# Kluwer Copyright Blog

## Please share nicely — From Database directive to Data (governance) acts

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In retrospect, life was simple in 1996, the year that gave us the Database directive and its much-maligned sui generis right aimed at promoting a European database industry. Fast forward and see: The Database directive stands unchanged and there is still no clear evidence that the then-new intellectual property right is an effective instrument. At the same time, there is a flush of policy initiatives, laws and legislative proposals that either problematize or downplay the importance of intellectual property rights for data. Instead, the focus of policy makers is on how the sharing of data can be promoted in a society where data are generated all the time, everywhere, by everyone and everything. This is all part of the *European Data Strategy*. Its ambition is to "make more data available for use in the economy and society, while keeping those who generate the data in control."

Will the Database directive survive the crowded field of data regulation?

One small sign that the Database directive is under pressure is in the current Public consultation on a set of European Digital Principles. The outcome will feed into the solemn declaration by Council, Parliament and Commission that is supposed to guide the further development of digital society. The consultation document restates the fundamental right to intellectual property as the fundamental principle of 'protection of the intellectual creations of individuals in the online space' but is otherwise silent on IP. Much bigger pressures come from the 2019 Open data and public sector information directive, the 2020 proposal for a Data governance regulation, and the still to be announced proposal for a Data Act. So how did we get to a place where the Database directive and specifically its sui generis right – once heralded by policy makers as the enabler of a glorious European database industry – has steadily been reduced to an instrument of minor relevance?

*Stage I: to the Open data directive*

For public sector bodies — producers and holders of vast quantities of data — as well as for the companies that act as suppliers, the sui generis database right has been slowly eroded since 2003. Public sector bodies are in principle barred from exercising their sui generis rights in information that is subject to the Open data and public sector information directive. The implementation deadline for the revamped directive has just passed (17 July 2021). If the proposal for the Data governance act comes through, that will also be a strong incentive for public bodies to ensure unfettered (commercial) re-use of other types of data, e.g., in which their commercial suppliers hold database rights.

The Database Directive and Open data directive have a shared history, going back to the late 1980s when the European Commission first got serious about copyright in the internal market (Van Eechoud 2021). The Commission units in charge of public sector information policy have successfully chipped away at the sui generis right, the successive units responsible for copyright so far seem to have favoured a status quo. This, despite the fact that the highly critical 2005 evaluation report of the Database directive already signalled that the economic impact of the sui generis right was unproven, and that it comes perilously close to an undesirable property right in data as such. The database industry (its European powerhouse being the U.K.) then did not favour a repeal of the sui generis right and the Commission identified various other drawbacks, so no action followed. The 2018 review of the Database directive and accompanying public consultation perpetuated this stasis. It too concludes there is no proven economic benefit, but overall because the sui generis right has some advantages, i.e., it harmonized laws and offers database producers an additional layer of protection, there was no reason to repeal it.

One key finding of the second evaluation was the need for clarification of the relationship between the Database directive and the public sector information directive (the report is from April 2018). This clarification was already in the works: the proposal for a revised Open data and public sector information directive (not coincidentally also from April 2018) severely limits the use of the sui generis database rights by the public sector. Under the 2013 version of the Public sector information directive, public sector bodies (excluding public broadcasters and a few other institutions) were already obliged to allow maximum (commercial) re-use of information that is publicly accessible under national laws. This was to be done by imposing as few conditions as possible, using standardized licenses wherever possible, making information technically open (open formats, electronic delivery, etc.) and not charging fees for re-use. So effectively, the 2013 directive already curtailed public sector bodies' copyright and sui generis rights in data. But the 2019 Open data directive makes this even more explicit, by mandating that "The right for the maker of a database provided for in Article 7(1) of Directive 96/9/EC shall not be exercised by public sector bodies in order to prevent the re-use of documents or to restrict re-use…" Art. 1(6) Open data directive).

*Stage II: The Data Governance Act*

The proposed Data governance act seeks to expand the scope of the Open data directive. Public sector bodies are pushed to make data available for commercial re-use even where the Open data directive does not mandate this, —e.g., because there is no public access regime that applies, or because third parties own intellectual property rights. Where third parties such as publishers or data services hold copyright or sui generis rights (or related rights) the public sector body would then of course have to ensure it has proper authorization from the right holder.

But the Data governance act would do more. A major issue on the Commission's agenda is Business to Business (B2B) sharing of data. For this, a notification framework is proposed for so-called "data-sharing service providers". Parties that want to establish or run data exchanges, or create platforms or databases enabling the exchange or joint exploitation of data must notify a specially designated (national) authority. If they meet several conditions, the system allows them to operate in the entire EU. The idea behind the scheme is that it enhances transparency and trust, and so promotes B2B data sharing. The proposal also sets up a system that promotes data-altruism: where natural and legal persons share data on a non-commercial basis especially for general interest purposes. Organisations would be able to register as 'Data Altruism Organisations recognised in the Union' to enhance their attractiveness.

*Stage III: A Data Act*

It is a further ambition of the E.U. to promote business to government (B2G) sharing for public interest purposes —think Uber providing data access to local authorities so they can improve traffic flows. This is a topic that the Data Act will likely address. Hidden in the plans for what is to become that Data Act, also lurks the prospect of a major overhaul of the sui generis right. That Data act would contain measures necessary 'to create a fair data economy by ensuring access to

and use of data', yet at the same time 'seek to preserve incentives in data generation'. In the Public consultation that is running now, the role of contracts is a focal point, and many questions are asked about data access, interoperability, data portability and the need to guarantee these by law. What ideas the Commission has with respect to the Database directive is difficult to gauge from the consultation. It asks about the applicability of the database rights to machine-generated and Internet-of-things data, and about whether the sui generis right should be accompanied by rules on access and sharing of data. If anything, this suggests that sui generis rights might be curtailed. We might know before the year is out. On the surface, the 1996 Database directive will reach its 25th anniversary unscathed. But this will not be true come its 30th birthday.

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