An overview of the limitations to the dissemination of data

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Outline

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Data as an asset

Data are a recently-born, very profitable business.

Why?

- ▶ Fast collection (data mining, spidering. . .)
- ▶ Cheap to maintain (fast obsolescence)
- ▶ Easy to transfer (Internet)
- ▶ Many different functions (process optimization, profiling, marketing, security. . .)

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But other interests are involved!

Limitations to data circulation
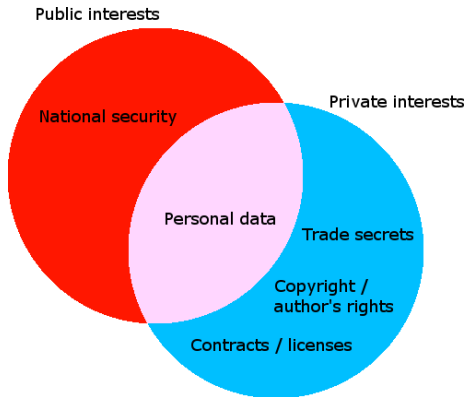
Regimes regulating data transfers.

Outline

1 Basic concepts

2 National security

3 Trade secrets

4 Copyright

5 Personal data

6 Contracts

National security

- ▶ Very strict rules on weapon trading
- ▶ Applies to weapons but also to related data, including software
- ▶ In the US:
    - ▶ Arms Export Control Act (AECA)
    - ▶ International Traffic in Arms Regulations (ITAR)
- ▶ In Europe:
    - ▶ Not under traditional EU competence
    - ▶ European Union Code of Conduct on arms exports
    - ▶ Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment
    - ▶ EU Regulation 1334/2000 setting up a Community regime for the control of exports of dual-use *[civil and military]* items and technology (many amendments)

How the provisions work

US

- Only US citizens or greencards are allowed to even see ITAR classifieds, unless authorized
- Penalties include fines and imprisonment

EU

- Arms: authorization granted by Member States
- Dual-use items: export licenses granted by the EC for certain destinations, or by Member States for all others (Article 6 of the Regulation)
- Penalties set by Member States

In brief: the Regulation allows for a general Community authorization which sometimes overrides Member States

Does it matter to me?

Probably not, unless you trade in weapons or are sharing data that are related to weapon development.

Most importantly, if these laws apply to you, you know it.

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Industrial property

Trade secrets are protected under several perspectives:

- ▶ patents
- ▶ trade marks
- ▶ designs
- ▶ industrial models
- ▶ trade secrets

Rules

- Conventions, treaties, Directives covering patents, trade marks, designs and models
- Some US federal acts protect trade secrets
- US: Uniform Trade Secrets Act (UTSA) (model legislation, States can implement)
- No EU law protects trade secret
- Several Member State laws
- Directive proposal started in November 2013

Trade secret principles

- The protected content must be secret (i.e., not available to the general public)
- Protected as long as it is not common knowledge
- Reverse engineering of publicly-available products is allowed
- Consent of the trade secret holder allows disclosure

It is a directive. Don't expect a law anytime soon.

Does it matter to me?

Probably not, unless some of your data were collected by companies who own them as trade secrets.

In that case you need to acquire the owner's consent.

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Two opposite approaches

EU and basically all except US
- Author's rights
- Limitation to usage of protected content
- A set of independent, autonomous rights
- Authors transfer specific rights, some are not tradable

US
- Copyright
- Fair use and protection of publisher's rights
- Copyright is basically a unitary concept
- The author transfers copyright

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But things have changed recently. Now the US recognize a minimal author's protection.

Legal context

- Berne Convention for the Protection of Literary and Artistic Works (1886)
- The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) (1994) for software and databases
- National laws (compliant with Berne)
- US: Digital Millennium Copyright Act (DMCA)
- EU: Directive 96/9/EC on the legal protection of databases

EU author's rights principles

- ▶ Moral rights vs. economic rights
- ▶ Not a single right but an unlimited set of separate rights
- ▶ Economic rights can be individually transferred
- ▶ Connected rights: when something cannot afford copyright protection (e.g., performers' rights, photos, critics...)
- ▶ Sometimes the law does not allow to hinder distribution (more later)
- ▶ Special rules for collective works and databases

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In general, the author's consent allows distribution.

Databases

- Protection for the database and not the content
- Only if the database has creativity
- Does not apply to data for which the content imposes the structure

Article 5(a) of Directive 96/9/EC

[. . .] the author of a database shall have the exclusive right to carry out or to authorize [. . .] reproduction by any means and in any form, in whole or in part.

Article 6.2(b) of Directive 96/9/EC

[. . .] the author of a database shall have the exclusive right to carry out or to authorize [. . .] reproduction by any means and in any form, in whole or in part.

Member States shall have the option of providing for limitations on the rights set out in Article 5 [. . .] for the sole purpose of [. . .] scientific research, as long as the source is indicated [. . .].

Does it matter to me?

Collected data are not subject to this protection, but their aggregation and organization (i.e., the database) is.
If the supplier of the data collected them in a non-obvious way, then it would be advisable to obtain the copyright holder's consent.

Outline

Legislation

EU

- Directive 95/46/EC
- Directive 2002/58/EC
- All Member States have enacted these
- Directive 2006/24/EC (Data Retention Directive) is now invalid
- Ongoing reform

US

- No general law, some sectorial provisions (especially in finance)

Basic principles

- ▶ Data controller, data processor, data subject
- ▶ Consent
- ▶ Existence of a Data Protection Authority (DPA)
- ▶ Sensitive data
- ▶ Purpose limitation

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Valid in EU and almost all the world (except US)

Processing for research

- Processing only allowed for the consented purpose
- Transfer to a new controller might violate that purpose
- Article 6.1(b) of the Data Protection Directive (DPD): processing for scientific purposes is allowed if the Member State provides *appropriate safeguards*
- Article 13 of the DPD: Member States may introduce further exemptions for scientific research
- Proportionality and anonymization

Two possible conditions to process location data:

1. Ok if anonymous data are used
2. If data are not anonymous, then
   - consent (withdrawable)
   - necessary duration
   - inform about the type of data and the purpose
   - possibility to refuse processing for single connections

Cross-border transfers

- ▶ No provisions to and from Member States
- ▶ Transfer allowed where the DPD is in force
- ▶ The only rules are those above
- ▶ Transfer to/from EU institutions: Regulation 45/2001

Non-EU transfers

- Adequate level of protection
- Decisions by the Commission
- `http://ec.europa.eu/justice/data-protection/document/`
  `international-transfers/adequacy/index_en.htm`

Commission decisions on the adequacy of the protection of personal data in third countries

- AD - Andorra
- AR - Argentina
- CA - Canada
- CH - Switzerland
- FO - Faeroe Islands
- GG - Guernsey
- IL - State of Israel
- IM - Isle of Man
- JE - Jersey
- NZ - New Zealand
- US - United States - Safe Harbour
- UY - Eastern Republic of Uruguay

Commission decisions on adequate levels of protection.

No adequate level

How to transfer lawfully?

1. Consent or contractual requirement
2. Member State (DPA) decision
   - Controller must ensure adequate level through standard clauses/contracts (available online)
   - Controller must ensure adequate level through non-standard clauses/contracts (approved by the DPA)
   - Authorization by the DPA

How data protection is changing

- ▶ The context is very different from 1995
- ▶ Marketing through *opt-out* approaches
- ▶ Social networks
- ▶ Blurred separation between data controller and data subject
- ▶ "Bounces"
- ▶ There is the need for a reform

The reform

- ▶ Reform ongoing since 2011
- ▶ The bulk is the General Data Protection Regulation (GDPR)
- ▶ Uniform legislation, directly applicable in Member States
- ▶ Entry into force: no sooner than 2018
- ▶ Main changes
  - ▶ Centered more on the data subject and withdrawable consent
  - ▶ *Privacy by design* and *by default* (incl. security)
  - ▶ High fines (might be 2-5% of the annual turnover)
  - ▶ Research: principle of necessity (anonymization and separation), or consent
- ▶ Data transfer is essentially the same

Does it matter to me?

Almost certainly.
In general, anonymized data between EU/trusted States allow sharing data for research.

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License agreements

- ▶ Services that provide access to data
- ▶ Data can be distributed depending if the license agreement allows it
- ▶ Sublicensing
- ▶ Beware of exclusivity
- ▶ Derived data (copyright, anyone?)

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But...

Often, license agreements contain clauses that are illegal:

- ▶ Too permissive (allow to share data that you shouldn't)
- ▶ Too restrictive (illegitimately prohibit to share data over which they have no right)

How social networks work

Traditional website

- ▶ The site owner is the data controller (subject to rules)
- ▶ The controller is liable in case of breaches

Social network

- ▶ Users post personal data about other users
- ▶ Who is the data controller?
- ▶ Who is liable, the user or the social network?

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Answer

The other one.

So?

- Data protection uses old topics (i.e., data controller vs. data subject)
- Data subject has the right to object or to rectification
- DPAs cannot operate on users
- Users are liable, but at the remedies level
- Major hassle for the platform as well

So?

- ▶ Data protection uses old topics (i.e., data controller vs. data subject)
- ▶ Data subject has the right to object or to rectification
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- ▶ Major hassle for the platform as well

This is a major flaw in data protection rules.

Copyrighted material concerning social networks

- ▶ Long debate over who the owner is
- ▶ Check the license agreement
  - ▶ But it might contain an invalid clause
- ▶ In general, the material belongs to the author

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Bouncing

- Am I allowed to repost a copyrighted material from a social network?
- This actually depends on the license agreement (and it's valid)
- E.g., material can be reposted from Facebook (recent debate), but the only owner is the author