DATA RIGHTS – GERMAN PERSPECTIVE

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PROTECTION OF DATA – GERMAN PERSPECTIVE

What are unstructured data in the legal sense?

- a thing under regulations of German Civil Code (BGB)?
- like animals (§ 90a BGB) not qualified as things, but their regulations applicable?
  Problem: would create an exclusive assignment to a person
- a right?
- a third new category?

PROTECTION OF DATA – GERMAN PERSPECTIVE

Data a thing?

case law so far rules out protection as „property“ as data is not a „thing“

- *“data deleted by the power failure **do not constitute property within the meaning of §§ 823 para. 1, 90 BGB**. Accordingly, "property" is only physical objects in one of the three possible aggregate states (solid, liquid, gaseous). Electronic data, on the other hand, consist of electrical voltages … and therefore do not fall under the (property law) concept of property.*
- *Therefore, no ownership can exist in them (unlike in the data carrier, which they require precisely because of their lack of material existence).*
- *This qualification under property law is also not contradicted by the fact that computer programs, for example, are treated as property under the law of obligations…. **The term "thing" is clearly defined in the law. A broader interpretation is not possible.** Accordingly, a decision by the legislature would be required to also subject computer data to the concept of thing.“*

  (LG Konstanz, 10.05.1996, 1 S 292/95)

PROTECTION OF DATA – GERMAN PERSPECTIV

Legal situation

- no clear legal definition so far, thus no clear regulation on access, use or dissemination of data
- no protection of mere data outside of databases
- data itself protected as trade secrets under the German Trade Secrets Protection Act (Geschäftsgeheimnisgesetz):

  individual “Datum” a trade secret?

  - must be secret
  - must have commercial value

  would not lead to a right to use data in the sense of a genuine exclusive right

PROTECTION OF DATA – GERMAN PERSPECTIVE

Data access

- existing possibilities for (contractual) regulation of access to data not sufficient to meet the requirements of Big Data in the Internet of Things and Industry 4.0
- recently passed bill of 10th GWB amendment in antitrust law
- § 18 (3) GWBE introduces access to competition-relevant data in the case of a dominant market position
- § 19 (2) no. 4 GWBE introduces right of access even in the absence of market dominance in the case of market blocking opportunities

AIPPI RESOLUTION „IP RIGHTS IN DATA“ 2020

General Procedure

- AIPPI Report General sent out questionaire *„IP Rights in data“* to national groups
- national study groups prepared report on national law and proposals for harmonisation (33 reports were received)
- Reporter General and study committee prepared draft resolution which had been discussed in several different steps
- Executive Committee of AIPPI voted on draft resolution
- Resolution has been published (AIPPI library) and circulated to interested Offices and bodies

AIPPI RESOLUTION „IP RIGHTS IN DATA“ 2020

Background

- “*This Resolution addresses the issue of rights in data, in particular IP rights in **structured and unstructured data** under existing or possible new forms of protection.”*
- *In the context of this resolution,*

(i) “mere data” or “unstructured data”, means any information of any kind, not structured and not arranged in a systematic or methodical way;

(ii) “Database” or “structured data” refers to a collection of information arranged in a systematic or methodical way and individually accessible by electronic or other means

AIPPI RESOLUTION „IP RIGHTS IN DATA“ 2020

Resolution Q274

AIPPI resolves that:

1) Harmonization of the law relating to the protection of mere data and databases is desirable. Harmonization should specifically include legal definitions of mere data or unstructured data and databases or structured data.

Mere data:

2) Without prejudice to existing rights, mere data should not be eligible for protection by a new specific IP right such as a new sui generis right.

AIPPI RESOLUTION „IP RIGHTS IN DATA“ 2020

Resolution Q274

Databases

3) Without prejudice to any protections which may arise under copyright and under laws relating to undisclosed information, unfair competition and contracts, **databases should be eligible for protection by a sui generis right**, according to A-D below.
   A) Sui generis IP protection should arise where there has been a substantial investment (financial or otherwise) in either the obtaining, verification or presentation of the contents of the database.
   B) The original owner(s)of the sui generis IP right should be the individual person(s) or entity or entities that made the investment(s) which result(s) in the database.
   C) The scope of the protection of the sui generis IP right covering a database should prohibit unauthorized third parties from certain acts, e.g. of extraction and re-utilisation, of the whole or a substantial part of the contents of the database, including repeated acts that individually do not involve extraction or re-utilization of a substantial part of the contents, but that cumulatively constitute extraction or re-utilisation of a substantial part of the contents of the database.
   D) Exceptions and limitiations to the sui generis IP right should provide a reasonable balance between IP protection and the interests of third parties, including freedom of expression and freedom of speech, public health and safety, privacy, research and development in all sorts of industries and fair use.

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