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A New Right for Industrial Data Producers – Searching for an Appropriate Framework for a European Data Economy

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Example: the networked car

- □ today: many sensors and about 80 steering devices
- Internal and external networks

R-Link connectivity



Interests in data ownership

- Data on state of the car, the behaviour of the driver, heartbeat, alcohol and traffic, conditions of the environment
- Big Providers entering production industry
- Car will just be another user interface for services
- Perspective: horizontal and vertical Integration of data flows across companies ("Internet of things and services")
 - Estimation 2020: Network of 6,5 bln. People and 20 bln. objects (BDI 2015)
 - Increasing importance of non-personal / industrial data

Interests in data ownership

- Owner of the car
- User of the car (data input)
- Navigation and TC services
- Insurances ("pay as you drive")
- ISP (distribution channel, data collection for advertising, growth potential € 80 bln. 2015-20)
- Government (traffic control, eCall, toll system, crime prevention)
- Pertinent conflicts could include:
 - May the owner prohibit data collection in the car by producer?
 - May he allow third party access against the will of the producer?
 - May producer forward data to third parties?

Protection of data under current framework

Absolute Protection

- Copyright: creativity needed, no protection of raw data
- Database sui generis: Protection of data originating from the database involving some investment
 - Strict exclusion of data generation (CJEU) could be alleviated
 - Covers aggregation of data valuable for big data
 - Problems as to scope of protection
 - Limited to Europe
 - e contrario: no protection of data?

Protection of data under current framework

Relative Protection

- Know-how and trade secrets
 - Limited to factual secrecy
 - Preservation and allocation increasingly difficult
 - Directive Proposal: higher requirements for secrecy
 - Anonymisation: loss of connection to owner
- □ Indirect protection
 - Property in data carrier
 - Legal protection of technical measures against circumvention

Protection of data under current framework

General Civil Law concepts

- Tort law
 - Limited to destruction and modification
- Civil law property
 - Transfer of criminal law protection against hacking
 - Analogy to physical property no publicity of possession in data

-> Do we need a new IP right in data and how could it look like?

Comm. Oettinger: "EU lacks a data strategy"

...The first step would be creation of a legal basis clarifying who owns the data. "We need a virtual and digital law of property that includes data".

April 2015

EU: Strategie für den digitalen Binnenmarkt

- Digital Single Market strategy for Europe, COM (2015) 192 final
- Communication Building a European data economy, COM(2017) 9 final v. 10.1.2017
- Commission Staff Working Document on the free flow of data and emerging issues of the European data economy, SWD(2107) 2 final v. 10.1.2017
- Legal study on Ownership and Access to Data, SMART 2016/0085, Sep. 2016

Framework for a European Data Economy

- Reduction of "Data location restrictions"
- Data access and transfer, objectives:
 - Increasing access to anonymised machine data
 - Alleviating exchange of such data
 - Protecting investment
 - Protecting confidentiality of data
 - Minimising Lock-in-Effects
- Liability of IoT and autonomous Systems
- Portability and Interoperability

Data access and transfer

- Maschine generated or sensored Data
- Possible Problems:
 - Producers of machines have de facto-control towards users,
 - Other parties in the value chain have de facto-control due to superior bargaining power
 - Exclusive data use through imposing standard contracts and technical measures, high transaction costs for weaker party
- Different Options
 - Technical solutions, Model contracts, Licensing law, Data producers right, Access rights to data

A future data producers right

Contours

- Right in rem or subjective defensive right
- Limiting protection to syntactical level
- Right in rem: Allocation following investments: producer or operator of machines, common property possible
- Defensive right: protection against 3rd parties below level of secrecy, exchange in networked environments possible

A future data producers right

Limitations

- Oblgation to "Sharing"
 - Operator, share data with producer (product improvement and supervision)
 - Exemption for security reasons
- Access in the public interest
 - smart metering Information, smart homes
- Access rights for public institutions
 - Statistics, urban planning, environmental protection
 - Mostly limited to aggregated information
- Scientific exception
 - Scientist, financed from public sources

Does it make sense ?

Pros

- Incentive function (-)
 - Evidence insufficient
- Disclosure function (~)
 - Not relevant
- Allocation function (++)
 - Ordering of markets
 - Increase efficiency in data markets

- Paradigm shift in information protection ("Super IP")
- The problem of delineating other IPR
- The problem of specification and allocation

Allocation problem

- □ Who is the person that made investments ?
 - Networked car: producer of black box, producer of car, owner of car
 - Further Stakeholders: Driver, Navigation and tc services, insurances, ISP, State (eCall, traffic control, crime prevention)
 - Example: Smart Analytics in networked production
 - Service provider generates sensored data with his own device (Bräutigam/Klindt, Digitalisierte Wirtschaft/Industrie 4.0, Gutachten 2015, S. 25)
 - Interests of access by other stakeholders
- Balance Commission:
 - Sharing obligation economic operator/manufacturer device
 - Access for private parties in certain cases
 - Lowering of rights in public interest
 - Sector specific distinctions

Specification Problem

Delineating subject matter

- Unqualified indirect protection of information
- Data as abstract concept
 - ISO/IEC 2382-1 (1993): "a reinterpretable representation of information...in a formalized manner suitable for communication, interpretation, or processing"

Virtualised infrastructures

- Physical control impossible
- End-to-end-encryption as technical solution

Vielen Dank für die Aufmerksamkeit!

