EU Data Access Rules and Protection of TPMs in the Field of Scientific Research

Community over Commercialization
Open Science, Intellectual Property and Data
27 October 2023

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Governance of Science

- Institutional culture & policies: incentives, openness, scientific reputation, gender, priority ‘rights’, good scientific practices, institutional guidelines, etc.
- Sector-specific regulation
- Data access rules
- IPRs + TSs
- TPMs + private ordering
- Personal Data
- ?
Governance of Science

- Data access rules
- Institutional culture & policies: incentives, openness, scientific reputation, gender, priority 'rights', good scientific practices, institutional guidelines, etc.
- © and related rights + TPMs
Governance of Science

International level
Arts. 19 and 27 UDHR
Art. 15 ICESR

European level
Art. 11(1); 13; 17(2) and 52(1) EU CFR

National Constitutions
e.g. Art. 44 Spanish C.
e.g. Arts. 33 and 9 Italian C.

Protection of IPRs

Freedom of research

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Scientific Research Cycle

- Data Collection
- Analysis
- Interpretation
- Outcomes
- Research Design
- Data in Works
- Data in Databases
- Raw Data
Agenda

- Problem Statement
- Focus 1: Data Act Proposal
- Focus 2: TDM
- Assessment and Ways Out
Problem Statement

- Data access rules in EU law
- *De facto* control via TPMs
- Legal protection of TPMs
  - in Copyright
  - in Data

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  - in ©opyright
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Art. 6 InfoSoc Dir.
Art. 7 Software Dir.
Art. 11 DA
Problem Statement
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Data Act Proposal: overview

- Draft regulation in final stage
- Complex law (more than 100 p) with several rules on data (sectorial and horizontal)
- Approach chosen: not property-based but data access rules
Data Act Proposal: why it is important

In the research field

1) IoT data (pervasive)

Ex. research fields:
- Medical
- Behavioural (domotic)
- Farming – Agricultural – Nutrition
- Mobility
- Insurance
- Environmental
- Energy
- Etc.

2018

2025
Data Act Proposal: why it is important

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- Etc.

2) Exceptional needs (e.g. Covid 19)
Data Act Proposal: content

- Article 5
  User of IoT devices
  → can be shared with third parties (such as an enterprise, a research organisation, a not-for-profit organisation or an entity acting in a professional capacity - Rec. 29)

- Articles 14 and 21
  Public bodies for exceptional needs of data (not just IoT)
  → can be shared with individuals or organisations for carrying out scientific research or analytics (shall act not-for-profit or in public interest mission)
Data Act Proposal: Criticisms

- **Art. 1(4c) DA**: Without prejudice to IPRs (except for Art. 35 DA)
- **Scope of Art. 35 DA**: (not applicable to non-IoT data)
- **Data access/trade secrets interface**: (e.g. Art. 8(6) DA)
- **TPMs**
a) Copyright TPMs

- © TPMs for copyright and related rights  
  (Art. 6 InfoSoc Dir. )

- © TPMs for software  
  (Article 7(1)(c) Software Dir. )
b) Data TPMs

Art. 11 DA

✓ New protection against circumvention of TPMs on data

✓ Any private sector data that is subject to statutory data sharing obligations (Art. 1 DA)
Art. 11 DA

1. A data holder may apply appropriate technical protection measures, including smart contracts and encryption, to prevent unauthorised access to the data, including metadata, and to ensure compliance with Articles 5, 6, 8, and 9, as well as with the agreed contractual terms for making data available.[...]

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1. [...] Users and third parties shall not alter or remove such technical protection measures unless agreed by the data holder.
Art. 11 DA

Parr. 2-2b: Users, data recipients, and third parties (=anyone)

- Erase data
- Pay compensation

shall

in case of

☑ Abuse of gaps in the technical infrastructure
☑ Alteration or removal of TPMs applied by the data holder
☑ Not maintenance of technical and organizational measures agreed
☑ Unlawfully disclosure of data

Oversimplifying!
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Copyright DSM Directive

- **New © exceptions for TDM:**
  - **Art. 2**
    - „any automated *analytical technique* aiming to *analyse text and data* in digital form to generate information such as patterns, trends and correlations“
New © exceptions for TDM:

- **Art. 3** – TDM for scientific research
- **Art. 4** – General exception for TDM
Art. 3 – TDM for scientific research

Par. 3. Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.

Art. 7(2) – Common provisions

The first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to Articles 3 to 6 of this Directive.
Text and Data Mining and TPMs

- Art. 6 (4) (par. 1,3,5) InfoSoc Dir.
- TPMs apply to TDM
- TDM and other E&L may be overridden by TPMs
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Assessment

Data Holder

User

Raw Data
Data in Databases
Data in Works

(Ex Art. 5 DA)

(Ex Art. 35 DA + Art. 3 CDSMD)

© Software
© Content
Data

TPMs

(Ex Art. 5 DA)
Assessment

Data holders

Researchers
Ways out

- Assessing consistency of Art. 11 DA with proportionality principle (Art. 52(1) Charter of Fundamental Rights of EU; Art. 5(4) TEU).

- With regard to research, also assessing consistency of Art. 11 DA with Arts. 11 & 13 CFR EU.

- Interpreting Art. 11 in line with the “right“ to do TDM under Art. 3 CDSM-D (= the “right“ should prevail over the protection of TPMs over data).

- For both © content and data introducing new effective legal tools to contrast TPMs misuse (e.g. right to circumvent).
Thank you!