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

With the growth of the data-driven economy and the rise of ‘Big Data’ there have come calls for the introduction of a novel property right in data. Apparently, in response to demands from the financial industry and the European Commission, the ‘Data Producer’s Right’ has been introduced in the EU. This post critically assesses the emergence of the new right and concludes that there are, at present, no compelling economic arguments to advise introducing a novel right of intellectual property. If, as the European Commission rightly believes, “big data, cloud services and the Internet of Things are changing the way we do business” then the current intellectual property framework should be reconsidered. Introducing a novel right of intellectual property must be preceded by thorough economic, evidence-based research that demonstrates a real need for the right and its potential impact on 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 of contract, technology and secrecy. It is clear that the introduction of a novel property right in machine-generated data would go far beyond any protection currently offered by EU copyright law.

Fortunately, the introduction of a ‘data producer’s right’ is only one of several policy options currently on the agenda. The database right introduced in Europe in 1996 was similarly introduced by European firms to respond to US concerns over the US database industry. Although the contours of the ‘data producer’s right’ now being contemplated by the European Commission are still blurry, it is certain that such a right would ride roughshod over the existing system of intellectual property. It would undermine one of intellectual property’s main reasons that data per se are “not capable of the common use” and that only creative, innovative or other ‘meritorious’ investment is protected. It would introduce a mechanism of control by creating an undergrowth of rights that automatically protect 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. In addition, it would seriously undermine the scope of protection and seems more likely than a property right in machine-generated data would confer broad freedoms of expression and innovation, and grant new liberties to freedom of competition, freedom of services and the free flow of data.

The great promise of big data is the privacy, for reasons too many to list, that data per se are endowed with. The idea of a ‘data producer’s right’ that protects the owner of data against the world would go far beyond any protection currently offered by EU copyright law. A ‘data producer’s right’ would ride roughshod over the existing system of intellectual property. It would undermine one of intellectual property’s main reasons that data per se are “not capable of the common use” and that only creative, innovative or other ‘meritorious’ investment is protected. It would introduce a mechanism of control by creating an undergrowth of rights that automatically protect 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. In addition, it would seriously undermine the scope of protection and seems more likely than a property right in machine-generated data would confer broad freedoms of expression and innovation, and grant new liberties to freedom of competition, freedom of services and the free flow of data.

Clearly, introducing such a right would be disastrous. It would undermine the existing system of intellectual property. It would undermine one of intellectual property’s main reasons that data per se are “not capable of the common use” and that only creative, innovative or other ‘meritorious’ investment is protected. It would introduce a mechanism of control by creating an undergrowth of rights that automatically protect 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. In addition, it would seriously undermine the scope of protection and seems more likely than a property right in machine-generated data would confer broad freedoms of expression and innovation, and grant new liberties to freedom of competition, freedom of services and the free flow of data.