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# The “Data Producer’s Right”: Unwelcome Guest in the House of IP

**Kluwer Copyright Blog**

August 25, 2017

Bernt Hugenholtz (Institute for Information Law (IViR))

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With the growth of the ‘data-driven economy’ and the rise of ‘Big Data’ have come calls for the introduction of a novel property right in data. Apparently in response to demands from the German automotive industry, the European Commission has in its 2017 Communication on ‘Building a European data economy’ advanced the idea of creating a ‘data producer’s right’ that would protect industrial data against the world.

As explained in the Staff Working Paper that accompanies the Communication, this new right would create a transferable property right in “non-personal or anonymised machine-generated data”. It would encompass “the exclusive right to utilise certain data, including the right to licence its usage. This would include a set of rights enforceable against any party independent of contractual relations thus preventing further use of data by third parties who have no right to use the data, including the right to claim damages for unauthorised access to and use of data.”

Inspiring the call for protecting industrial data is the fear – common to other recent policy initiatives – that valuable European assets are being misappropriated by large American companies. The specter of Google ‘stealing’ European news has already led to an ongoing EU initiative towards a neighbouring right for news publishers, following comparable rules previously introduced in Germany and Spain. The sui generis database producer’s right introduced in Europe in 1996 was similarly motivated by European fears of dominance by the US database industry.

Although the contours of the ‘data producer’s right’ now being contemplated by the European Commission are sketchy, as are its economic underpinnings, such a right would surely bring the protection of industrial data in the EU to a much higher level than the – much-maligned and still controversial – database right. Whereas database right protects data on the double condition that the data are structured in a ‘database’ and the database is the result of ‘substantial investment’, the novel right would directly protect machine-generated data without any material prerequisite. A ‘data producer’s right’ would also go far beyond any protection currently offered by EU copyright law.

Clearly, introducing such a right would be disastrous – for reasons too many to discuss within the confines of this blog. A ‘data producer’s right’ would ride roughshod over the existing system of intellectual property. It would violate one of intellectual property law’s maxims that data per se are “free as the air for common use”, and that only creative, innovative or other meritorious investment is protected. It would corrode IP’s mechanism of incentives by creating an undergrowth of rights that automatically protects all data produced with the aid of machines. It would extensively overlap with other IP regimes, and thus create undue impediments for the exploitation of existing rights, such as copyright and database right, and endanger user freedoms guaranteed under these regimes. It would also give rise to gross legal uncertainty, since the ‘velocity’ of real-time data generation makes it difficult, or even impossible, to circumscribe its subject matter, scope of protection and ownership. More generally, a property right in machine-generated data would contravene freedom of expression and information, and pose new obstacles to freedom of competition, freedom of services and the free flow of data.

The great promise of big data – for the economy, for science, for society at large – is that this resource may be freely exploited. Introducing a ‘data producer’s right’ preventing unauthorized access to big data would directly contradict this. Indeed, it is hard to understand how the new right would square with the text and data mining exception that is the centerpiece of the proposed DSM Directive.

If, as the European Commission rightly believes, “big data, cloud services and the Internet of Things are central to the EU’s competitiveness” , one would have expected supporters of this novel right to present powerful and convincing arguments in support of this revolutionary proposition. So far, the case for a property right in machine-generated data has yet to be made. A study by the

European Commission's own Joint Research Centre concludes that there are, at present, no compelling economic arguments to advise regulatory intervention. As Prof. Drexler of the Max Planck Institute has pointed out, the existing toolkit of trade secret protection, contract and technological protection measures offers data producers ample means of securing de jure or de facto exclusivity in 'their' data, if they so desire.

Fortunately, the introduction of a 'data producer's right' is only one of several policy options currently on the European Commission's table, so there is still hope that this calamity will be averted. Judging from the Commission's Mid-Term Review on the implementation of the Digital Single Market Strategy, the new right is not high on the Commission's present agenda. If nothing else, Europe's experience with the sui generis database right that was rather whimsically introduced in 1996 in response to special industry demands, and is currently under review, should give reason for extreme caution. Introducing a novel right of intellectual property should never happen in the spur of the moment. Any new right should be contemplated only after conducting thorough economic, evidence-based research that demonstrates a real need for the right and predicts its consequences for information markets and society at large. Assuming a convincing case in support of the right might indeed be made, this should then be followed by systematic legal analysis of the new right's contours and scope, and of its impact on the existing system of intellectual property and the law in general. The structure of the Union does not allow for legal experimentation at the EU level. Like the database right, a 'data producer's right' would be here to stay – a most unwelcome guest in the house of European intellectual property.

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