing to form a standardized, rigorous public interest litigation system. The judicial organs are still in the exploratory stage in trial of such cases. Moreover, problems still remain, such as how to define the applicable conditions of civil public interest litigation for children's personal information protection, whether the infringement of children's personal information has damaged the public interest, who enjoy the right of civil public interest litigation, how to put forward the claim and distribute burden of proof. Hence, some problems still exist in the judicial practice of civil public interest litigation for children's personal information protection, and people's growing needs to protect the interests of children's personal information through civil public interest litigation are not well met. This paper investigates civil public interest litigation for children's personal information protection, which is expected to contribute to theory and practice.

Based on the above context, this paper conducts research mainly by focusing on the following three core questions: (1) What is the legal concept basis for protecting children's personal information rights and interests through civil public interest litigation? (2) What is the current situation of civil public interest litigation for children's personal information protection in China? (3) How to reduce the current shortcomings in civil public interest litigation for children's personal information?

## **2. Legal Basis of Civil Public Interest Litigation for Children's Personal Information Protection**

### **2.1 The public interest nature of children's personal information**

According to Article 2 of the “Provisions on the Online Protection of Children's Personal Information” released in 2019, the children in this paper refer to minors under 14 years old. According to the “Personal Information Protection Act”, children's personal information means various data information related to children, including name, gender, address, ID number, phone number and learning interests. Children's information closely correlates with national security and ethnic interests <sup>[2]</sup>. If children's personal information is illegally collected and utilized, or children and their families are harassed and defrauded, children's rights and interests will be impaired, which will inevitably lead to disturbance and turbulence in family and society. National safeguarding of children's personal information equals to safeguarding of social stability and national security, so children's personal information interests are public interests. Children and adults are equally protected by law in personal information interests. Nevertheless, children in the stage of physical and mental development lack cognitive ability, willpower and capacity to bear responsibility, thus requiring special protection from the state. The EU's “General Data Protection Regulation”, a law influential in the field of personal information and data protection, clearly states in section 38 of the preface that children are vulnerable to personal information related risks due to unawareness of risks arising from young age and inferior intelligence, so special protection is required for children's personal information. Here, special protection means that the protection should differ from the protection of non-children's personal information in terms of method and intensity.

## 2.2 The Principle of Tilt Protection

The principle of tilt protection means that special protection in legislation should be given to vulnerable individuals and general public according to the principle of tilt protection, which provides an important index to measure whether a country's human rights protection system is appropriate. Enabling vulnerable groups to attain sound living status and development through special protection is an important principle for achieving substantial justice and maintaining social and economic order. Children are immature in intellectual development, whose physical strength and social life experience are inferior to adults, so their personal information is more easily damaged. Law should implement the principle of tilt protection in children's personal information protection, and measure of acts infringing on the rights and interests of children's sensitive information does not require the same "numerous" standards for adults.

## 2.3 The "interest maximization principle" in children's rights protection

The interest maximization principle in children protection means children's maximal interests should be prioritized in issues involving children, and children's interests should precede over adults' social interests. Children's interest protection takes precedence over adult protection, and their interest should be maximized. The "interest maximization principle" in children's rights protection was originally as an international guiding principle in the "Declaration on the Rights of the Child" in 1959, which was formally established as a principle in the "Convention on the Rights of the Child" in 1989<sup>[3]</sup>. Widely accepted by the international community, this principle becomes a basic principle for dealing with legal issues related to children. China is the drafting and signing country of "Convention on the Rights of the Child", so legal provisions concerning children should obey this principle. For instance, according to our basic national conditions and legal culture, "the Law on the Protection of Minors" specifically illustrates the "principle of children' interest maximization" as the principle of "minor interests first". Despite the different description, the basic spirit and legal concept are consistent<sup>[4]</sup>, which will not affect the application of the principle of children' interest maximization in our country. The construction of civil public interest litigation system for children's personal information protection should abide by this basic principle.

## 2.4 Sensitivity of children's personal information

Sensitive personal information closely concerns the rights and interests of the information subject. Infringement of sensitive information will seriously harm the personal and property safety of the information subject. It is theoretically believed that infringement of sensitive personal information will easily damage personal reputation, mental and physical health, leading to social discrimination, even anxiety, fear and other new damages.<sup>[5]</sup> Considering children's fragile body and mind and the need to better protect children's personal information, both the "Personal Information Protection Act" and the "Personal Information Security Regulation" stipulate that children's personal information belongs to sensitive personal information.

## 3. Current Status of Civil Public Interest Litigation for Children's Personal Information Protection

### 3.1 Establishment of institutional basis

Seen from institutional construction, the state values children's personal information protection. Article 55 of the current "Civil Procedure Act" provides the basic regulation on civil public interest

litigation system in our country, which sets up the basic norms for environmental public interest litigation, consumer infringement litigation and other civil public interest litigation. The “Regulations on the Online Protection of Children's Personal Information” promulgated by the National Internet Information Office in August 2019 clearly defines safety of children's personal information in legislation for the first time, providing a legal basis for children's personal information protection. In October 2019, the Fourth Plenary Session of the 19th CPC Central Committee proposed to “extend the scope of public interest litigation cases”. The “Law on the Protection of Minors” revised in June 2021 gives procurators the right of public interest litigation, meaning public interest litigation can be initiated against cases that infringe upon minors’ interests involving the public interest. The “Personal Information Protection Act” enacted in November of the same year lists children's personal information as sensitive information and allows prosecutors and related organizations to file civil public interest lawsuits when children's personal information interests are violated, thus formally establishing the civil public interest litigation system on children's personal information protection. According to the requirements of "improving public interest litigation" raised at the 20th CPC National Congress, the Supreme People's Procuratorate further promulgated the “Rules for the Handling of Public Interest Litigation Causes by People's Procuratorates”, which provides uniform guidance for people's procuratorates at all levels in handling civil public interest litigation for children's personal information protection. At the same time, local governments successively published normative documents for personal information protection to support and safeguarded local civil public interest litigation activities on children's personal information protection.

### 3.2 Practice approach exploration

Seen from the practice approach exploration into civil public interest litigation for children's personal information protection, the people's procuratorial organs actively take a lead to fully play a procuratorial role in children's personal information protection with public interest litigation as the starting point. Among the 17 guiding cases related to minor protection released by the Supreme People's Procuratorate in 2022, case in which Yuhang District People's Procuratorate of Hangzhou filed lawsuit against a company's short video platform violating children's personal information (Hangzhou Internet Court (2020), Zhejiang 0192, No. 10993) and the civil public interest case in which Gongshu District People's Procuratorate of Hangzhou filed lawsuit against Deng and Xiao for protection of minors and personal information protection (Hangzhou Internet Court (2021), Zhejiang 0192, No. 9214) are two typical civil public interest litigation cases for children's personal information protection. In the civil public interest litigation case in which Yuhang District People's Procuratorate of Hangzhou filed lawsuit against a short video platform for protection of minors, the trial court judged that the information processor infringed on the personal information rights and interests of non-specific children users on the platform, causing damage to the social public interest. In this case, the public interest plaintiff made a claim that the defendant should stop the infringement, eliminate the impact and compensate for the loss. The case was eventually settled by mediation. <sup>[6]</sup> This case is the first national civil public interest litigation case initiated by procuratorial organs for "online protection of minors" after the implementation of the Civil Code and the revision of the “Law on the Protection of Minors” <sup>[7]</sup>. It was included in the work report of the Supreme People's Court, the guiding cases of the Supreme People's Procuratorate and the typical cases of personal information protection of Zhejiang Court, etc. providing references for civil public interest litigation for children's personal information protection across the country.

## **4. Review of the Development of Civil Public Interest Litigation for Children's Personal Information Protection**

### **4.1 Unclear applicable conditions**

Damage to the public interest is a prerequisite for the filing of civil public interest lawsuit. What is "public interest"? Although the academic community has not formed a unified understanding, Article 65 of the Civil Procedure Act stipulates that civil public interest litigation can be initiated if the rights and interests of numerous interest subjects are infringed. Thus, "public interest" has the characteristics of "unclear interest content" and "unclear beneficiaries". Accordingly, "public interest" can be understood as "the interest of non-specific majority". The basic norms of the Civil Procedure Act on public interest litigation also apply to civil public interest litigation for children's personal information protection. However, application of special laws takes precedence over general laws, so the provisions of the "Personal Information Protection Act" should be first applied to civil public interest litigation for children's personal information protection. Nonetheless, in application of Article 70 of the "Personal Information Protection Act", there are several questions: (1) Is the interpretation of the "Act" expandable? (2) What means "violating the rights and interests of numerous individuals"? Does "numerous" mean more than 10 people or should it be determined according to the particularity of personal information subject? Do "personal rights and interests" raise requirements on the amount of personal information and the amount of damage? All these questions lack clear boundaries and definite directions.

### **4.2 The subject of litigation and its order remain to be defined**

The subject of public interest litigation involves two questions: first, the scope of the plaintiff subject; second, the order of the plaintiff filing the lawsuit.

The first is the scope of plaintiff subject. Whether one is qualified to file civil public interest litigation for children's personal information protection as plaintiff subject plays an important role in civil public interest litigation. The scope of plaintiff subject concerns who can file public interest litigation, the frequency applicable to public interest litigation, and the institutional combination of public interest litigation and private interest litigation. According to the existing Civil Procedure Act, the civil public litigation subjects include the procuratorate, the organs and organizations specified by law. Therefore, the litigation subject of civil public interest has legality, that is, a specific type of public interest litigation can only be initiated by the subject clearly stipulated by the law governing such case. Hence, civil public interest litigation for children's personal information protection should be initiated by the subject stipulated by the "Personal Information Protection Act". According to the law, people's procuratorates, consumer organizations prescribed by law and organizations designated by the state cyberspace administration can file civil public interest litigation for children's personal information protection. Nevertheless, the law fails to clearly define prosecution organizations. What conditions are required for these organizations? Can it be determined with reference to the "Law on the Protection of the Rights and Interests of Consumers" and the "Environmental Protection Act"? All these questions demand further discussion.

The second is the order of plaintiff filing civil public interest litigation for children's personal information protection. "Personal Information Protection Act" has different provisions from the Civil Procedure Act on the order of litigation plaintiff. It does not specify the supplementary role of the people's procuratorate in filing public interest litigation. Instead, in the law, the People's Procuratorate is ranked above the other two subjects, which implies that the legislature attaches great importance to the role of the People's Procuratorate in filing civil public interest litigation for children's personal information protection. Then, do People's Procuratorate, consumer organizations

and relevant organizations have order in filing public interest litigation for personal information protection? This question requires further study and judgment.

#### **4.3 The provisions on responsibility bearing wait to be further improved**

Article 69 (2) of the “Personal Information Protection Act” stipulates that civil public interest litigation for children's personal information protection can claim damages. Nonetheless, due to the comparison principle of the law, such questions are unavoidable in the specific litigation practice: how to determine the amount of compensation, whether punitive damages can be claimed and how to define the ownership of compensation, etc. Seen from the existing judgment, it is difficult to determine the amount of compensation because the amount of profit is not equal to the loss caused by the illegal act. It may be unreasonable in a specific case to determine the amount of compensation by the defendant's illegal profit. Seen from the existing provisions, the compensation liability of the defendant is mainly compensatory compensation. Different views exist on whether punitive damages can be claimed, and there are different approaches in litigation practice, some of which have court support, while others not, and unified understanding has not yet been formed. The existing law does not clearly specify the recipient and management of compensation, and there are different approaches in judicial practice. For instance, the defendant is sentenced to pay compensation to the procuratorial organ, or the defendant is required to pay compensation to a special account jointly designated by the plaintiff and the court. In some cases, the defendant is simply sentenced to pay compensation, without specifying the payment recipient and mode. It is judged in some cases that compensation for public interest litigation should be handled by prosecuting procuratorial organs according to law. Moreover, in addition to compensation, are there other liability manners? These questions demand further explorations in practice.

#### **4.4 The rules for the distribution of burden of proof wait to be further improved**

Article 69 of the “Personal Information Protection Act” stipulates that, civil public interest litigation for children's personal information protection practices the principle of presumption of fault, and the defendant should bear the burden of proof for no fault. The law does not clearly specify distribution of burden of proof for other elements of tort liability, including infringement act, causality and damage consequences. According to the general principle for distribution of burden of proof in the Civil Procedure Act, the plaintiff of public interest litigation should bear the burden of proof for the above three facts. However, owing to the particularity of children's personal information, the complexity of torts and the undiscoverability of damage consequences, more targeted provisions are still necessary for the rules regarding distribution of burden of proof in civil public interest litigation for children's personal information protection. Some scholars believe that torts are monopolized by personal information processors, so it is necessary for personal information processor to prove legal source and use of the information regarding infringement behavior elements.

### **5. Reflections on the Development of Civil Public Interest Litigation for Children's Personal Information Protection**

#### **5.1. Optimize the applicable conditions**

The applicable conditions for civil public interest litigation on children's personal information protection can be optimized from the following ways: First, correctly define the disposal of illegal acts infringing upon children's personal information. According to the "interest maximization

principle" of children's rights protection, the "Law" in Article 70 of the "Personal Information Protection Act" requires extensive illustration. In addition to "Personal Information Protection Act" itself, it also includes other normative documents covering personal information protection, such as the "Civil Code", the "Law on Protection of the Rights and Interests of Consumers", the "Network Security Law" and the "National Intelligence Law". Secondly, according to the principle of tilt protection of children's interests, measure of acts infringing on the rights and interests of children's sensitive information does not require the same "numerous" standards for adults. Instead, it should be understood from the substantial connotation of public interests and the legislative purpose, that is, the "numerous individuals" should be understood from whether the social public interests are reflected, rather than simply base it on the number of individuals. On the one hand, this favors the full protection of children's personal information; on the other hand, civil public interest litigation for children's personal information protection should protect not only specific children with actual damage, but also potential non-specific children. These potential child victims have extensive and indefinite distribution, making quantification almost impossible. Third, the infringement of "individual rights and interests" involves two circumstances: the first is actual substantial damage; the second is the risk of damage. Under such circumstances, even if the damage does not actually occur, according to the interest maximization principle in children's protection, the risk of damage should be nipped in the bud. As long as there is risk of damage, it is necessary to initiate civil public interest litigation for children's personal information protection.

## 5.2 Refine the scope of plaintiffs in civil public interest litigation

The "Personal Information Protection Act" stipulates that three subjects may file civil public interest litigation for children's personal information protection, including people's procuratorates, consumer organizations stipulated by law and organizations designated by the state cyberspace administration. Except the people's procuratorate, the latter two subjects require further refinement. By refining the specific scope and standards of relevant organizations, on the one hand, the scope of relevant organizations can be limited to avoid the waste of judicial resources from concurrent lawsuits filed by multiple organizations. On the other hand, it reduces the discrimination of the subject qualifications in a specific lawsuit.<sup>[8]</sup> When specifically defining the scope and standards of litigation organizations related to civil public interest litigation for children's personal information protection, we can refer to the existing legal provisions and practical experience. At present, the "Law on Protection of the Rights and Interests of Consumers" stipulates that, China Consumer Association and provincial consumer associations can file civil public interest litigations. Consumer organizations at provincial level or above have strong professional expertise and can allocate resources, but consumer organizations can be appropriately extended to municipal ones to better protect children's personal information. When determining the civil public interest litigation organizations for children's personal information protection, the national cyberspace administration can refer to the conditions stipulated in the "Environmental Protection Act" for environmental organization in environmental public interest litigation: the organization shall aim to protect children's personal information, be non-profit in nature, with a certain scale and responsibility capacity, and guaranteed business capacity.

In addition, is it necessary to determine the order of the above three types of litigation subjects? This paper argues that, due to the modest and restrained principle of the procuratorial organ, in other types of public interest litigation, the procuratorial organ should mainly support prosecution, only initiating public interest litigation when other subjects fail to do so. In the current information age, for the vulnerable group of children, their personal information infringement is technical, concealed, non-regional, with diverse infringing acts and severe consequences. If undesirable effect

is achieved before litigation when urging relevant administrative authorities to adopt administrative measures to stop infringing acts, damage expansion is inevitable, even causing irredeemable consequences. With rich judicial practice experience and necessary personnel and material conditions in public interest litigation, procuratorial organs can respond quickly to the cases qualified for public interest litigation and timely protect the interests of victims. Hence, there is no need to emphasize the order of the three types of subjects in civil public interest litigation for children's personal information protection.

### **5.3. Diversify the ways of bearing responsibilities**

In civil public interest litigation cases for children's personal information protection, the ways for defendants to bear responsibilities can be further diversified: first, improve the provisions on damage compensation. Damage compensation is usually a remedy for the victim loss. If there is no specific victim, can damage compensation still be claimed? This paper believes that the answer is yes. Damage compensation items can be determined by referring to the provisions of Article 18 of the "Interpretation of the Supreme People's Court on Several Issues Concerning the Applicable Law for the Trial of Consumer Civil Public Interest Litigation Cases", which stipulates that the damage compensation items include the investigation fee, attorney fee, appraisal fee and other expenses incurred by litigation of torts. On the one hand, it can lower the economic burden of the plaintiff subject and encourage relevant plaintiff subjects to actively initiate public interest litigation. On the other hand, it can also increase the illegal cost to the infringer and curb the illegal information processing behavior. As for punitive damages, without explicit provisions in the current law, different opinions and practices exist in theory and practice. According to the principle of maximal protection of children's interests, it is of positive significance to actively explore the application of punitive damages in civil public interest litigation for children's personal information protection. In terms of the application of compensation, active exploration is also made in judicial practice. To facilitate protection of children's personal information, the author suggests establishing a national special fund for children's personal information damage compensation dedicated to the expenditure in children's personal information protection. The second is to clarify other ways of bearing responsibility. In addition to the traditional ways to bear tort liability, such as stopping infringement, offering apology, avoiding risk and eliminating impact, etc., we can also refer to the approaches proposed in judicial practice, such as "shutting down the infringing website", "cancelling the QQ number involved", "providing relevant services to compensate for losses", "deleting the collected children's personal information" <sup>[9]</sup>, etc. Some preventive, compensatory, restorative measures can be added as a new way of bearing responsibility.

### **5.4 Rules for the balanced distribution of burden of proof**

When defining the rules for distribution of burden of proof in civil public interest litigation for children's personal information protection, it is necessary to take into account the proof ability of the plaintiff and the defendant in public interest litigation as well as the principle of children's interest protection, reasonably formulate rules for distribution of burden of proof. This paper considers that the illegal behaviors of children's personal information processors can be subdivided into three types: illegal collection, illegal leakage and illegal use, and different rules for distribution of burden of proof should be implemented for different types.

In the first type, the information processor fails to follow the sensitive information collection requirements and illegally collects numerous children's personal information, regardless of whether obligation to inform is fulfilled, whether the guardian's consent is obtained, whether the performance of relevant obligations abide by the principle of good faith, etc. Since the behavior implementation is controlled by the information processor, it is difficult for the victim as a vulnerable group to prove the illegality of the information processor's collection behavior. Therefore,



the information processor should undertake the burden of proof for the legality of his behavior of collecting numerous children's personal information and follow the principle of presumption of fault.

Information processor's leakage of numerous children's personal information means that the information processor fails to undertake the obligation of safekeeping the collected and grasped children's personal information, resulting in information leakage or theft. In such cases, it is difficult for the public interest plaintiff to judge whether the information processor has fulfilled the safekeeping obligation. In order to balance the burden of proof on both sides, it is advisable to implement the principle of presumption of fault. If the information processor cannot prove that it has fulfilled the safekeeping obligation or there is no third infringer, it should bear the tort liability.

In cases where information processor illegally uses numerous children's personal information, the illegal processing behavior is the active behavior of the information processor. Compared with the previous two infringing behaviors, such behavior causes greater infringement on children's personal information. For inappropriate utilization behaviors using information technology and algorithm technology, the no fault principle should be implemented since verification is more difficult for outsiders. Information processor shall bear tort liability as long as there is illegal utilization behavior.<sup>[10]</sup>

## 6. Conclusion

For vulnerable children, their interests and security of personal information are prone to infringement in Internet commercial activities, and cases occur from time to time. The introduction of the "Personal Information Protection Act" is of great significance for safeguarding the rights and interests of children's personal information. Due to the rough legislation, there are still shortcomings in the current "Personal Information Protection Act" regarding the provision of civil public interest litigation path for children's personal information protection, and many obstacles still exist in judicial practice. In order to let "Personal Information Protection Act" better protect children's personal information, it is necessary to optimize the applicable conditions for civil public interest litigation for children's personal information protection, refine the scope of the plaintiff, diversity ways of bearing responsibilities and balance the distribution of burden of proof, thus providing effective paths for civil public interest litigation for children's personal information protection.

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