

# OPINION

## Data Ownership is Dead: Long Live Data Ownership

Prof. Dr Thomas Hoeren  
University of Münster

Philip Bitter  
University of Münster

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*Some time ago, we were wondering who owns the data in a car and whether it has to belong to anyone at all. Since then, there has been a huge debate about whether there should be a general data ownership. In the meantime, at least in Germany, there almost seems to be a consensus that a comprehensive general data ownership de lege ferenda does not lead to the desired results. However, this does not solve the question of the ownership of data for the original purpose.*

### Introduction

Nowadays, a look at the discussion about data ownership is accompanied by a certain amount of gloating. A few years ago, some German scholars have started to investigate how to establish a property-like right *de lege lata*, for example to mobility data from the automotive industry. This attempt was indeed urgently necessary since s.453(1) (second alternative) Bürgerliches

Gesetzbuch (German Civil Code) has defined data as a suitable object of purchase and has thereby made the rules on the sale of goods (ss.433–480 BGB) applicable to data.<sup>1</sup> The abstract concept of “data ownership”, though, is ambiguous and ultimately leaves a lot of space for thoughts on how to de jure assign digital data to whomever and in whatever way. As a result, many academic and policy approaches covering this topic exist throughout Europe by now.

In the process, the legitimate initial question of the assignment of data to a person by establishing a property-like right *de lege lata* under the heading of “data ownership” has become a question of a general data ownership *de lege ferenda*. Yet, it has not led to a specific assignment of data to a person. After all, what kind of definition of data should be legally determined, and how should an abstract and future general data ownership cover all the different ways of current data processing?<sup>2</sup> The economic and legal consequences of such data ownership cannot be foreseen. In brief summary, one could say that in this specific manner the issue of data ownership is dead today.

This could put an end to the debate for good, and we could stop arguing at this point. But since data is currently traded so much in the information industry and the awareness of the economic advantage of data processing is increasing,<sup>3</sup> it is still mandatory to question how data can be assigned to a person as a commodity. At this point you also have to say: long live data ownership.

### Challenges of data ownership

As data is duplicable and not exclusive by nature,<sup>4</sup> the legal challenges of assigning data to a person are obvious and have been discussed extensively. Regardless of the question whether a future general data ownership is necessary or not, it can be stated that there is neither an appropriate coherent European nor a German property right for data as such today.<sup>5</sup> The traditional law of property, as has been common to the European civil law systems since Roman times, is applicable to tangible goods but not to digital data as intangible and duplicable assets.<sup>6</sup> Referring to s.903 BGB, for instance, only the owner of a thing receives the positive rights to use and the negative rights to exclude, limited in the rights of third parties.<sup>7</sup>

Therefore, you could protect data as such by applying tangible property rights by analogy. This, however, requires an unintended regulatory gap. Such a gap may exist due to the recent developments in information society. In the age of big data, the omnipresent data

\* Prof. Dr Thomas Hoeren is the head of the Institute for Information, Telecommunication and Media Law (ITM) at the University of Münster (Germany). Philip Bitter is a research associate of the Institute for Information, Telecommunication and Media Law (ITM) at the University of Münster (Germany).

<sup>1</sup> Compare Thomas Hoeren, “Big Data and the Ownership in Data: Recent Developments in Europe” (2014) 36 E.I.P.R. 751, 753.

<sup>2</sup> Compare also Drexel, “Designing Competitive Markets for Industrial Data”, (2016), pp.11 et seq., SSRN, <https://ssrn.com/abstract=2862975> [Accessed 5 April 2018].

<sup>3</sup> See Autorité de la Concurrence and Bundeskartellamt, “Competition Law and Data” (10 May 2016), p.9, [https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?jsessionid=3D6DC63ED0CE8E35BEADCCC9580F02E8.2\\_cid371?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?jsessionid=3D6DC63ED0CE8E35BEADCCC9580F02E8.2_cid371?__blob=publicationFile&v=2) [Accessed 5 April 2018].

<sup>4</sup> See Herbert Zech, “Data as a Tradable Commodity” in A. de Franceschi (ed.), *European Contract Law and the Digital Single Market* (Intersentia Ltd, 2016), p.59.

<sup>5</sup> Compare also Commission, “Building a European Data Economy” (10 January 2017) COM(2017) 9 final, p.10, <http://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:52017DC0009&from=DE> [Accessed 5 April 2018].

<sup>6</sup> See with further references Thomas Hoeren, “Big Data and the Ownership in Data: Recent Developments in Europe” (2014) 36 E.I.P.R. 751, 751.

<sup>7</sup> Bettina Brückner, *Münchener Kommentar zum BGB*, 7th edn (Munich: Beck, 2017), §903 Rn.12.

processing and trading increasingly determines everyday life. It might be appropriate to take this trend into account in civil law. In return, contract law, intellectual property and competition law options, inter alia, should be respected when discussing the assignment of data to a person as a commodity.

According to the mentioned areas of law, there are existing legal approaches to protect data and assign data to a person. It may also appear that these approaches could already form an adequate protection system. Data as such, though, does not fall within the scope of protection of the traditional intellectual property and data protection law.<sup>8</sup>

Yet the approaches *de lege lata* have one thing in common: unlike a general data ownership *de lege ferenda*, they could help to assign data to a person under the law in force and in certain applications. It should be noted that current legislation has already provided safeguards for the protection and use of data and the initial academic approaches to establish a property-like right *de lege lata* can not be regarded as a proposal for future legislative measures on data ownership. This should be the base to build on when asking the question again: who owns the data in a car?<sup>9</sup>

Despite that, the issue of data ownership from the early days with all its pitfalls developed into a great misunderstanding and finally culminated in a Babylonian confusion. Scholars everywhere in Germany and Europe discussed the possibility of establishing a general data ownership *de lege ferenda*—completely detached from a single use case and from the question of what exactly to protect. Countless doctoral theses, books, essays, research papers and not least of all congresses have been filled with all kinds of obscure approaches. No matter how much you might be convinced of the futility of such an undertaking, the subject of data ownership has simply been fashionable and impossible to break down.

## Current trends

Recently, a great deal of regret has emerged in the debate on data ownership. In May 2017, the German Conference of Justice Ministers published a long report clearly showing that general data ownership *de lege ferenda* is neither meaningful nor economically desirable.<sup>10</sup> The outlined German protective rights are referred to as a “patchwork rug” of the protection of data.<sup>11</sup> The same could apply to the European framework. But what does that mean for the assignment of data today?

According to its coalition agreement, the new German Federal Government wants to address the issue of “whether and how data ownership can be structured”.<sup>12</sup> So it remains to be seen whether the question has really been resolved. A study for the German Federal Ministry of Transport and Digital Infrastructure suggests, among other things, a system of ownership for (mobility) data,<sup>13</sup> and the European Commission also raised the issue of data ownership some time ago, but without so far taking concrete regulatory measures.

## And now what?

Hopefully, we will come back to the real issues and discuss the old question of who owns the data in a car, for example. We could have done so earlier, but it is more important now as the insurance industry and others are circling like vultures around autonomous driving and the traffic data of the automotive industry. It is still unclear whether the data stored in a networked car belongs to the automobile manufacturer, the driver, the seller or the owner of the car.<sup>14</sup>

The answer to the current question of the assignment of data to a person is not likely to be found in an abstract debate about a prospective European or national ownership of data. We should even better stop the discussion on a data ownership *de lege ferenda* immediately. It is misleading and a dead end for information law.

<sup>8</sup> See Commission, Staff Working Document on the free flow of data and emerging issues of the European data economy, SWD(2017) 2 final (10 January, 2017), pp.19-22., <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0002&from=de> [Accessed 5 April 2018].

<sup>9</sup> See with references Hoeren, “Big Data and the Ownership in Data” (2014) 36 E.I.P.R. 751, 753.

<sup>10</sup> Arbeitsgruppe “Digitaler Neustart” der Konferenz der Justizministerinnen und Justizminister der Länder, Bericht (15 May 2017), [https://www.justiz.nrw.de/JM/schwerpunkte/digitaler\\_neustart/zt\\_bericht\\_arbeitsgruppe/bericht\\_ag\\_dig\\_neustart.pdf](https://www.justiz.nrw.de/JM/schwerpunkte/digitaler_neustart/zt_bericht_arbeitsgruppe/bericht_ag_dig_neustart.pdf) [Accessed 5 April 2018].

<sup>11</sup> “Flickenteppich” was first mentioned by Malte Grützmaier, “Dateneigentum – ein Flickenteppich – Wem gehören die Daten bei Industrie 4.0, Internet der Dinge und Connected Cars?” [2016] CR 485, 492, 495; Arbeitsgruppe “Digitaler Neustart”, der Konferenz der Justizministerinnen und Justizminister der Länder, Bericht (15 May 2017), pp. 60, 98, [https://www.justiz.nrw.de/JM/schwerpunkte/digitaler\\_neustart/zt\\_bericht\\_arbeitsgruppe/bericht\\_ag\\_dig\\_neustart.pdf](https://www.justiz.nrw.de/JM/schwerpunkte/digitaler_neustart/zt_bericht_arbeitsgruppe/bericht_ag_dig_neustart.pdf) [Accessed 5 April 2018].

<sup>12</sup> “Die Frage, ob und wie ein Eigentum an Daten ausgestaltet ein kann, müssen wir zügig angehen”: Koalitionsvertrag zwischen CDU, CSU und SPD, (2018), p.129, para.6085, [https://www.bundesregierung.de/Content/DE/\\_Anlagen/2018/03/2018-03-14-koalitionsvertrag.pdf](https://www.bundesregierung.de/Content/DE/_Anlagen/2018/03/2018-03-14-koalitionsvertrag.pdf) [Accessed 18 April 2018].

<sup>13</sup> See Gerrit Hornung et al., “Eigentumsordnung für Mobilitätsdaten? Eine Studie aus technischer, ökonomischer und rechtlicher Perspektive (August 2017), pp107-108, [https://www.bmvi.de/SharedDocs/DE/Publikationen/DG/eigentumsordnung-mobilitaetsdaten.pdf?\\_\\_blob=publicationFile](https://www.bmvi.de/SharedDocs/DE/Publikationen/DG/eigentumsordnung-mobilitaetsdaten.pdf?__blob=publicationFile) [Accessed 5 April 2018].

<sup>14</sup> Compare also Hoeren, “Big Data and the Ownership in Data” (2014) 36 E.I.P.R. 751, 751.