MACQUARIE LAW SCHOOL
Faculty of Arts

WIPO'S FOURTH CONVERSATION

DATA: BEYOND AI IN A FULLY INTERCONNECTED WORLD

22-23 September 2021

Issue 11: Further Rights in Relation to Data

SUMMARY: This intervention relates to Issue 11 in WIPO's Revised Issues Paper on IP Policy and AI. It counsels for caution in relation to the creation of further rights in relation to data.

Data is a powerful resource that fuels the digital economy. It has become common to describe data as 'the new oil'. Just like oil, data can be extracted or mined; and, it must be aggregated or refined to be commercially useful.

It is not difficult to see the intuitive appeal of a new IP right in data. Those who produce, collect, organise, and use data might be usefully encouraged by incentives. The public, too, might be thought to benefit from value extracted from the commodification and marketisation of data.

Yet, there are key differences between data and oil. For one, although some personal data might be finite, in general there is no risk of data running out. Data 'as such' is pure information that by its nature cannot be contained or controlled. In this way, data shares the characteristics that famously led Thomas Jefferson to argue that ideas are not inherently susceptible to ownership[1].

Indeed, Copyright and Patent law have long insisted on the exclusion of ideas, facts and discoveries – that is to say, data or information 'as such' – from protection. It is only the elaboration, expression or implementation of ideas that can be protected. This has remained a fundamental principle of IP law despite the difficulties distinguishing ideas from protectable expression. The freedom to use the information – that is, the data – that forms the building blocks of creativity and innovation is at the heart of the balance struck by intellectual property law between the interests of rightsholders and the public.

The recent explosion in data collection and exploitation demonstrates that additional incentives are not needed in this area. In fact, there are good policy reasons to favour less (rather than more) IP protection. These include the need to spur competition and the value of open, transparent and unbiased datasets. Furthermore, there are issues of non-economic significance, such as privacy, which are implicated in the marketisation of data. Intellectual Property law lacks the appropriate tools to deal with these sorts of issues, which are already the subject of specialised regulation in many states.

[1] See, Letter from Thomas Jefferson to Isaac McPherson (13 August 1818): "If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it" (i.e. ideas are non-rivalrous and non-excludable).

Dr Daniela Simone | Senior Lecturer, Macquarie University NSW 2109 Australia | Honorary Lecturer, University College London | **E:** daniela.simone@mq.edu.au **E:** d.simone@ucl.ac.uk **Twitter:** @DrDSimone

WIPO's Revised Issues Paper expertly points to the numerous, complex questions that would arise in crafting a new right in data. What might be its normative basis? How could ownership be rationally allocated? No doubt, the proper scope of any right would be differently calibrated among nations and between industries. And given the numerous public policy reasons to allow access to data in particular circumstances, the exceptions would need to be extensive and adapted to local conditions.

A new right in data is not warranted without compelling evidence of the need for more economic incentives. This need must outweigh the costs and complexity that would necessarily accompany an addition to the already crowded field of data regulation. Lessons must be learned from the muted success of other attempts to grant rights in information per se, such as the EU Database right.

There is, however, a need for increased international dialogue around the extent to which existing IP rights already directly or indirectly protect data – and particularly, how this varies between nations. There may be scope for greater international harmonisation in relation to the *exclusion* of data 'as such' from IP protection. An international baseline standard would provide a stable foundation to enable the open, shared and transparent access to data that is critical for innovation (for example, text and data-mining).

The title of this session asks: 'Is the current IP system for data sufficient?'. I would like to conclude by suggesting the consideration of the converse: whether the protection of data *from* the current IP system is sufficient.

ABOUT THE AUTHOR

Dr Daniela Simone is a Senior Lecturer at Macquarie Law School, specialising in Intellectual Property Law. Prior to taking up this position she was a Co-Director of the Institute of Brand and Innovation Law at University College London. Her research examines the challenges that the digital age poses for copyright law. Daniela is the author of *Copyright and Collective Authorship: Locating the Authors of Collaborative Work* (Cambridge University Press, 2019). She has BCL, MPhil and DPhil degrees from the University of Oxford and a BA/LLB (Hons I) degree from the University of Sydney. Daniela is a Fellow of the Higher Education Academy. Prior to joining academia, she worked as a lawyer in the intellectual property, communications, and technology team in Ashurst's Sydney office.