Who owns non-personal data? Legal aspects and challenges related to the creation of new ‘industrial data rights’

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Outline:

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II. Example: the networked car
III. Protection of industrial data de lege lata
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   2. Relative Protection (Know how, Data protection law)
   3. Indirect Protection
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IV. Protection of industrial data de lege ferenda
   1. Procs and cons
   2. How could a data right look like?
   3. Main problems (allocation and specification)
V. Perspectives: where to go?
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“.

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Example: the networked car

- today: many sensors and about 80 steering devices
- Internal and external networks
Example: the networked car

- Data on state of the car, the behaviour of the driver, heartbeat, alcohol and traffic, conditions of the environment

- 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

- **Relative Protection**
  - Know-how and trade secrets
    - Limited to factual secrecy
    - Preservation and allocation increasingly difficult

- **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?
A new IPR in industrial data?

- **Pros**
  - Incentive function
    - Evidence insufficient
  - Disclosure function
    - Not relevant
  - Allocation function
    - Ordering of markets
    - Increase efficiency in data markets

- **Cons**
  - Paradigm shift in information protection
  - The problem of delineating other IPR
  - The problem of specification and allocation
Semiotic analysis: Data / Information

- **Syntactical level**
  - DATA

- **Semantics**
  - Work
  - Design
  - data protection
  - Know-how protection

- **Pragmatics**
  - Invention
  - Trademark
How could it look like?

- A neighbouring right for data
  - „Coding“ (first storage or recording)
    - Limited to measurement data, excluding machine generated
  - Requirement of added value / novelty
  - Allocation to entrepreneur and consumer
  - Limited to copying, excluding independent creation
  - Duration 5 years, option to prolong
  - Registration over the Internet
  - Only commercial exploitation
  - Scientific use free
Allocation Problem

- Who is „encoding“?

- Networked car:
  - Producer (interest in product data)
  - Owner of the car (costs of operation)
  - Driver (data input)

  Who makes investment?

- Smart factory:
  - Service provider
  - Factory owner
  - Other companies in network

  Who is the most efficient user?
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
  - Right of access to information?