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

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 (“ADM”) 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.

The ongoing debates on “fairer” and more transparent algorithms are ever-evolving, invariably stimulating, and, often, heated. However, they are also every so often misguided, polarized, and isolated. From the technical perspective, there are ongoing attempts to conceptualize and operationalize “fairness” and non-discrimination through, for example, the inclusion of ethical assessment in standardization on AI, work on approaches to code interpretability and modalities of transparency. Though promising, however, these undertakings appear insufficient and decontextualized.

The calls for public transparency and accountability are often taken as an end in itself, with access to code and “derived data” (“algorithmic inferences”) as a destined endpoint of the enquiry. The economic context of algorithms development, seen through the choice of IP modes of protection tailored to the sector-specific dynamics of innovation, is too, often overlooked.

This paper aims at bridging this gap by unpacking transparency through the lenses of innovation capabilities of ADM. Thus, the research focuses on the workings, roles, and implications of the IP software protection in the data protection realm. In particular, it examines three specific instruments of transparency: the right to access, the right not to be subject to a decision based solely on ADM, and the right to data portability. Portrayed as potential venues for incorporating public interest in transparency, the named rights often seem to be obstructed by IP and trade secret rights claims. In assessing these limits posed by IP protection, the paper critically examines a claim that the disclosure of IP protected information brings about the risk of “gaming the rules” by data subjects thus removing incentives to develop potentially efficient and societally beneficial algorithms in a first place.