IP for Future ... where do we want to go?

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Agenda

AI / Big Data in EU IP law
(Copyright, Trade Secrets)

AI / Big Data /IoT in Patent law and EU law
(... and what the EU can do...)
- **Protection discussion**
  - Investment oriented discussion on incentivization
  - Ethical discussion on data property
  - Both arguments seem to have little merit

- **Access & portability discussion**
  - Access to collected use/behaviour data etc. vs. access to refined and structured (generated) training data
  - Inner relationship to incentives oriented discussion above → 'smart', 'inclusive' IP rights, reduce transaction costs etc.
    - Petty patents?
    - Revising the database sui generis right → registered IP right?, protection term, exceptions and/or compulsory licenses
    - Role of trade secrets?
    - Very difficult policy prognosis
  - New exceptions, compulsory licenses etc.
• **Contracts & contract law (B2B & B2C)**
  - Best practices, non-mandatory (or even mandatory) contract law
  - Portability (Art. 20 GDPR – model character for the future?)
  - → Art. 16 (4) Digital Content Directive 2019/770 as a first step
    - How to make this work in practice? See also Furman report et al.
    - Interoperability, APIs etc.
    - Transaction costs (information costs)

• **Competition law and regulation**
  - New instruments & approaches (pro-active, upstream, horizontal)
    - E.g. 10th planned revision of German Competition Act (to be enacted in 2020) → New § 19a GWB!
    - Data as an essential facility & ‘intermediary’ market dominance
      - This is not just for the social networks, this is also for IoT!

• **Area specific access rights →**
  Further research on case examples needed and partly underway
  - Partly, already existent
  - No present need for pro-active intervention
• Relationship of existing IP protection and contracts
  • Almost no IP contract law on the European level!
    (e.g. Trade Secrets Directive)
  • Competition law issue of ‘empty‘ licenses (IP & trade secrets)
  • → Contract law instruments and refined competition law analysis needed

• Intellectual Property
  • Extending registration requirements, incentivizing/enforcing disclosure, improving access?
    • In copyright: new exceptions (fair use/revision of TDM)
    • Database sui generis protection for collected data → Need for reform!
    • In patents → ...
  • Trade Secrets Directive (additional flexibility in particular in enforcement) – trade secrets as the new paradigm?
    • Additional guidance for licenses in the field
    • Will trade secret protection inhibit necessary access to training data?
Challenges for the patent system

Protection
- Upstream
- Downstream

Access & disclosure
- Training data
- AI results (eg. for improvement etc.)
- IoT Communication Standards
Protection of AI or AI created inventions

- Al core technology
- Machine learning/NN & training data
- Application of AI to certain fields – AI based simulation
- AI based inventions

Upstream

Downstream
Disclosure, access & use: Two main problems

Disclosure & access
- To training data & AI results
- E.g. for improvements etc.

Accessibility & portability of AI standards & data
- IoT Communication Standards
- IoT in the age of SEPs
• **Scope of protection**
  
  • Process patents and their scope concerning resulting products – reach through problems?
  
  • **Data set as direct product of a patented process (algorithm)**
    
    • German Federal Court of Justice
      
    
    • Different situation in U.S. law
  
  • New multi-polar & international infringements
  
  • **No 'automatic' injunctions? Proportionality?**
    
    • General proportionality qualification in injunctions?
    
    • Cf. the recent German policy discussion
Access and portability in IoT & AI in the age of SEPs – even larger problems
(AI Standards needed, more players across more industry sectors)

**Patent law instruments**
- Licensing of rights registrations (LORs)?
  - New ‘collecting societies’?
  - Compulsory arbitration?
- Extended role for the Patent Offices?
  - Proportionality in enforcement?

**Competition law**
- Targeting the SSO’s (e.g. essentiality check, transparency, …) – more specific competition law framework under Art. 101?
  - But: what about trade secrets?
  - New instruments under Art. 102 for hold up?
• Contracts & contract law

• Resurrection of registration requirements for certain new style neighbouring rights? Revision of Db. Dir?

• Trade Secrets


• Competition Law (pro-active, upstream, horizontal) & Regulation

• New institutional alternatives
Thank you very much for your attention!

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