



Database Rights and Data Donations in the EU

Case Studies

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1. Introduction

Dedicated database protections have existed in EU law since Directive 96/9/EC (hereinafter "Database Directive") was adopted. The aims of this legislation were to harmonise the copyright protection of databases across EU Member States and to incentivise additional investment in the creation of databases by offering a new layer of protection for non-original database content - a so-called sui generis database right.

Less than a decade after its creation, the European Commission conducted a [first evaluation](#) of this legislation, outlining four policy options - 1) repealing the Directive, 2) repealing the sui generis right only, 3) amending the sui generis right, or 4) maintaining the status quo.

At the end of 2015 the European Parliament [called on the Commission to abolish](#) the sui generis database right in its report titled "Towards a Digital Single Market".

About two decades after its adoption, the European Commission is now conducting a consultation on the Database Directive and is re-evaluating the policy options with the intent to propose a new legislative package. The Wikimedia community welcomes these efforts and is delighted to contribute to the deliberations not only by responding to the survey, but also by providing concrete examples of daily issues and ideas for remedies.

2. Analysis

Chapter II of the Directive, concerning copyright protection, has significantly improved harmonisation with regard to the level of originality across EU Member States. By raising the threshold in a number of countries it has helped making it easier to estimate which databases are protected and which ones are not across the EU. By contrast, the optional nature of the exceptions outlined in the Directive has led to a great variety of transpositions and interpretations by Member States. While many countries that joined the EU after the sui generis database right was adopted, like Bulgaria, Bulgaria, the Czech Republic and Poland, recognise all three optional exceptions, Hungary, for instance, doesn't have a private copying exception (although such an exception exists for the copyright protection).



At the same time, the fifteen Member States that were already in the Union at the time of the Directive's adoption were allowed to keep all their pre-existing exceptions. This means that instead of harmonisation and clear rules we are currently confronted with uncertainty when it comes to cross-border uses. This has been [confirmed by academic researchers](#) who went even further in their assessment by calling the current status a “very significant example of dis-harmonisation”.

Chapter III of the Directive establishes a sui generis right that aims to protect non-original content with the aim of incentivising investments in the database sector in Europe. There is little to no evidence of increased investment across the EU since the introduction of the sui generis right. This is even acknowledged by the European Commission in its evaluation report and seems to be supported by the information found in the [Gale Directory Databases \(GDD\)](#).

At the same time, there have been issues with definition and scope of the sui generis right. The “**substantial investment**” **criteria** raises a lot of uncertainty in relation to the application of the sui generis protection (see, for instance [Fixtures Marketing vs. Svenska Spel](#) or [British Horseracing Board vs. William Hill](#)). This uncertainty oftentimes leads organisations and institutions to reduce risk and act defensively when asked to open up their data.

The sui generis right in practice, also contradicts **the public interest in the re-use of public sector information**, as outlined in several examples below. Even if the PSI Directive should ultimately take precedence over the Database Directive's sui generis right, the latter has nonetheless been used by public institutions as a pretext for not opening up their databases.

A third major obstacle that is caused by the sui generis right is the fact that it seems to be little known and in the majority of cases an **unwanted right**. Many institutional open access policies and available licenses fail to account for it, leading to situations where, despite the willingness to share information freely, the administrative burden of altering the



already established institutional policies are chilling the motivation for action. Such examples shall be elaborated, among others, in the next chapter.

3. Case Studies

Wikimedia is dedicated to free knowledge projects. Beside Wikipedia our perhaps most important project – and certainly the most relevant in the context of the Database Directive – is Wikidata: a free knowledge base that everyone can use and re-use, even for commercial purposes. Wikidata is already being used by a wide array of European organisations from [academia](#), [public broadcasting](#), and [industry](#). Over the years, the Wikimedia movement has built many successful partnerships with representatives of these sectors. Many times, however, potential data donations either fell through or were significantly complicated, because of the obstacles created for by the sui generis right. The following paragraphs describe case studies of such cases that illustrate these problems.

3.1. Saxonian Tenders Information

In autumn of 2006 the German Federal Supreme Court [handed a case to the CJEU](#) because it was unable to decide whether public works exceptions could take precedent over the sui generis database right. The plaintiff, a publishing house also publicising the official gazettes of the German state of Saxony, tried to stop another company from using public information on tenders issued by the state. The plaintiff based this on the sui generis right without the state authorities being able to intervene. The case was settled and the ECJ request withdrawn before it could be decided, but this is a prime example for the legal friction produced by the sui generis database right even in the context of public sector information. It can be assumed that for each case litigated, hundreds don't ever reach the level of judicial proceedings. Data use then either happens "in the grey" or not at all, which are both bad options for the EU legal framework."

3.2. European Universities

Many if not most European universities nowadays have an open access policy. This has partly been helped by the Commission's strategy to develop and implement open access



to research results from projects funded by the EU Research Framework Programmes, namely FP7 and Horizon 2020. However, open access requirements in these programmes are vague, which leads to a wide array of different licenses (an institution's own legal notices, different public licenses, different versions of the same public licenses). The unfortunate obstacle is that many if not most of the institutions' in-house licenses and public licenses do not take the sui generis database right into account. This leads to situations where text and images of research are reusable under an open access policy, but not corresponding databases. It can take a long time for an institution to change its license, if it happens at all. Individual researchers and scholars often feel they can't change policy, leading to a situation where databases remain effectively locked-up. The University of Vienna, for instance, despite being supportive of reuse, [only started offering](#) open licenses covering database rights in 2017 and only for some publications. Databases in Chemistry papers remain for the most part not covered. While better information about the sui generis right might be a way forward, it should be considered whether the social transactions costs aren't higher than the potential gains.

3.3. Italian Population Data

Various public databases across the EU remain unavailable for reuse, although they are not original enough to be copyright protected. This is the case whenever the public body lacks an open license policy or this policy prescribes a license that doesn't account for the sui generis protection. As the Directive [clearly applies](#) to government databases containing public data, this makes the reuse of such public data often legally impossible. One of the most poignant examples is the [Italian population census](#) data, which is off limits for Wikidata due to the sui generis right, although Italian Statistics Office ISTAT [already uses a free license](#). The free license they use, however, only covers copyright protection. Another example where public data cannot be reused despite copyright not being an obstacle is the [directory of the French National Assembly](#). French legislative documents are not covered by the national copyright law, but there is not similar exception for the sui generis right.

3.4. Hungarian Government Databases



The transposition of the Database Directive in Hungary is more restrictive than in other countries. It has been incorporated as part of the copyright framework ([Chapter VII and Chapter XI/A of the 1999 LXXVI National Law](#)). According to this, a database is an organised collection, whose elements can be reached individually. A database it is protected for 15 years that restart every time a database has been changed “with significant effort”. Wikimédia Magyarország (Hungary) has over the years encountered many difficulties with this additional protection when trying to reuse public data.

The database of protected natural areas (and other protected natural objects), as part of the natural heritage of Hungary is handled by the [Ministry of Agriculture](#), and is, for the most part, publicly available. There is a [searchable list](#), an [old](#) and a [new map service](#). The Ministry refused to allow its opening up saying that they didn’t want anyone to change the databases, because they are official data, while citing the sui generis database protection as legal basis for their refusal.

The database of protected monuments of Hungary (national level), which contains an official list of monuments with IDs and coordinates, is not publicly available. In order to receive information about the protection status of a building, one has to pay for each single record, but is also required to sign away the right do anything with the provided data. The database right is used as a legal basis for this prohibition to reuse and republish even parts of the data. There is currently some data about protected national monuments on Wikipedia and Wikidata, but Wikimedia Hungary cannot check if the data is correct or not. The [Prime Minister’s Office](#), that is responsible for the database, has not provided answers to what they consider a "part of the database" or after how many single entry reuses we would violate their right.

3.5. Traffic Data by Sofia Municipality

Since 2015, a coalition of NGOs, municipal councillors, and municipal advisors has been working on opening up all datasets of the Sofia Municipality and providing them for reuse in several Bulgarian open government data portals. In 2016, a [list of priority datasets](#) has been adopted by the Council of Ministers of the Republic of Bulgaria that were to be



opened up in fasttrack procedures. Municipal traffic and public transport data is part of the list.

While the [opening up of other datasets](#) by the Sofia Municipality has proceeded rather smoothly, the traffic data is still being held back by the [Sofia Urban Mobility Centre](#) (SUMC), which cited mainly two reasons: trade secrets and sui generis database protection. The arguments by the management given for their reluctance to share traffic data, is that some lines are granted as concessions and ran by private companies and they should be allowed to have secrets from their competition. The sui generis right argument has been used to avoid the publishing of the data in the open data portal, although it is legally questionable. The original free license negotiated between the coalition and the SUMC didn't cover the sui generis right, because of lack of awareness. The SUMC, now aware of another hurdle, would have to agree to switch licenses now, something it avoids committing to. While this is a licensing issue at its core, it goes to demonstrate how the sui generis right adds an additional hurdle to

3.6. Integration Between Different Open Data Projects

The integration between different open data & knowledge projects like Open Street Maps and Wikidata, for instance, is being considerably complicated by the sui generis right. The Open Street Map project relies on the Open Data Commons Open Database License (ODbL). The issue at hand is that this license is inherently more complex because of the additional layer of protection. This makes making it compatible with some of the most commonly used free licenses difficult, which hinders the integration and reuse of information. Although this is primarily a licensing problem, it shows how additional layers of unclear protection create a complex framework that stifles compatibility and exchange.

3.7. Technical tools running websites and services

In today's digital world, virtually every single website, blog, service and infrastructure is able to function without databases. Search functionalities, categorisations, server & client requests create and use databases. Almost every API operation is a potential "systematic extraction" of data from the databases the API provider's system is working with. In effect, almost every API operation is a matter of clearing the sui generis rights. The protection of non-original databases amounts to major legal unclarity about the usability of such tools



and functions. It is like legal mildew sticks to almost every element of our digital environment.

4. Conclusions & Solutions

There are virtually no practical, real-life examples where the sui generis protection has fostered investment in the creation of databases. On the other hand, the concrete examples above demonstrate how the sui generis right has been an obstacle to data donations, open data and the re-use of public sector information data.

Wikimedia's European chapters and communities would therefore suggest to withdraw the sui generis right. The option for this would be to strike the sui generis right EU-wide. The withdrawal must in this case be mandatory for all Member States.

We are concerned that a withdrawal of the EU-level right, if not mandatory, would allow Member States to preserve such a protection in their national legislations. This coupled with a lack of an EU-wide framework could lead to even greater divergence of the laws. We must stress that this would be a dangerous outcome and is to be avoided in all scenarios.

As an alternative policy option, we could imagine keeping the sui generis part as "protection upon registration" right only, in the case solid economic evidence is provided that the investment in the protection of databases is significantly supported in some specific industry fields by the sui generis protection. Such an option would allow these specialised markets, if they exist at all, to continue to function, while removing barriers to the rest of the industry while fuelling open science, open data and open knowledge initiatives.

In this scenario, the European Commission could create a Protected Databases Directory at the EU IPO in Alicante, which has already gathered valuable experience by creating and



running the Orphan Works Database as well as running registries for various commercial rights such as trademarks and designs.

Furthermore, a valuable step towards legal certainty and seamless cross-border use of data and databases in Europe could be made by making all the exceptions mentioned in the Directive mandatory.

Future European economic and citizen activities will very much depend on the access to and the non-monopolisation of data, data repositories and free knowledge bases. In this sense the expected data economy package can be one of the cornerstones to boost quick and future-oriented initiatives.