

WEBINAR

Data ownership – what is ‘your’ data?

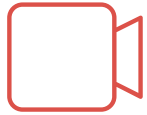
The logo for Data Europa Academy is located in the bottom left corner. It consists of a dark blue circle containing the text 'data.europa academy' in white. The word 'data' is on the top line, 'europa' is on the second line, and 'academy' is on the third line. The dots in 'europa' are colored yellow and orange. To the right of the blue circle is a white circle, and both are set against a larger grey circular background.

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8 December 2023

10.00 — 11.30 CET

Rules of the game



The webinar will be recorded



For questions, please use the ClickMeeting chat.



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Introduction



Hans Graux
Timelex



Thomas J. Farkas
Eversheds Sutherland



Claude Rapoport
Chairman of the Beltug Board



Wolfgang Kerber
University of Marburg

Agenda

10.00 – 10.15	Opening and introduction to data ownership – <i>Hans Graux</i>
10.15 – 10.35	Data ownership from an IP rights point of view – <i>Thomas J. Farkas</i>
10.35 – 10.55	Data ownership from an industry point of view – <i>Claude Rapoport</i>
10.55 – 11.15	Data ownership from an academical point of view - <i>Wolfgang Kerber</i>
11.15 – 11.25	Q&A
11.25 – 11.30	Closing and remarks

Introduction to data ownership

Hans Graux

Data ownership from an IP rights point of view

Thomas J. Farkas

Data ownership – what is “your” data?

An IP perspective

8 December 2023

Dr. Thomas J. Farkas, LL.M. (London)
Attorney-at-Law (Hamburg, Germany)

data.europa.eu event





“Ownership”: an Intellectual Property (IP) perspective

1

Concept of ownership

2

General justification of IP Rights

3

Subject matter of IP Rights

4

Limitations of IP Rights

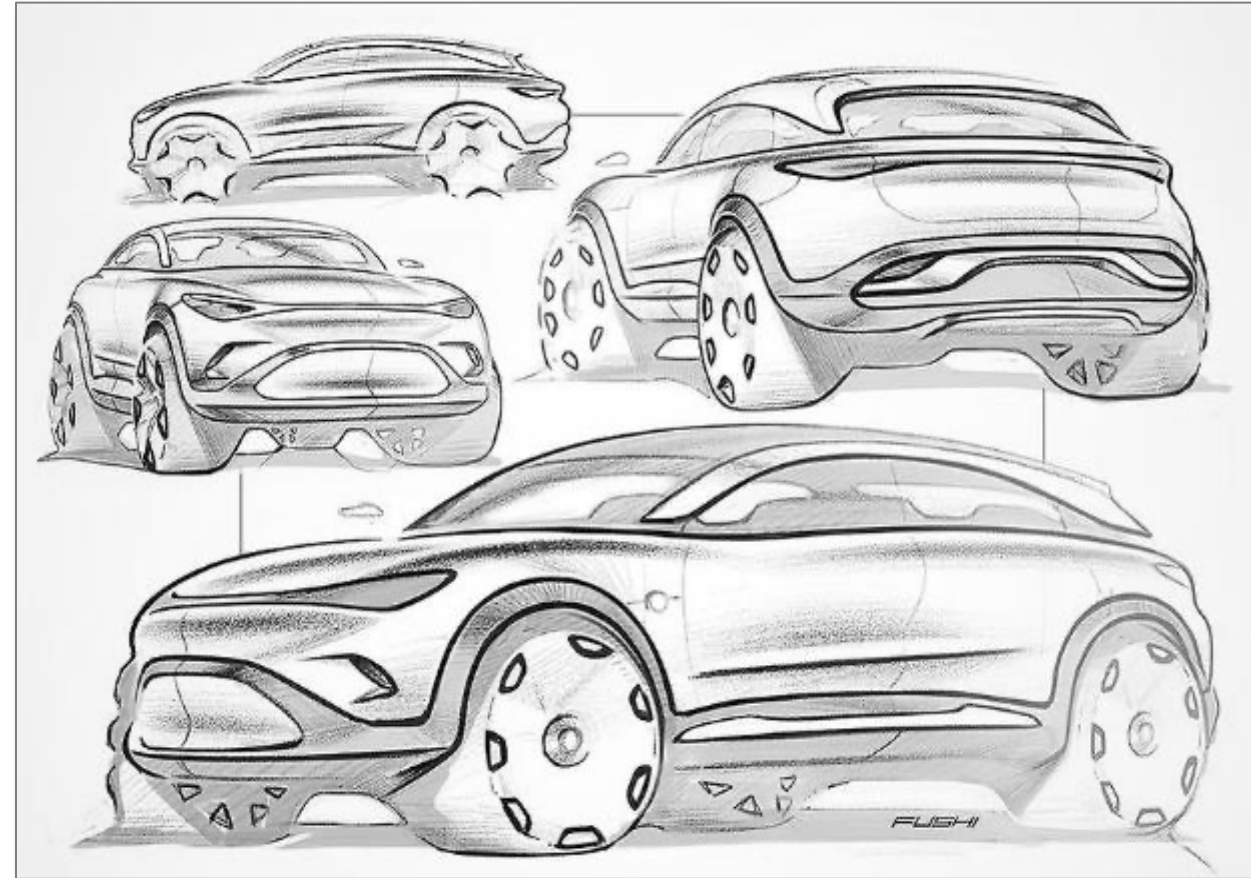
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Is data protected by IP Rights?

6

New IP Right for data?

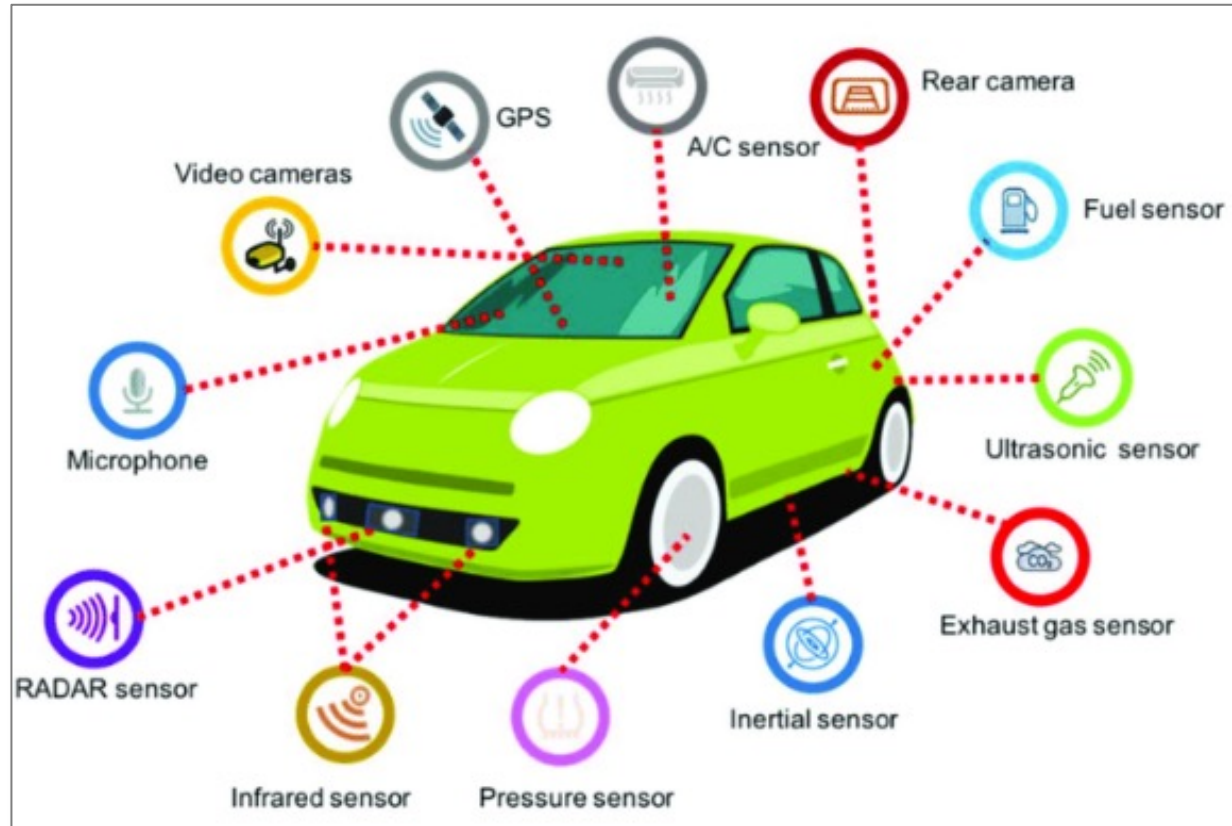
1. Concept of Ownership



<https://www.istockphoto.com/en/vector/auto-set-flat-colorful-style-isolated-on-white-background-gm1413048328-462256690?phrase=car>

<https://www.carsales.com.au/editorial/details/2024-smart-3-design-sketches-revealed-140133/>

1. Concept of Ownership



<https://www.mdpi.com/1424-8220/18/4/1212>



2. General justification of IP Rights

- **Will there be future creations without (exclusive) rights?**
- **Incentive** (“Anreizfunktion”)
- **Reward** (“Belohnungsfunktion”)

3. Subject matter of IP Rights



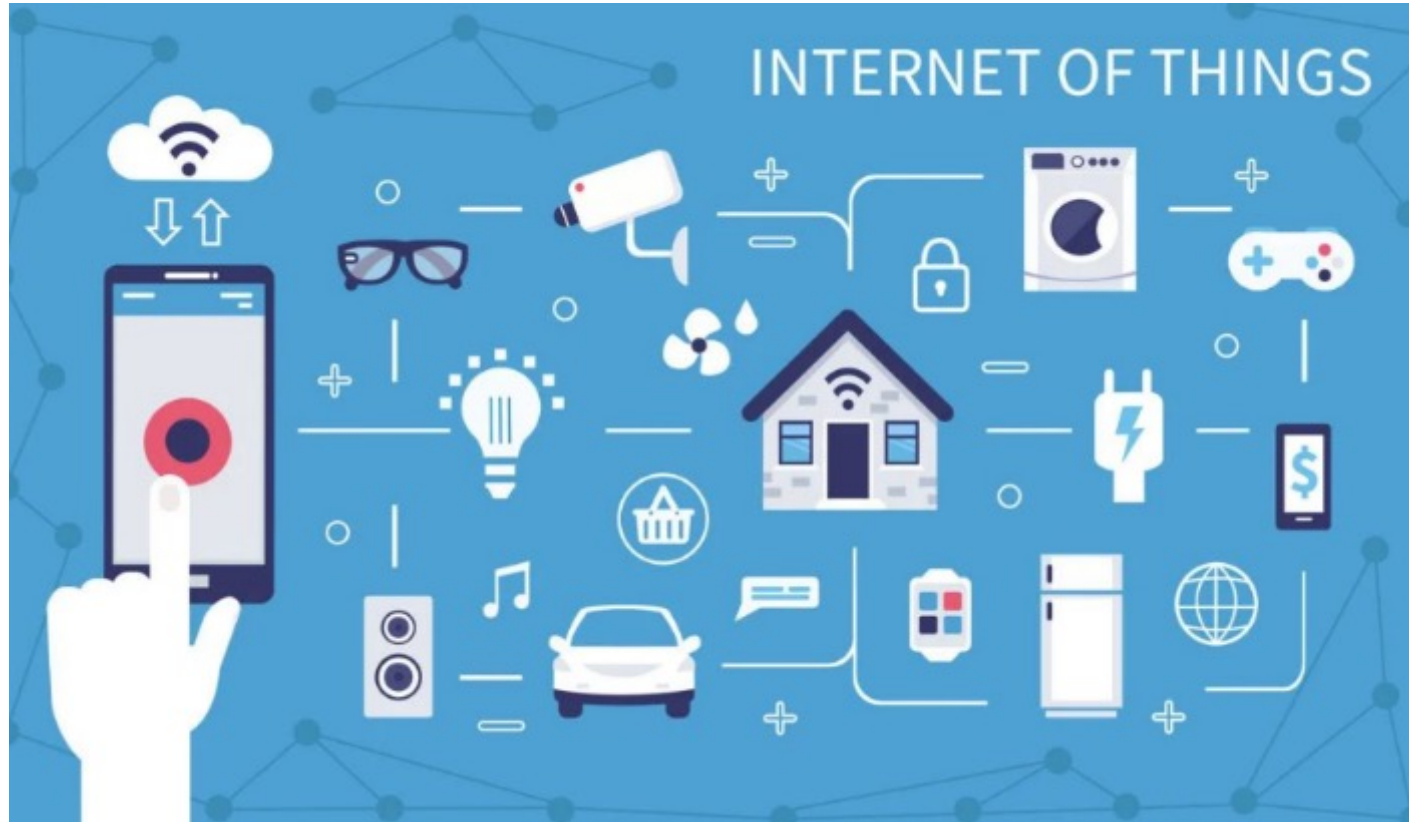
(IP) Right	Subject matter	Owner
Trademarks	Signs capable of indicating an origin	Applicant
Patents/Utility models	Exclusive right to invention in return for publication and advancing knowledge	Inventor (Employee) / Employer (Employee Invention Law)
Designs	Benefit for design creation	Designer, co-designer, employer
Copyright	Protection for an original expression of an idea	Author (German Law=transfer of rights not possible, but rights can be granted); Employer Right to be named as author
Database rights	No creative/originality requirement; protects the investment made in compiling data, even without creative aspect	Producer of database="investor"
Trade secrets	Protection of information, if information has a value because it is secret (or not generally known or readily ascertainable by others)	"Trade secret holder" = any natural or legal person lawfully controlling a trade secret



4. Limitations of IP Rights

- Goal: striking the right balance between exclusive rights & access to art, access to innovation, etc.
- Generic creations, non-original
- Citation, parody, pastiche (Copyright)
- Descriptive signs, signs contrary to public policy, deceptive signs, use in a non-trademark manner (trademarks)
- Aesthetic creations, computer programs, reproduction of information, compulsory licenses (patent law)
- Information publicly available, no trade secret
- Competition Law

6. Is Data protected by IP?



<https://robots.net/tech/what-is-internet-of-things-iot/>



6. Is Data protected by IP?

- Copyright (-): no intellectual creation
 - Database right (-): investment (+), but not for generating the particular content (automated generation)
 - Trade secrets (-): is the data secret?
- ⇒ **In most cases, No!**





6. New IP Right for data?



Pros

- New property right may
- increase efficiency of data markets
 - prevent establishment of monopolistic structures & exploitation of bargaining power
 - hinder exclusive de facto control of manufacturers over IoT data



Cons

- New data right may
- lead to paradigm shift in protection of information
 - interfere with balanced approach of IPR
 - Subject matter and rights unclear (exclusivity right?)
 - not solve problem of specification / allocation
 - lack justification (**no innovation incentive problem**)
 - lead to too **extensive data capturing**
 - **overprotection**

Questions and issues



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Data ownership from an industry point of view

Claude Rapoport

What's is "your" data ? New Data Act perspective

Data.europa academy
8.12.2023

New Data Act perspective

The Data Act is a **Game Changer**

Main objective: Create a fair Data economy by ensuring a fair access and use of the Data ... Wouaw 🤔 ... This is a challenge !!!

2 important chapters:

- BtoC and BtoB data sharing
- Switching between Data Processing Services

What is already clear ?

What can we expect for implementation (best guess) ?

B_{to}B and B_{to}C Data Sharing

Who is the owner of the data ?... Big question !

You drive a car ... Are you owner of the data generated by the car ?
... for personal data, certainly YES ... and for other generated data?....

The car sends data to the manufacturer... is the manufacturer owner of the data ?
... for technical data, probably YES... and for other generated data ?...

The Data Act takes a radically new perspective ...

B_{to}B and B_{to}C Data Sharing

Let us take an example:

You are a careful driver and want your insurer to know how you drive

How can you do this today ?

- Are you the owner of some data ?
- Is the manufacturer the owner of some data ?... And so what ?

New perspective:

The Data Act forgets Data Owner and talks about **Data Holder**

Art 3: Obligation to make connected products data and related services data accessible to the user

You drive a car. It is a connected product that sends data to the manufacturer

User

Data Holder

When you buy a car you will have to sign 3 contracts:

- Purchase order
- GDPR addendum
- **Data Act addendum** about the use of the **data produced by the car over the years** and how you can access or retrieve them... free of charge

This is really new and it will change the game

Art 5: Right of the user to share data with 3rd parties

You drive a car. It is a connected product that sends data to the manufacturer

User

Data Holder

You are a careful driver and want your insurer to know how you drive

User

3rd party
= Data Recipient

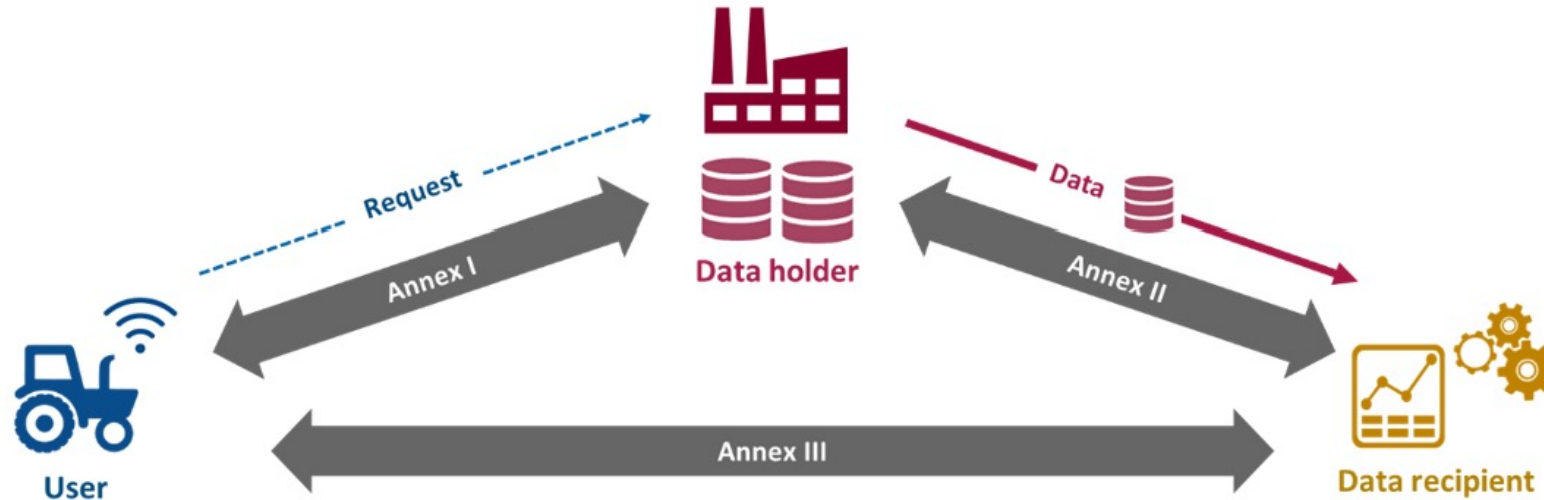
Upon request of a user, the Data Holder shall make available **readily available data** to a 3rd party ...with a reasonable and non-discriminatory compensation...

This is also a game changer... but

- Security requirements must be agreed
- The manufacturer wants to protect the trade secrets embedded in the data

Trilateral Data Sharing scenario

Trilateral data sharing scenario (mandatory for data holder)



It is a market in the making

- a lot of new aspects to analyse and a lot of new rules must be defined
- Balancing trade secrets with open access to data is complex and must be explicitly managed

Trilateral Data Sharing scenario

What is already clear ? The principles

- The Data Holder is obliged to share the data
- Security requirements must be agreed
- Trade secrets shall be preserved
 - **The Data Holder shall identify the data protected as trade secrets** and define necessary measures to preserve them
 - **In exceptional circumstances**, when the Data holder can demonstrate that it is highly likely to suffer serious damage from the disclosure of trade secrets, despite the technical and organisational measures taken by the user, **the Data holder may refuse the request for access on a case by case basis**
- A reasonable and non-discriminatory compensation must be calculated

Trilateral Data Sharing scenario

What can we expect for implementation (best guess) ?

“Voluntary Data sharing” :

Data holder and Data recipient find a common interest to share data for giving service to the user

“Mandatory Data sharing”:

Data holder and Data recipient have conflicting interests

The definition and the process to share the Data (and definition of trade secrets) will be difficult to set up in the contract and to implement in practice

Art 41: The Commission shall recommend non-binding Model Contractual terms (MCTs) including reasonable compensation and the protection of trade secrets

B_{to}B and B_{to}C Data Sharing

Conclusion

Each and every contract for purchase, rent or lease a connected product must have a Data Act addendum

When ?

20 months after the official publication → **09/2025**

Eventually, contracts must be setup between the User and the Data Recipient

Eventually, contracts must be setup between the Data holder and the Data Recipient

Switching between Data Processing Services

Today:

- Only 5% of Cloud Services agreements include a switching and exit clause
- The cost of switching is a big obstacle

So the customers are locked-in.

The Data Act has explicitly addressed these issues:

- Article 23: **Removing obstacles to effective switching between providers of data processing services**
- Article 29: **Gradual withdrawal of switching charges including data egress charges**

From [date X+3yrs] onwards, providers of data processing services shall not impose any charges on the customer for the switching process, including data egress charges.

Switching

What is already clear ?

- **From 09/2025 Switching and Exit clauses are mandatory** in Cloud Service Agreements
- **From 09/2025 reduced switching charges** not exceeding the cost directly linked to the switching process
- **From 09/2028 no switching charges**, including data egress charges

Some limitations:

- In case of fixed term contracts, **early termination penalties are allowed**
- Where relevant, Providers shall provide **information on services that involve highly complex or costly switching...**
- The obligations shall **not apply if the majority of main features has been custom-built**

Switching

What can we expect for implementation (best guess) ?

- In all cases switching brings a lot of worries and will never be pleasant.
- The Commission wants to make a real change on the market to restore competition
- The Commission intends to publish a “Cloud Rulebook” in line with the Data Act.
- All public tenders might require the compliance with the “Cloud Rulebook” so this might create In a new reference on the market.

Thank you!

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President of the Beltug Board
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Data ownership from an academic point of view

Wolfgang Kerber

“Data Ownership”, Bundles of Rights on IoT Data, and the Data Act

Prof. Dr. Wolfgang Kerber
(University of Marburg)

Webinar

Data ownership – what is „your“ data?

data.europa.eu

December 8, 2023

1. Introduction

Policy background:

- EU data policy for more reuse and sharing of (non-personal) data
 - + Communication: “Building a European Data Economy“ (2017)
- new exclusive rights on non-personal data? broadly rejected
- since 2016 policy discussion about access to data in connected cars
- EU data policy has so far focused primarily on voluntary solutions
 - + Data Governance Act: trustworthy data intermediaries
 - + Digital Markets Act: very few and specific data access / sharing obligations
- **Data Act** (proposal February 2022 / final version in July 2023):
mandatory introduction of new rights of users of IoT („Internet of Things“) devices
for access, use, sharing of IoT data

[Based upon two papers:

- (1) Kerber, W. (2023): Governance of IoT data: Why the EU Data Act will not fulfill its objectives, GRUR International, 72, 120-135.
- (2) Eckardt, M. / W. Kerber (2023): Property Rights Theory, Bundles of Rights on IoT Data, and the Data Act, <https://dx.doi.org/10.2139/ssrn.4376833> (forthcoming in EJLE)

2. Data Act: Overview (1)

Data Act: Overview

Three main data governance issues:

(1) **Governance of the data generated by IoT devices: (Ch. II)**

- + new rights of users of IoT devices to use and share the generated data
- + in B2C and B2B contexts

(2) Business to Government: data access obligations in a public emergency (Ch.V)

(3) Switching between data processing services, solving lock-in problems (Ch. VI)

[Additionally:

- General rules if legal obligations for making data available, e.g. on fair, reasonable and non-discriminatory terms (w. reasonable compensation) (Ch.III)
- Fairness of contractual terms in data-sharing („imbalances in negotiation power“) for micro, small- and medium-sized enterprises (Ch. IV)]

2. Data Act: Overview (2)

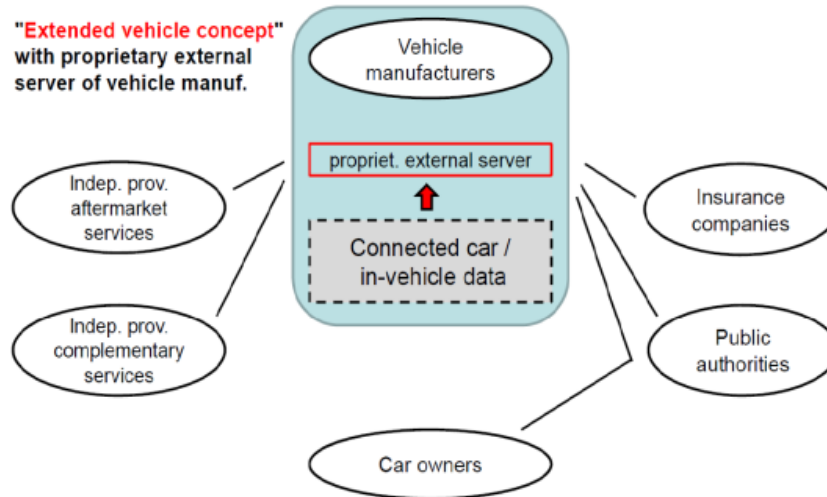
Problems regarding data in IoT contexts:

- Legal situation: Many generated IoT data are
 - + personal data: EU data protection law remains fully applicable (consent)
 - + non-personal data, for which no „de jure“ rights exist, but data holders can have **exclusive de facto control** over the data
 - Main problem: (both in B2C and B2B contexts)
 - + Manufacturers of smart devices can **get through their own technical design exclusive de facto control** over all data generated by device
 - + **access problems** for:
 - > users who (co-)generate the data by using their device
 - > firms for providing services but also for data-driven innovation
- => Problems:
- competition problems, e.g. on secondary markets
 - negative effects on choice of users for services etc.
 - negative effects on innovation / under-utilization of data
 - no fair sharing of the value of data

2. Data Act: Overview (3)

Example: Data in ecosystem of connected cars (Kerber 2018, 2019)

“Extended vehicle”: current data governance concept of vehicle manufacturers (VM)



- all data are directly transmitted to a proprietary server of the VM
 - VM has exclusive control over
 - 1) **access to the data** and
 - 2) **technical access to the car**
(closed system / no interoperability)
- => Gatekeeper position

- **VMs can get control over all secondary markets in this ecosystem** and can foreclose independent service providers and leverage market power
=> **negative effects on competition, innovation, and consumer choice**
- Independent service providers and consumer associations demand a regulatory solution for these problems (policy discussion in the EU since 2016)
=> EU Commission has acknowledged the problem but so far no solution

2. Data Act: Overview (4)

Data Act acknowledges this main problem and wants to solve it

Objectives of the Data Act:

- (1) more user (consumer) empowerment and better additional services / competition on secondary markets
- (2) „unlocking data“ to make more data available to firms for innovation
- (3) fairness in the allocation of value from data among actors in data economy
- (4) preserving incentives to invest in generating value through data

Two key instruments:

- new rights for users to access IoT data and share them with third parties
- need for a contract between data holder and user about the use of non-personal data by data holder

2. Data Act: Overview (5)

Overview and basic architecture

Starting-point: manufacturers (data holders: DH) can get exclusive de facto control over IoT data through their own technical design of the IoT devices

- (1) Art. 3: Obligation to make data generated by the use of products or related services accessible
- (2) Art. 4: The right of users to access and use data generated by the use of products or related services
- (3) Art. 5: The right of users to share data with third parties
- (4) Contract between user and manufacturer / DH: data use of data holder based upon a contract betw. data holder and user (Art. 3, 4(13) and (14))
- (5) Data sharing with third party requires a „licensing contract“ between DH and third party with FRAND conditions (includ. „reasonable compensation“)

Scope of data: only raw data and "pre-processed" IoT data but not derived or inferred data

3. Research approach: Analysis of Data Act solution for non-personal IoT data from a bundle of rights approach (1)

Property rights theory, bundle of rights approach, and rights on data

- economic property rights theory (since 1960s)
 - + deconstructed „property“ into a bundle of specific rights, and asked for optimal design and assignment of this set of rights
- bundle of rights: (also used widely in the legal discussion)
 - + rights to use, access, exclude others, manage and transform, transfer ...
 - + rights can be assigned to different actors
- application to innovation: IPRs: temporary exclusive rights as innovation incentives
- **application to data:** so far optimal bundle of rights solution unclear
 - + important: data is non-rivalrous in use => rationale für more reuse / sharing
 - + what we know: optimal BoR for data can be very different due to widely different economic and technological conditions
- => wide range from exclusive solutions to ... data access rights / data sharing obligations to ... open data / data commons („no one design of BoR fits all“)

3. Research approach: Analysis of Data Act solution for non-personal IoT data from a bundle of rights approach (2)

Status quo: Exclusive de facto control over IoT data by manufacturers as result of a „technological capture“ of generated IoT data

- status quo: manufacturers / data holders have through de facto control over data economically a property-like exclusive position on non-personal data
 - + can use it, license it, and sell it (w/o having any de jure rights on this data)
- How has this de facto exclusivity emerged?
- manufacturers can choose betw. different technological solutions, and they will choose the profit-maximizing technical design
 - + choosing a design that allows them to „capture“ exclusively all data generated by these devices and therefore all the value from this data
 - + this technological choice often not optimal from perspective of society
 - => potential market failure of a wrong technological choice
- property rights theory: can explain de facto „capturing“ of resources (Barzel)

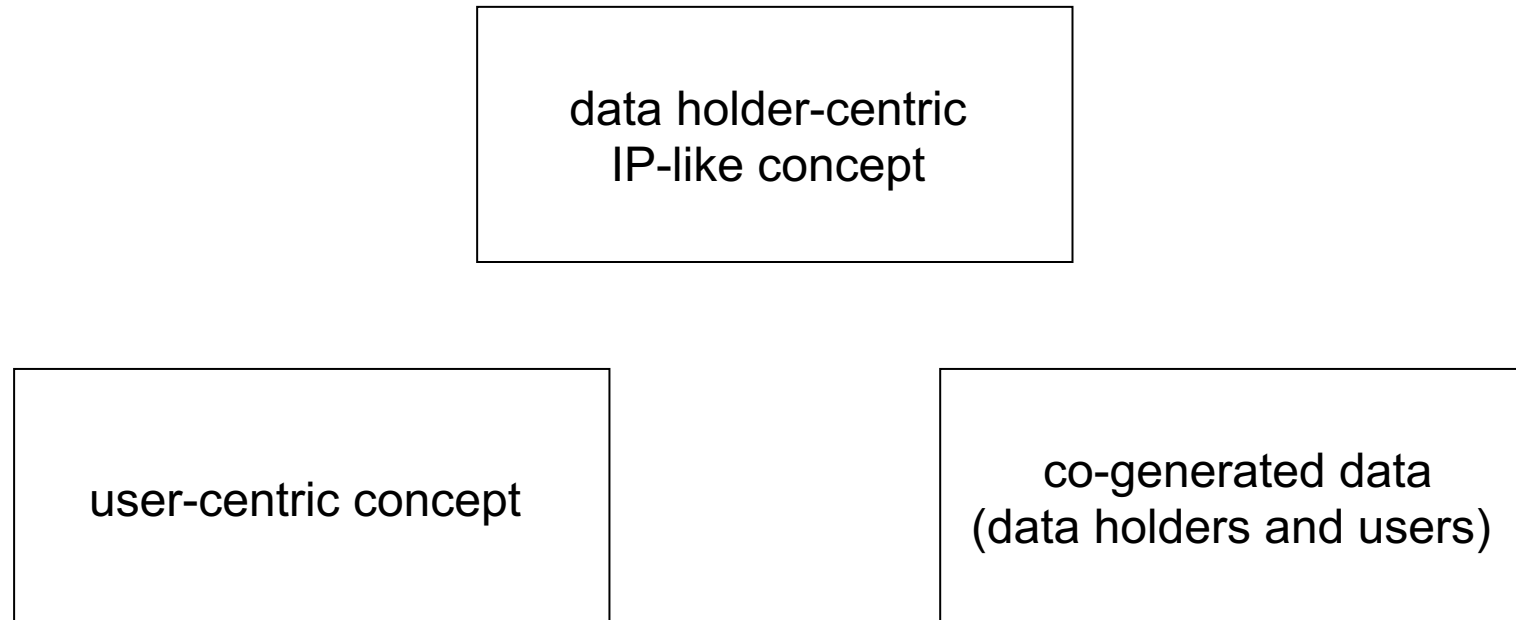
3. Research approach: Analysis of Data Act solution for non-personal IoT data from a bundle of rights approach (3)

How does the DA change the BoR on non-personal IoT data?

- Very important: DA does not discuss / question this „technological capture“
=> DA accepts it but tries to limit negative effects of de facto exclusive control
 - How does the DA try to change the „bundle of rights“ on IoT data?
 - (1) users get rights for access / use / sharing the (raw + preprocessed) IoT data
 - (2) data holders can only use non-pers. data based upon contract with users
 - **Main problems:**
 - + many unclear provisions, as well as inconsistencies and contradictions within the Data Act => high implementation and compliance costs
 - + User rights and data sharing mechanism with third parties will be weak and very ineffective (too many restrictions, requirements, trade secret protection, technical protection measures, too small scope of data, high transaction costs)
=> not much IoT data will be shared => will not help much to provide more services for users (e.g. repair services) or lead to much more innovation
- => DA is not based upon a clear legal and economic concept !**

3. Research approach: Analysis of Data Act solution for non-personal IoT data from a bundle of rights approach (4)

Three concepts of BoR on non-personal IoT data



Elements of these three BoR concepts can be found in the DA as well as in the discussion about the DA

4. Data holder-centric IP-like BoR concept (1)

Data Act can be read as **assigning the BoR on non-personal data in an IP-like way to the data holders** (i.e. they are the „de facto owners“ of the data)

- technical „capturing“ of IoT data by manufacturers / DH is not questioned in DA
- economic position is similar to an IP-like protection of IoT data
 - + data holders are free to set monopoly prices if they directly share data
- DA justifies exclusive de facto control through an incentive argument for investing in data-generating IoT devices (in analogy to an IP rationale)
- data sharing with third parties requires a negotiated „licensing contract“ with DH (with „reasonable compensation“ / FRAND conditions)
- new user rights need not contradict such an IP-analogy interpretation:
 - + also other IPRs have limitations with some limited rights of users
- DA has provisions for protecting the de facto control of data holders („in-situ“ access, remedies against unauthorized use, technical protection requirements ...)
- **But:** What does not fit into the IP analogy: Art. 4(13) and (14) with its claim that DH can only use the data on the basis of a contract with the users

4. Data holder-centric IP-like BoR concept (2)

Can such an IP-like position of DH be defended by an incentive problem?

- Market failure regarding incentives to invest in data-generating IoT devices?
- So far no concerns or any evidence for an underinvestment in IoT devices or in using too few sensors, cameras, microphones in IoT devices
- no economic analysis why there should be an incentive problem ...
- decisive: manufacturers are selling the IoT devices to users and all costs can be covered by the price of IoT devices => no general unsolved incentive problem !
=> no justification for additional monopoly position for data monetisation
- However: data monopoly position can lead to high costs for society
 - + monopolistic data prices => under-utilization of the data, esp. for innovation
 - + enables foreclosing competitors on secondary markets (in IoT ecosystems)

Assessment:

- DA seems to follow to a large extent such an IP-like concept, although it cannot be defended economically and has negative effects on objectives (esp. innovation)

5. User-centric BoR concept of IoT data (1)

Assigning the BoR on non-personal data to the users of IoT devices

Basic idea: exclusive assignment of BoR to the users over the data that they generate with their own device (i.e. users are seen as „owners“ of IoT data)

- + why? Owner of device is also owner of benefits of the device (usus fructus)
- + (also some similarities to rights of data subjects about personal data)

Data use contract between DH and user can be interpreted in that way
(it is the users who give a „license“ to data holders if they want to use the IoT data)

- final version: only the users have the right to monetize the IoT data (rec. 26)
- also for enabling liquid, fair and efficient data markets (rec. 26):
 - + third parties can resell the data and aggregation through data intermediaries
 - => large data sets for enabling data-driven innovation by other firms, esp. also start ups etc.

- => **final version** clarified: - **clear assignment of the IoT data to users !**
- (but not consistent with other provisions of DA)

5. User-centric BoR concept of IoT data (2)

Key question: **Can this contract work effectively or do market failures exist?**

- **B2B situations:** allocation of rights between users and DA is negotiated, which can lead to very different outcomes
 - + in most cases free negotiation between firms works well
- **B2C situations:** very different
 - + this data use contract can suffer from the same information / behavioral problems like contracts about processing personal data (where we often have to agree without transparency / understanding or a realistic choice)
 - + plus: DH can tie sale of product with a buy-out contract about IoT data, i.e. large danger that assigned data are directly contracted away by data holders
 - => DA does not help to solve this market failure / „empower“ consumers for using this contract for „meaningful control“ over IoT data (only: freedom of contract)
 - => need for additional regulatory measures (consumer protection)

Additional problem: Does exclusive assignment of IoT data to users really lead to more data sharing and innovation? => motivation of users?

=> much skepticism about entire concept of user-initiated data sharing mechanism

6. Concept of co-generated data

General concept of co-generated data: (ALI-ELI 2021)

- often more than one actor contributes to the generation of data
- all co-generators should have rights on this data/get a share of its value

Application to IoT governance in the DA: user rights justified, because IoT data are co-generated by manufacturer and users (recital 6)

Concept of co-generated data by Metzger/Schweitzer (2023) [and Martens 2023]

- basic idea: DH and users should have **parallel and independent rights** to use, share, and monetize the IoT data (=> both have the same rights)
- prevents monopolisation of data / allows competition between DH and users for sharing data (two sources for IoT data)
- much more innovation- and competition-friendly BoR on IoT data than first two types of data holder-centric or user-centric concepts, who still rely on exclusivity

Final version of DA: did not go into this more innovation-friendly direction but instead goes back to the concept of exclusive rights on non-personal data

7. Conclusions and perspectives (1)

Conclusions:

- In DA an IP-like / exclusive BoR concept on non-personal data is primarily used
 - + in final version more contradictions between a data holder-centric and a user-centric concept with many unclear provisions and inconsistencies
 - + design of bundle of rights on non-personal IoT data remains unclear
 - + neglected: market failure problems regarding contract about use of IoT data
- objectives of DA will not be achieved:
 - + data sharing mechanism via new user rights is weak and largely ineffective
 - + skeptical whether thriving new data markets will be achieved
 - + will not help much innovation and competition on secondary markets
 - > option for more additional sectoral regulation for more targeted solutions (scope of data, interoperability etc.), e.g. regarding connected cars
 - + also much more empowerment of consumers cannot be expected
 - + final version has not really improved overall effectiveness of DA !

7. Conclusions and perspectives (2)

Perspectives:

- If we want more innovation and competition:
 - + choose BoR that make more IoT data broadly available for users and firms
 - + e.g., also more direct access rights for firms, (public) data trustee solutions, open data, data commons
 - + particularly important: IoT data for training AI, and for research purposes
 - + interesting alternative model to DA: proposal for European Health Data Space with far-reaching opening of health data for secondary use
 - DA might go into wrong direction:
 - + it helps to entrench current strong position of IoT manufacturers / DH: justification of de facto control / contracting away the data from the users
 - + danger of a path to „propertization“ of non-personal data !
 - + danger of further incentivizing technological capture of data !
- => concepts of „ownership“ of data (or „data property“) are misleading and not helpful, due to the complexity of data governance problems

Some references

Eckardt, M. / W. Kerber (2023): Property Rights Theory, Bundles of Rights on IoT Data, and the Data Act, <https://dx.doi.org/10.2139/ssrn.4376833> [to be published in a special issue of European Journal of Law & Economics in 2024]

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Questions & Answers



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your feedback!



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The increasing role of Artificial Intelligence in processing and generating new data – part 1



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19 January 2024
10.00 — 11.30 CET

WEBINAR

The increasing role of Artificial Intelligence in processing and generating new data – part 2




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26 January 2024
10.00 — 11.30 CET

WEBINAR

The increasing role of Artificial Intelligence in processing and generating new data – part 3



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2 February 2024
10.00 — 11.30 CET



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