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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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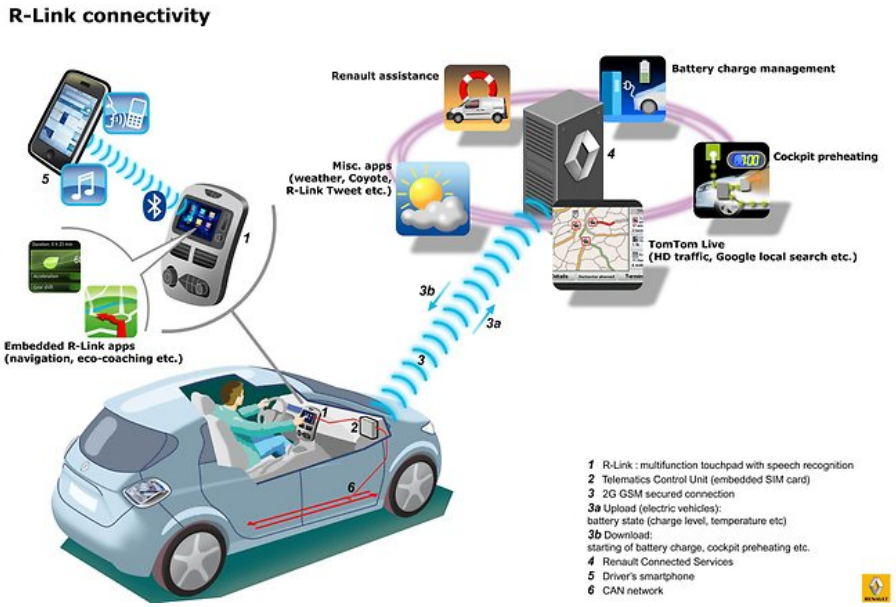
Example: the networked car

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



Data production - trends

- 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?

Who owns the data ? 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
  - Know-how and trade secrets
- General Civil Law concepts
  - Tort law
  - Civil law property

Discussion on data ownership

-> 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 response: Strategy for the digital Single Market

- 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(2017) 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

A future data producers´ right

- Communication COM(2017) 9
  - Alternatives:
    - Right in rem:
      - Allocation following investments: producer or operator of machines
    - Relative right:
      - Protection against 3rd parties below level of secrecy, exchange in networked environments possible

A future data producers right

- Limitations
  - Obligation 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 (~)
    - Is it relevant?
  - Allocation function (++)
    - Ordering of markets
    - Increase efficiency in data markets
- Cons
  - Paradigm shift in information protection ("Super IP")
  - The problem of delineating other IPR
  - The problem of specification and allocation

Allocation problem – who should be the owner?

- 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
    - Interests of access by other stakeholders
- Balance in EU Communication:
  - Sharing obligation economic operator/manufacturer device
  - Access for private parties in certain cases
  - Lowering of rights in public interest
  - Sector specific distinctions

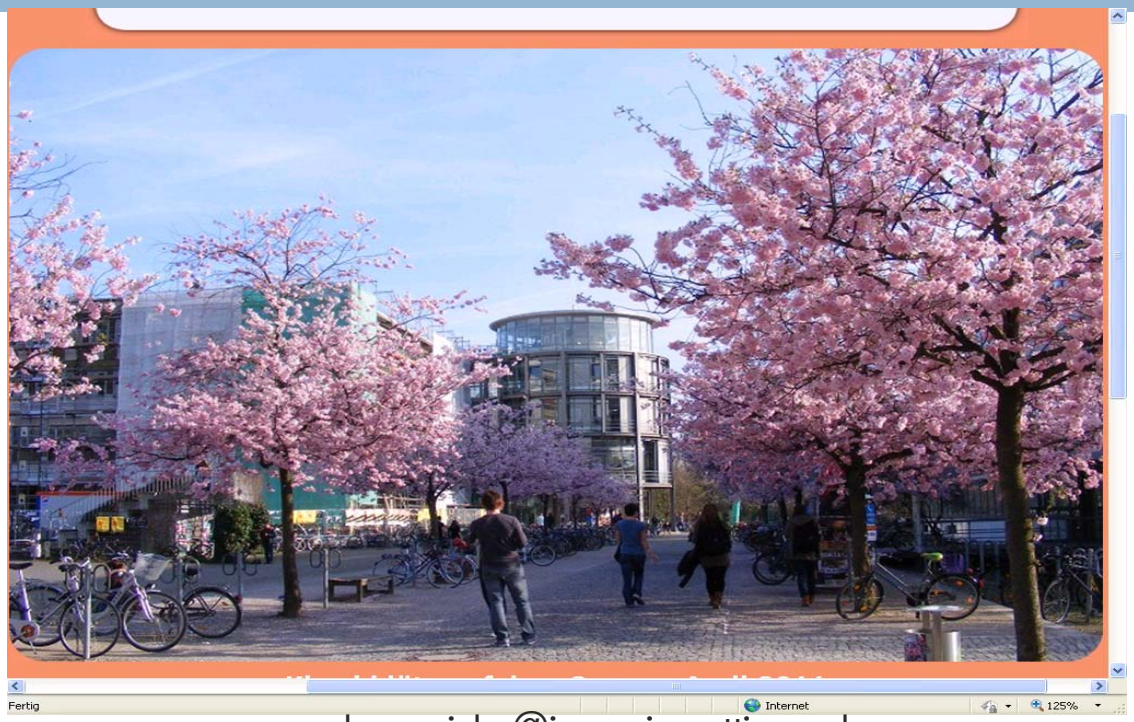
Specification Problem

- 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"
- EU Communication: Limiting protection to syntactical level
  - Separation not possible, different levels of information

Perspectives: Where to go?

- Severe theoretical and practical impediments to establishing industrial data rights
- Two positions:
  - More efficiency and transparency through exclusive right
  - Open Data and open innovation
- Distinguish specific markets
- Distinguish Buiness/consumer
  - B2B: „private ordering" – contract chains combined with technical protection
  - B2C: Refining consumer protection/data protection law – transparency, certification, standard contracts control
- Competition law adapted to digital economy – data and monopoly power, portability
- Need for further research

Thank you for the attention !



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