Data Ownership

Should the EU introduce a data producer’s right in non-personal, machine-generated data?

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"BUILDING A EUROPEAN DATA ECONOMY"

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"BUILDING A EUROPEAN DATA ECONOMY"

1. INTRODUCTION

Data has become an essential resource for economic growth, job creation and societal progress. Data analysis facilitates the optimisation of processes and decisions, innovation and the prediction of future events. This global trend holds enormous potential in various fields, ranging from health, environment, food security, climate and resource efficiency to energy, intelligent transport systems and smart cities.

The "data economy"\(^1\) is characterised by an ecosystem of different types of market players – such as manufacturers, researchers and infrastructure providers – collaborating to ensure that data is accessible and usable. This enables the market players to extract value from this data, by creating a variety of applications with a great potential to improve daily life (e.g. traffic management, optimisation of harvests or remote health care).

The value of the EU data economy was estimated at EUR 257 billion in 2014, or 1.85% of EU GDP.\(^2\) This increased to EUR 272 billion in 2015, or 1.87% of EU GDP (year-on-year growth of 5.6%). The same estimate predicts that, if policy and legal framework conditions for the data economy are put in place in time, its value will increase to EUR 643 billion by 2020, representing 3.17% of the overall EU GDP.

Under the General Data Protection Regulation (GDPR)\(^3\), as of May 2018, there will be one single pan-European set of rules contrary to 28 national laws today. The newly
The most valuable thing about tomorrow's cars is something you'll never even see.

Forget the engine. Or the shiny rims. The money is in vehicles' data.

People have made fortunes selling cars and trucks. For many of us, a car is the second most expensive thing we'll ever buy. (A home being Number 1.)

But experts say the value of vehicles will likely pale in comparison to the riches from our cars' data.
statistical reporting burden on economic operators. Similarly, access to and the ability to combine data from different sources is critical for scientific research in fields such as medical, social and environmental sciences.

**Data producer's right:** A right to use and authorise the use of non-personal data could be granted to the "data producer", i.e. the owner or long-term user (i.e. the lessee) of the device. This approach would aim at clarifying the legal situation and giving more choice to the data producer, by opening up the possibility for users to utilise their data and thereby contribute to unlocking machine-generated data. However, the relevant exceptions would need to be clearly specified, in particular the provision of non-exclusive access to the data by the manufacturer or by public authorities, for example for traffic management or environmental reasons. Where personal data are concerned, the individual will retain his right to withdraw his consent at any time after authorising the use. Personal data would need to be rendered anonymous in such a manner that the individual is not or no longer identifiable, before its further use may be authorised by the other party. Indeed, the GDPR continues to apply to any personal data (whether machine generated or otherwise) until that data has been anonymised.

**Access against remuneration:** A framework potentially based on certain key principles, such as fair, reasonable and non-discriminatory (FRAND) terms, could
Commission Staff Working Document

on the free flow of data and emerging issues of the European data economy

Accompanying the document

Communication

Building a European data economy

(COM(2017) 9 final)
The proposed ‘data producer’s right’

- Right in “non-personal or anonymised machine-generated data”
  - Avoid overlap with (personal) data protection law
- “Exclusive right to utilise certain data, including the right to license its usage”
- Fully transferable
- Right owner: “the economically responsible operator of equipment that generates the data (data producer)” (H. Zech)
Data under existing EU IP law

• Copyright:
  – Originality/creativity standard: creative compilations
  – No protection of facts, data, ideas
    • “free as the air for common use” (J. Brandeis)
• Database (sui generis) right:
  – ‘Database’: structured data collections
  – Substantial investment
    • No investment in ‘created data’ (CJEU)
→ No protection of machine-generated ‘data’ per se
Why create rights in machine-generated, non-personal data?

- Foster markets for re-utilization/trading of data, by creating legal certainty re ‘data ownership’
- Prevent non-EU industry (e.g. Google, Uber, Tesla) from appropriating valuable European data (for self-driving automobiles)
- Validate and legalize intuitive notions of ‘data ownership’
Why create rights in machine-generated, non-personal data?

• But economic literature sceptical about need for ‘data property’ right:
  – No evidence of insufficient incentives to generate data
  – No evidence of transactional market failure requiring legislative intervention [Kerber, Drexl/MPI, JRC]
The economics of ownership, access and trade in digital data

Nestor Duch-Brown
Bertin Martens
Frank Mueller-Langer

2017
‘Data producer’s right’ would disrupt IP system

• ‘Data producer’s right’ would extensively overlap with existing IPR’s
  – Create extra layers of IP protection for any machine-aided creation ➔ license thickets
  – Undermine copyright exceptions and limitations
Data producer’s right would not create legal certainty

- Subject matter/scope of right highly uncertain:
  - ‘Velocity’ of real-time data generation → no stable object of protection

- Ownership of right uncertain:
  - Owner or user/operator of the data-generating machine, or both?
‘Data producer’s right’ would undermine rationales of IP system

- Data producer’s right: no merit in machine data generation, no need for incentive; would call legitimacy of entire system of IP into question.
Data producer’s right would impede free flow of information

- ‘Data ownership’ would severely affect scientific and journalistic freedoms, and conflict with emerging EC policies on open data, text and data mining, and data sharing
Where are we now?

- EC Consultation reveals scepticism amongst stakeholders concerning data producer’s right
- Data producer’s right not proposed in recent EC communications on “European Data Space” and “Maximising the Benefits of AI for Europe”.
- EC review of Database Directive suggests that (some) machine-generated data might benefit from *sui generis* right.
Copyright Reconstructed
Rethinking Copyright’s Economic Rights in a Time of Highly Dynamic Technological and Economic Change

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Reconstructing Rights
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