RIGHTS IN DATABASES AND OPEN DATA POLICIES – CONVERGENCE OR CONFLICT?

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Directive 96/9/EC on the legal protection of databases on the European level regulates rights in databases. This Directive aimed to harmonise part of copyright law dealing with databases and incentivise the development of the information society and investment in creating databases. Nevertheless, since this Directive was among the earliest ones in the copyright field, many issues arose over time with the development of the information society concerning the protection of the rights in databases. The development of open data policies is one of the most significant concepts that interfere with copyright and related rights, particularly with rights in databases. It will be discussed here whether the open data policies conflict with the protection of rights in databases or if they make convergence in which both concepts may exist and continue to develop together, side by side.

The idea of the protection of databases relies on two pillars: copyright and *sui generis* right in databases. Copyright in databases is an old concept which is upgrading the concept of the protection of collections. If collections are arranged in a systematic or methodical way and individually accessible by electronic or other means, they shall be considered databases. Collections may consist of independent works, data or other materials. They may be protected by copyright if they constitute the author's intellectual creation because of the selection or arrangement of their contents. So, databases will be protected by copyright if they are original and individual by selection or arrangement of their contents.

Nevertheless, originality and individuality will often be missing criteria related to databases because, usually, the principles of data organisation within the database will be simple and banal. Still, the content of the database will be much more interesting. For example, electronic databases may contain millions of items or data or information which are interesting to users because of data and not because of how data are organised within the database nor because only some data are selected among other possible data. So, data itself are taking much more attention than originality or individuality criteria in realising the database. Therefore, the EU developed a new concept in protecting databases by introducing so-called *sui generis* rights. This right does not protect the originality or individuality of a database creator but his investment. *Sui generis* right is turned towards the substantial investment of money, time, work or other valuable assets in data collection and database creation.

While the owner of the copyright database is entitled to exclusive rights to reproduction, distribution, communication to the public and adaptation concerning the whole database, the owner of the database protected by *sui generis* right is restricted to acts which include prevention of extraction and/or re-utilisation of the whole or a substantial part of the contents of a database. In the previous Copyright and Related Rights Act in Croatia, the protection of sui *generis rights* in databases was introduced in the law as a related right and included wide content of rights with respect to the entire content of a database, wider than envisaged by Directive 96/9/EC. On the contrary, in the new Copyright and Related Rights Act, the content of database rights regulated as related rights of a database producer in non-original databases is restricted to extraction and/or re-utilisation. This means that the content of rights in non-original databases is completely in line with Directive 96/9/EC and that the national legislator did not widen its content above this Directive. With this change, by narrowing the scope of exclusive rights in non-original databases, the legislator made a small step towards open data policies. Furthermore, this change concerning non-original databases opened more space for developing the freedom to operate. Namely, the concept of freedom to operate, in brief, gives any person the possibility to develop, make and market products without legal liabilities to third parties, such as owners of intellectual property rights. So, if the scope of the protection of non-original databases is narrower, it gives more space for developing and applying open data policies.

Moreover, in the new Copyright and Related Rights Act, a new concept is introduced, which regulates the status of copyright works and subject matters of related rights concerning employment contracts and contracts on commission. While previously it was presumed that the rights in copyright works and subject matters of related rights created under an employment contract or a contract on commission remains with the author and original owner of the related right, the new Act regulates a presumption that the employer and commissioner, respectively, are automatically the owners of the exploitation rights in works and other subject matters created under those contracts. This change should take away a part of the commercial risk from employers and commissioners who invest in creating copyright works and subject matters of related rights, support their better position in the digital market, and secure their portfolio of intellectual property rights towards third parties. But, of course, those presumptions are rebuttable. In addition, some other provisions are also regulated in the new Copyright and Related Rights, in the context of the mentioned two types of contracts, which should enhance a balance between the rights, interests and obligations of employers and commissioners, on the one hand, and the ones of authors and other creators, on the other. When applied to databases, this change should give database investors a better market position when they offer their databases in the digital market. But how will this change affect the open data policies?

On the one hand, the producers may better protect their databases by copyright and related right. On the other, they may, in a simpler way, turn to open data policies or use other possibilities to free their databases from copyright and related rights protection because their ownership is not questionable. The said refers, in particular, to public authorities, scientific and similar institutions, and private companies (in particular small and medium businesses) in Croatia and similar countries where the contracts on employment and commission in practical life, unfortunately, very often miss the specific provisions on intellectual property ownership.

Due to recent legislative changes in the Croatian Copyright and Related Rights Act, it may be reasonably expected that in the practical application, there will be much more situations where a related right of the producers of non-original databases will protect databases. On the other hand, databases will rarely be protected by copyright. In any of those two cases, the content of a database is not protected as such.

The described context of exclusive monopoly rights regulated to original and non-original databases shall apply to their authors and other creators, *i.e.* producers, employers and commissioners as derived owners of the same rights. The concept of exclusive and monopoly rights granted by copyright and related rights interferes with the interests of third parties. These interferences are even more intensive in a digital environment than in traditional circumstances. Namely, the business models, communication methods, and new approaches to data and privacy issues in the digital environment moved the boundaries of understanding the rights of privacy and private property, including intellectual property.

The idea of openness and free access to all information flooded the copyright and related rights. Open data policies have many faces. They vary from extreme viewpoints where everything that stays in the way of achieving absolute freedom of all information and absolute and divine right to free access and free use must be abolished, particularly intellectual property rights. More moderate views tend to find balance in the conflict between freedom of information and other rights and interests, such as intellectual property rights.

Open data policies rely on the constitutional right of freedom to information. The right to information is also regulated in the highest acts in the EU and the Council of Europe. In particular, open data policies rely on the idea that the information derived from public entities, institutions and other public authorities should be admissible without interference by public authority and regardless of the frontiers. Concerning this, the Croatian Right to Information Act mentions that its purpose is to enable and ensure the right to information as the constitutional right, as well as the right to re-use of information belonging to public authorities, including all public entities and trading companies. With this respect, it is to be seen how the intellectual property rights belonging to public authorities and other public entities and trading companies may survive and converge with the revival and renaissance of open data policies. It should not be forgotten that intellectual property rights are also constitutional rights.

The concept within the open data policies is the re-use of data collected, produced and developed by public authorities. This concept, in brief, relies on the idea that all data, all information created, produced, collected or analysed in the public sector, should be available for re-use for commercial or non-commercial purposes. This suggests that re-use should multiply the commercial value of the data and information created in the public sector for the direct or indirect benefit of society and its members. Furthermore, this sub-concept of open data policies relies on the idea that all public institutions should give up their intellectual property rights, particularly copyright and related rights, for the benefit of the concept of re-use. According to Directive 2019/1024 on the open data and re-use of the public sector data, the states should, by implementing this Directive, take a path towards the minorisation of copyright belonging to public authorities and other public entities, including public undertakings. For example, suppose there is copyright in data, *i.e.* information belonging to public sector bodies. In that case, the public sector body should diminish its

application and give the information for free or, if this is not possible, at marginal costs and only exceptionally at costs which would give a reasonable return on investment in the production, collection, or creation of the information. Moreover, it regulates that public sector bodies shall not exercise their *sui generis* database rights to prevent the re-use of documents or to restrict re-use beyond the limits set by that Directive.

It seems that the legislator on the EU level, when drafting the Directive 2019/1024, concluded that copyright belonging to the public bodies, particularly the database *sui generis* right, is in direct conflict with the open data policies and it should be narrowed, even put out of the application.

Also, Directive 790/2019 on copyright in the Digital Single Market gave another reason to rethink the protection of databases, particularly the non-original ones. Text and data mining exemption regulated in this Directive directly interferes with the copyright and related rights, particularly databases rights. This exemption directly affects the acts of extraction and re-utilisation, which is the basic content of rights in non-original databases. It regulates that database rights shall be restricted in favour of research organisations and cultural heritage institutions to carry out for scientific research, text and data mining of works and other subject matters to which they have lawful access. On the other hand, all other persons, including commercial undertakings, may benefit from the same exception if the right owner has not expressly reserved the rights concerning text and data mining. This exception to copyright and related rights is created to give free access to data for many purposes and the development of artificial intelligence, among other goals.

At the same time, legislators on the European and national levels take measures for better protection of copyright and related rights, particularly envisaged in Directive 790/2019. Taking into consideration that the same legislators at the same time are taking measures.

The shown examples conclude that the legislators on the European and national levels take measures to strengthen copyright and related rights in the Digital Single Market, particularly rights in databases, and promote and regulate open access concepts and principles. The idea seems to be to achieve convergence of those two concepts, despite their inherent conflict. New measures will probably be taken with the same aim. By now, the legislators have decided to favour open access in the public sector and apply the existence–exercise dichotomy. The copyright and related rights will not be abolished, and their content will not be squeezed.

Nevertheless, measures will be taken to make them not be exercised, sometimes by some soft and sometimes by more intensive legal tools. At this time, the public sector bodies are invited not to exercise their copyright and related rights. Furthermore, they are forbidden to exercise their *sui generis* or related rights in non-original databases for the benefit of open access and free re-use.

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