

# A New Approach to Data Property?<sup>1</sup>

Thomas Hoeren<sup>2</sup>

Prof. dr. Th. Hoeren is a law professor at the University of Münster (Germany) and a visiting scholar at the Institute for Information Law (IViR), University of Amsterdam.

In the information society and data driven economy, data itself and the access to it incontestable is a decisive economic factor. As the European Commission states, “[d]ata has become an essential resource for economic growth, job creation and societal progress.”<sup>3</sup> Therefore, it is not surprising, that a debate about the legal appropriation of data has emerged and thoughts on this have filled many pages over the last few years. With the new EU directive on the protection of trade secrets (Directive 2016/943/EU)<sup>4</sup>, there now will be a new legal framework for the protection of trade secrets. The approach of the directive reveals the problems in establishing an absolute right to data. This article aims to give a brief overview of the debate on data “ownership” and then considers the question, whether the new directive creates a new absolute right in information or not. This also requires a closer look at the basic statements of the directive’s legal approach.<sup>5</sup>

## 1. The Debate on Data “Ownership”

Facing the impacts on economics and society as well as the references to constitutional rights (concerning personal data related to a data subject), the question of the legal allocation of data in fact is crucial. This contains the specification of access and exploitation rights as well as (negative) restriction rights. In this context, a comprehensive approach for a data “ownership” is inter alia confronted with the problem, that the underlying legal principles and legal norms partly only address special kinds of data. For instance, the new EU directive on the protection of trade secrets addresses data that is to be classified as trade secrets. Data with personal references instead is covered by data protection law which grants rights to the data subject.

The broader discussion about establishing a “property” right to data was mainly caused by several authors trying to assist the car industry in finding a way to attribute rights to data in their cars. These authors knew that there is a way to attribute a right to those who technically created the data (so-called Skripturakt).<sup>6</sup> Others tried to argue with an approach of an intellectual property right (referring to copyright law and patent law). However, the debate about a “property” right for data caused into great confusion. Scientists started to discuss the possibility of establishing a general data ownership de lege ferenda.<sup>7</sup> Most authors involved in that topic denied such a right and criticized the negative economic consequences of such an absolute right.<sup>8</sup> But still, countless doctoral theses, books, essays, research papers and last but not least congresses were filled with all kinds of obscure approaches including the attempt to use the data

1 This text forms the basis for a presentation delivered in February 2018 at the Institute for Information Law/University of Amsterdam.

2 The author is currently working with a special NOW grant as a visiting professor at the Institute for Information Law/University of Amsterdam. He wants to thank for fruitful exchange of ideas and especially the atmosphere of hospitality by Prof. Dr. Bernt Hugenholtz and his colleagues from IViR.

3 European Commission, COM(2017) 9 final, Jan. 10, 2017, p. 2

4 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ L 157, June 15, 2016, p. 1-18.

5 Also see Hoeren/Münker, *Wettbewerb in Recht und Praxis* [WRP] 2018, p. 150 f.; Ackermann/Rindell, *Gewerblicher Rechtsschutz und Recht, Internationaler Teil* [GRUR Int.] 2017, p. 486; Lejeune, *Computer und Recht* [CR] 2016, p. 330; Volker, *Compliance Berater* [CB] 2016, p. 368.

6 Hoeren, *MultiMedia und Recht* [MMR] 2013, p. 486; Zech, *CR* 2015, p. 137; Also see Fezer, *MMR* 2017, p. 3.

7 See European Commission, Building a European data economy, communication from the Commission to which the European Parliament, 10 January 2017, COM(2017) 9 final, 13. See in particular: European Commission, ‘Staff Working Document on the free flow of data and emerging issues of the European data economy’, Brussels, 10 January 2017, SWD(2017) 2 final, 33-38.

8 Dorner, *CR* 2014, p. 617; Spindler, *JuristenZeitung* [JZ] 2016, 805; Kerber, *GRUR Int.* 2016, p. 989; Drexler, *Designing Competitive Markets for Industrial Data*, 8 *JIPITEC* (2017) 257. See especially Hugenholtz, ‘Data property: Unwelcome guest in the House of IP’, [https://www.ivir.nl/publicaties/download/Data\\_property\\_Muenster.pdf](https://www.ivir.nl/publicaties/download/Data_property_Muenster.pdf) (accessed on 8 February 2018)



base directive for providing such a property right. All in all, a general property right has been shown to be superficial and even dangerous from an economic perspective.<sup>9</sup>

The trade secret protection shows the problems in establishing the scope of an absolute right. Thus, this article claims to take a closer look on the main contents of the directive and the question, whether the new legal regime creates a new absolute right in information or not. Regarding the legal approach of the directive, it is questionable, if it leads to a new right on this specific kind of data.

## 2. The New Protection of Trade Secrets

The EU directive on the protection of trade secrets was published in June 2016, forcing the member states to integrate a new system of know-how protection until June 2018. The directive is based on the fact, that the member states currently have entirely different approaches to trade secret protection although the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides for a uniform legal framework (Article 39 (2) TRIPS). As already mentioned, the directive does not address data in general, but only data that is to be classified as trade secrets.

### a. Background and Main Structure of the Directive

Two studies<sup>10</sup> published in November 2011 and April 2013 found that at least one in five companies had suffered misappropriation of an important trade secret. Furthermore, they observed a divergence of national laws regarding the protection of know-how: Some of them inadequately protect businesses information and act as a deterrent to cross-border innovation activities. A vast majority of the companies that were surveyed proved that "an effective and equivalent protection against the misappropriation of trade secrets within the" EU can only be ensured by common legislation.<sup>11</sup> This caused the EU legislator to pass the Directive 2016/943/EU, which tries to harmonise the national laws protecting trade secrets.<sup>12</sup> The common level of protection shall enable companies to make use of their trade secrets and share them with privileged business partners within the EU. This way their innovation can be turned into jobs and growth.<sup>13</sup> On the European level, most states are currently working on the implementation of this directive. Germany will not manage to present an act before the implementation date due to internal problems in forming a government. The Netherlands

have started the implementation discussion in November 2017; the Dutch proposal seems to be implementing the directive on a word to word basis.<sup>14</sup>

### b. Definition of "trade secrets"

The directive acknowledges "trade secrets" protection as a complement or as an alternative to intellectual property rights. According to Recital 3 of the directive, trade secrets are "one of the most commonly used forms of protection of intellectual creation and innovative know-how by businesses, yet at the same time they are the least protected by the existing Union legal framework."

One main aspect of the directive is the definition of "trade secrets." As set forth by Article 2 (1) trade secrets are information, which (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question, (b) has commercial value because it is secret and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. To be regarded as a trade secret, the information in question must meet all of the criteria above. As this definition exemplifies in (b), the commercial value of the trade secret has to lie within its secrecy: It is valuable, because it is secret. Therefore, the secret holder has to adopt sufficient measures to ensure and keep the secrecy of the information. Yet, the directive does not explain which measures are deemed reasonable in protecting information.<sup>15</sup>

### c. Legal Prohibition

Under Article 4 (2) the directive deems every acquisition of a trade secret unlawful if it meets the following requirements: it has to be acquired against the trade secret holder's will and furthermore by either unauthorized access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, containing the trade secret or any other conduct which, under the circumstances, is considered contrary to honest commercial practices (Article 4 (2)). Of course, not only the unlawful acquisition of trade secrets is recognized by the directive, but also their unlawful use or disclosure without the secret holder's consent. This requires the offending party to meet one of the following conditions as well: (a) having acquired the trade

9 This is the consequence drawn by the ministries of justice in Germany in the long expertise written in May 2017, [https://jm.rlp.de/fileadmin/mjv/Jumiko/Fruhjahrenskonferenz\\_neu/Bericht\\_der\\_AG\\_Digitaler\\_Neustart\\_vom\\_15\\_Mai\\_2017.pdf](https://jm.rlp.de/fileadmin/mjv/Jumiko/Fruhjahrenskonferenz_neu/Bericht_der_AG_Digitaler_Neustart_vom_15_Mai_2017.pdf) (accessed on 8 February 2018).

10 Study on Trade Secrets and Confidential Business Information in the Internal Market, MARKT/2011/128/D (April 2013); Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKT/2010/20/D (November 2011).

11 MARKT/2011/128/D (April 2013), 151.

12 [http://ec.europa.eu/growth/industry/intellectual-property/trade-secrets\\_en](http://ec.europa.eu/growth/industry/intellectual-property/trade-secrets_en) (accessed on 8 February 2018).

13 [http://ec.europa.eu/growth/industry/intellectual-property/trade-secrets\\_en](http://ec.europa.eu/growth/industry/intellectual-property/trade-secrets_en) (accessed on 8 February 2018).

14 See the explanatory memorandum of the second chamber <https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorstel details&qry=wetsvoorstel%3A34821> (accessed on 8 February 2018).

15 Kalbfus, *Gewerblicher Rechtsschutz und Urheberrecht, Praxis im Immaterialgüter- und Wettbewerbsrecht* [GRUR-Prax.] 2017, p. 391; Hauck, *Neue Juristische Wochenschrift* [NJW] 2016, pp. 2218 (2220); Koós, *MMR* 2016, pp. 224 (225).



secret unlawfully, (b) being in breach of a confidentiality agreement or any other duty not to disclose the trade secret or (c) being in breach of a contractual or any other duty to limit the use of the trade secret (Article 4 (3)). Thus Article 4 determines the scope of protection of trade secrets.<sup>16</sup>

In contrast to Article 4, Article 3 deems certain cases of the acquisition of a trade secret and honest commercial practices lawful. This article constitutes the statutory exception to the protection of trade secrets, paralleling the system known from intellectual property rights.<sup>17</sup> For instance, acquisition by independent discovery or creation or by exercise of the rights of workers to information and consultation are lawful according to Article 3. But more importantly, the article also allows acquisition by observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer (Article 3 (1) lit. b). Compared to the German law on trade secrets, this is a significant innovation.<sup>18</sup> Apart from this statutory exception, the directive contains a justification for whistleblowing<sup>19</sup> and the protection of freedom of expression and the press (Article 5). Therefore, commercial practices like reverse engineering, which ultimately aim to acquire information potentially regarded as a trade secret, are not forbidden under the directive.

#### d. Bundle of rights

The directive gives a bundle of rights to the owners of misappropriated trade secrets. They can claim for destruction or surrender of all or parts of any document, object, material, substance or electronic file, which contains or constitutes the trade secret (Article 12 (1)), recall of the infringing goods from the market, depriving them of their infringing quality or their destruction (Article 12 (2)).

However, those rights are limited by the principle of proportionality as set forth in Article 13. The courts are required to grant the aforementioned rights only if they are proportionate under assessment of the specific circumstances of the case. In particular, courts may order the liable person to pay pecuniary compensation instead of applying the aforementioned measures, if the person concerned unknowingly used or disclosed a trade secret, the execution of the measures in question would cause disproportionate harm and the pecuniary compensation to the injured party appears reasonably satisfactory (Article 13 (3)). This consideration is especially important in connection with claims for destruction of infringing goods and ban on sales, since those measures have the highest potential of causing disproportionate harm to the infringing party.

In addition to the aforementioned claims, the holder of the secrecy rights can file for damages against the infringer, who

knowingly or negligently engaged in the unlawful acquisition, use or disclosure of a trade secret (Article 14). According to Article 14 (2) the amount of damages shall be determined by all appropriate factors, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and elements other than economic factors, such as the moral prejudice caused to the trade secret holder. But the national courts are also given the possibility to set the damages as a lump sum in cases where they deem this appropriate. The lump sum can for example be based on the amount of royalties or fees the infringer would have had to pay to acquire the secret holder's authorization.

Apart from the aforementioned rights the directive lacks a right to information. An example for a right to information which could have been added to the directive can be found in German patent law in section 140b Patent Act (Patentgesetz, PatG). Under section 140b (1) PatG a patent holder has the right to get information from the patent infringing party regarding origin and distribution channels of the infringing goods. This principle could easily be transferred to the protection of trade secrets, by giving the secret holder a right to information about the way an infringing party acquired and whether they disclosed or used an unlawfully acquired trade secret.

### 3. Conclusions: A New Property Right in Data?

The trade secret protection illustrates the problems in establishing the scope of an absolute right to data. It is based on contractual terms and the enforcement of contractual rights. But the right and what is done for trade secret protection are far wider than the mere contractual situation. The protection is similar to that of tort law and other intellectual property rights. You can compare the threefold way of defining damages in copyright law with that of trade secret protection. The injunction may even be granted for a mere negligent behaviour of third parties who use trade secrets for their products. Therefore, you are held liable for injunctions even if you merely know that your product has been made of utilizing the trade secrets of a certain person. Consequently, the directive speaks about rightsholders and presupposes that the right to a trade secret is vested in and attributed to a certain person.

The directive leads to a new right for certain data which is neither contract law nor tort law.<sup>20</sup> It will thus lead to a new kind of a certain "property" right – however linked to a lot of limitations and exceptions. Still, the new right shows that the obscure discussion on granting a general property right definitely has to stop now.

<sup>16</sup> McGuire, *Mitteilungen der deutschen Patentanwälte* [MittPatA] 2017, pp. 377 (379).

<sup>17</sup> McGuire, *MittPatA* 2017, pp. 377 (379).

<sup>18</sup> Gregor, *Zeitschrift für Corporate Governance* [ZCG] 2016, pp. 262 (263); Kalbfus, *GRUR* 2016, pp. 1009 (1012).

<sup>19</sup> For more information about whistleblowing see Schmitt, *Recht der Arbeit* [RdA] 2017, p. 365.

<sup>20</sup> I would avoid the term of property, which is misleading. I proposed at my presentation in Amsterdam to use a fun word for it which has no meaning like Hurz.