

Transparency of Algorithmic Decision-Making: Limits Posed by Intellectual Property Rights

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Abstract : Today, algorithms are assuming a leading role in various areas of decision-making. Prompted by a promise to provide increased economic efficiency and fuel solutions for pressing societal challenges, algorithmic decision-making is often celebrated as an impartial and constructive substitute for human adjudication. But in the face of this implied objectivity and efficiency, the application of algorithms is also marred with mounting concerns about embedded biases, discrimination, and exclusion. In Europe, vigorous debates on risks and adverse implications of algorithmic decision-making largely revolve around the potential of data protection laws to tackle some of the related issues. For example, one of the often-cited venues to mitigate the impact of potentially unfair decision-making practice is a so-called 'right to explanation'. In essence, the overall right is derived from the provisions of the General Data Protection Regulation ('GDPR') ensuring the right of data subjects to access and mandating the obligation of data controllers to provide the relevant information about the existence of automated decision-making and meaningful information about the logic involved. Taking corresponding rights and obligations in the context of the specific provision on automated decision-making in the GDPR, the debates mainly focus on efficacy and the exact scope of the 'right to explanation'. In essence, the underlying logic of the argued remedy lies in a transparency imperative. Allowing data subjects to acquire as much knowledge as possible about the decision-making process means empowering individuals to take control of their data and take action. In other words, forewarned is forearmed. The related discussions and debates are ongoing, comprehensive, and, often, heated. However, they are also frequently misguided and isolated: embracing the data protection law as ultimate and sole lenses are often not sufficient. Mandating the disclosure of technical specifications of employed algorithms in the name of transparency for and empowerment of data subjects potentially encroach on the interests and rights of IPR holders, i.e., business entities behind the algorithms. The study aims at pushing the boundaries of the transparency debate beyond the data protection regime. By systematically analysing legal requirements and current judicial practice, it assesses the limits of the transparency requirement and right to access posed by intellectual property law, namely by copyrights and trade secrets. It is asserted that trade secrets, in particular, present an often-insurmountable obstacle for realising the potential of the transparency requirement. In reaching that conclusion, the study explores the limits of protection afforded by the European Trade Secrets Directive and contrasts them with the scope of respective rights and obligations related to data access and portability enshrined in the GDPR. As shown, the far-reaching scope of the protection under trade secrecy is evidenced both through the assessment of its subject matter as well as through the exceptions from such protection. As a way forward, the study scrutinises several possible legislative solutions, such as flexible interpretation of the public interest exception in trade secrets as well as the introduction of the strict liability regime in case of non-transparent decision-making.

Keywords : algorithms, public interest, trade secrets, transparency

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