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Summary Report

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2020 -- Study Question

Rights in Data

Introduction

- This study question addresses the issue of rights in data, in particular IP rights in data.

  It examines the extent to which data already enjoys protection under current IP and other laws, as well as any gaps or overlaps, such as those that may exist with regard to databases under copyright law and trade secret law.

  It addresses whether there is a need for a new *sui generis* right in certain kinds of data, or whether current laws and contractual agreements are sufficient; and the potential right holder, object and scope of protection of any new right.

  It also addresses whether such a right in data might undercut the existing system of intellectual property rights, unduly restrict the public domain and fundamental rights, distort competition, and hinder scientific research.

- This study question does not address legal issues of privacy and personal data, *i.e.* information relating to an identified or identifiable natural person. Legislation and policy issues relating to personal data protection should not be taken into consideration to answer this questionnaire.

  This study question raises health data as one example of a data-intensive industry where the issues of rights and access to data are important. This question does not address any issues relating to procedures for obtaining legal approvals for products or procedures, such as pharmaceutical approvals and the like.

  This study question also raises the topic of Public Sector Information (PSI) as another large source of data to which access may be desired by certain parties for commercial or other purposes.

- In the context of this study, the term “mere Data” means unstructured data, i.e., any collection of information of any kind, not aggregated and not arranged in a systematic or methodical way, that is recorded and stored by electronic or other means.

The term “Database” means a collection of data arranged in a systematic or methodical way and individually accessible by electronic or other means.

- The Reporter General has received Reports from the following Groups and Independent Members in alphabetical order:

  Argentina, Australia, Azerbaijan, Belgium, Brazil, Bulgaria, Canada, Chile, China, Chinese Taipei, Croatia, Ecuador, Finland, France, Germany, Hungary, India, Indonesia, Italy, Japan, Malaysia, Mexico, Paraguay, Philippines, Poland, Spain, Switzerland, The Netherlands, Turkey, United Kingdom, United States of America.

  31 Reports were received in total[1]. The Reporter General thanks the Groups and Independent Members for their helpful and informative Reports. All Reports may be accessed here.

  The Reports provide a comprehensive overview of national and regional laws and policies relating to rights in data, set out in three parts:

  - Part I – Current law and practice
  - Part II – Policy considerations and proposals for improvements of the current state of the law
  - Part III – Proposals for harmonization.

  This Summary Report does not summarise Part I of the Reports received. Part I of any Report is the definitive source for an accurate description of the current state of the law in the jurisdiction in question.

  This Summary Report has been prepared on the basis of a detailed review of all Reports (including Part I), but focuses on Parts II and III, given AIPPI's objective of proposing improvements to, and promoting the harmonization of, existing laws. As it is a summary, if any question arises as to the exact position of a particular Group in relation to Parts II or III, please refer to the relevant Report directly.

  In this Summary Report:

  - references to Reports of or responses by one or more "Groups" may include references to Independent Members;
  - where percentages of responses are given, they are to the nearest 5%; and
  - in Part IV below, some conclusions have been drawn in order to provide guidance to the Study Committee for this Question.

[1] Reports received after 8 July 2020 are listed above but their content is not included in the summary in Parts II and III.

Questions

I. Current law and practice

For the replies to Questions 1) - 8) set out in the Study Guidelines for this Study Question, reference is made to the full Reports. The Study Guidelines may be accessed here.

II. Policy considerations and proposals for improvements of your Group's current law

Could any of the following aspects of your Group's current law or practice relating to rights in data be improved? If YES, please explain and answer each of the sub-questions.

9) Protection of mere data?

- 12 reports (40%) indicate that their current legislation could be improved.

  1/ Among these 12 reports, 10 reports call for a clarification of some definitions (*e.g.* "mere data") or point out the uncertainty of the protection of mere data by their current legislation (trade secret, etc.).
  For instance, the German report indicates that: *"The current law has no definition of the term "mere data". It is not clear even what kind of legal object data are"*.
  The Italian report indicates: *"A certain degree of uncertainty exists regarding the possibility to consider "mere data" as "information" protectable under trade secrets regulation. A clarification would therefore be welcome".*

  2/ 3 reports (US, CN and BG) consider that a new *sui generis* right should be created in order to protect mere data.
  The US report states that: *"Although the protection of mere data under current United States trade secret law, and by the various, specific statutory and regulatory schemes, provides sufficient protection in many situations, there remains a need for a sui generis form of data protection that would enable further development of AI systems. Further study is required in order to determine what type of protection is warranted".*

  3/ The Finish report considers that mere data should not be protected *sui generis*, but some other protection instead of an IP type of exclusive right could be considered, *e.g.* in the form of limited protection against unauthorised access to mere data. A similar possibility is supported by the Belgian report.

  4/ 5 reports consider that taking the decision to protect mere data or not is premature.
  For instance, the Dutch report indicates that *"the question whether such data should be protected strongly depends on whether there is clear evidence from economic research that protection of Data would lead to more information / knowledge / innovation which could be valuable for society. (…) If there would be clear evidence showing that protection of Data would lead to more information / knowledge and innovation, the Dutch group is in favour of a right protecting data".*

- 17 reports (about 60%) of the reports consider that no improvement of their legislation is desirable, either because their current legislation (trade secret, unfair competition) provide an adequate protection, or because they express doubts regarding the opportunity to provide a new protection to mere data.

For instance, the Indian report indicates that: *"The potential benefits of an exclusive right in data are not clear and at present, speculative. Creation of such a right may in fact result in monopolising and restricting access to the public of information which may be fundamental to a knowledge-driven economy and/or may even serve as building blocks of intellectual property creations".*

a) Requirements for such protection(s)?

Only 3 reports support the creation of a new IPR to protect mere data (US and CN), but they consider that further study is necessary in order to determine the requirements.

b) Ownership of the right(s)?

- Only the Chinese, Bulgarian and US reports propose to protect mere data through a new IPR.
  The Chinese report considers that the data collector/holder should be the original owner of mere data.
  The US report considers that further study is required to determine the owner of such right.

- Among the reports that ask for clarification, the Italian report points out the current uncertainty in the Italian legislation regarding the ownership of mere data: *"In the realm of internet of things technologies, uncertainties might exist on the identification of the "holder" of a trade secret. Employees working as data analysts and scientists have expressed concerns regarding the recognition of the value of their work. Basically, they claim a treatment similar to that of employed inventors (i.e. a right to equitable remuneration)"*.

c) Scope of the protection?

- Only the Chinese, Bulgarian and US reports propose to protect mere data through a new IPR.
  The Chinese report considers that the protection should be consistent with general principles for the protection of property rights.
  The US report considers that further study is required to determine the scope of such protection.

- The Dutch report points out that the protection of mere data should, in any case, cover the data recorded but not the information itself: *"The right would thus not, for the avoidance of doubt, cover the information that is embodied in and expressed by the data. Only the data recorded should be protected (and any copies that are made of that record). Any party should be free to independently make its own measurements and data records. Such independently made data records may express the exact same information, but would not infringe on the data protection rights (for they are an independent record).*
  If one would take a recording of a soccer match as an example. This recording would comprise many (potential) data-elements. On the other hand, everybody watching (the recording of) the match could record / collect all kinds of Data about the match (Which players? How many corners? How many correct passes per player, the distance covered per player the amount of possession et cetera) independently. Depending on the data, probably not all data records will be identical. Software measuring the distance covered per player through the recording will probably result in slightly different Data than Data collected through a GPS sensor on the player. Even if the different ways of recording the Data would lead to identical values, the different data records should be protected individually to avoid an information monopoly".

- Regarding the term of the protection, 2 reports consider that a short term is desirable.

  For instance, the Finish report considers that: *"Determining an appropriate term for the protection of such new protection (if any) is difficult as data typically has a very short life span.*

In this sense, there is necessarily no need for protection term of several years or even months. In any case, the term of protection should be much shorter than the term of protection of copyright and database".

d) Exceptions to this protection?

Only 4 reports indicate precisely the exceptions that should apply to the protection of mere data.
For instance, the Chinese report proposes to introduce a regime of fair use of data or compulsory license, considering the need for public governance, education and scientific research.
The Dutch report proposes to introduce at least two exceptions: private use and scientific/educational use.
The Belgian report also mentions a Text and Data Mining (TDM) exception.

10) Protection of databases?

- 15 reports (about 50%) consider that their current Legislation could be improved.

Among these 15 reports, 7 reports are from countries where no *sui generis* right exists, and 8 reports are from EU countries where a *sui generis* right for databases already exists.

1/ Reports from countries without sui generis right (7 reports)

Among these 7 reports, all reports propose to introduce such protection, sometimes comparable to the EU Directive 96/9 on the legal protection of databases.
The Australian report proposes to introduce a *sui generis* right consistent with the EU databases directive and/or an additional category of copyright work with relaxed originality and authorship requirements.
The Japanese report states that: *"There is a room for improvement to this aspect. Although database can be protected under the Patent Act, the Copyright Act, and the UCPA, a part of database is outside the scope of protection. When a database has a fairly large size, is recorded electromagnetically and searchable, a certain legal protection should be provided for the database in view of its usefulness".*

2/ Reports from EU countries (8 reports)

Among these 8 reports, all consider that the EU directive should be updated.
For instance, the Finish report indicates that: *"The existing regulation on databases, where such exists, may also be partially outdated and in need of updates: the currently existing EU database directive has been created during a time when databases were compiled, created and used locally through downloadable software. Currently, however, the compilation of databases differs significantly from the situation contemplated in the 1990s when the EU database directive was enacted: By way of example, databases may be compiled from data collected by networked IoT devices and software programs can search and access various information sources which can be located in different remote platforms geographically, and databases may be produced, held and accessed in multiple locations at the same time".*
The Spanish report expresses that definition and scope of some terms should be specified in the EU directive on databases, such as *"substantial investments"*, *"obtention of data"*, *"verification of data"*.
The Polish report proposes to resign from the EU directive or provide some limitation.

- 12 reports (about 40%) consider that their current legislation could not be improved.

a) Requirements for such protection(s)?

1/ Reports from countries without sui generis right (7 reports)

4 reports consider that the condition for such protection should be substantial investment.
For instance, the Chinese report considers that *"it is appropriate, similar to the rights of audio/video recordings producers, to establish a new right as "right of database producers" to improve the protection of databases. Such protection is conditional on the substantial input/investment by the database producer in the production of the database".*
The Canadian report considers that: *"The protection should extend to databases where the owner has expended substantial resources in its collection or arrangement and over which the owner has maintained control".*

2/ Reports from EU countries (8 reports)

6 reports point out that many terms should be clarified, particularly the scope of the protection, because it is unclear whether the creation of data can be protected, and not only the collection of data.
The German report points out that in the EU directive on databases, "*the differentiation between collection and creation of data should be clarified, as it is difficult to make the distinction between the investment in the collection/organisation of data and the investment in the generation of data"*. It also points out that the criteria of *"substantial investment"* to benefit the protection of database is not clear.
The French report proposes to update the EU directive on database in order to protect investment dedicated to the production of data: *"However, while the sui generis right of the database producer appears to be limited to the protection of substantial investments dedicated to the collection and verification of data, it seems to us that this right could be enhanced and modernised so as to protect substantial investments dedicated to the production of data"*.
This issue is also raised by the Italian report: *"It remains uncertain whether protection would be granted for databases generated within internet of things environments, considering that it might be difficult to identify investments made specifically to that end and/or the person that has made it. Moreover, it seems questionable whether requirements for protection would be met by investing in the processing of raw data, as one could argue that this should be seen as an investment made to create data more than to collect them"*.
In the same vein, the UK report mentions that even if the ECJ has drawn a distinction between investment in creating the contents of a database (which is not considered a relevant investment) and investment in obtaining pre-existing data (which is considered a relevant investment), *"there is an uncertainty regarding data bases in the context of data collected by sensors. The situation should be clarified"*.
The Polish report proposes to add the registration of databases as condition for the protection.

b) Ownership of the right(s)?

- There is a consensus that the owner of the rights should be the person/entity who made the substantial investment in the creation of the database.
  For instance, the Canadian report considers that *"the first owner of the data base should be the person or persons who expend the resources to collect and arrange the data, subject to contracts to the contrary"*.
  The Chinese report considers that: *"Database producers shall be defined as a legal subject at law, similar to the existing provisions regarding audio/video recordings producers"*.

- The Finish and the German reports point out that the owner of the *sui generis* right might be difficult to determine if several persons or entities intervene, *e.g.* in IoT environment.

c) Scope of the protection?

1/ Reports from countries without sui generis right (7 reports)

The Canadian report considers that the scope of the protection should be akin to other IP rights and allow the owner to make full commercial use and exploit the database.
The Chinese report considers that the monopoly should extend to use, reproduction, extraction, tampering of other people's databases without authorization from the right holder.

2/ Reports from EU countries (8 reports)

The German report considers that the scope of the protection by the EU Directive on databases is too broad and the lack of clarity could prevent potential users of the databases from legitimate uses. It proposes for instance to narrow the definition of database, in order to limit the scope of the protection.
The UK report supports the application of database right to sensor-data in order to encourage investment in the development of IoT devices.

d) Exceptions to this protection?

- The following exceptions are mentioned by reports, in order to allow access to data:
  - Exceptions in the public interest, *e.g.* teaching, scientific research, public security, etc. (6 reports);
  - Data mining (4 reports);
  - Private copy (2 reports);
  - Temporary copying of elements of a protected database for the purpose of automated analysis, in order to develop AI systems (UK report);
  - Competition legislation.

The Chinese Taipei report gives an example of Text and Data Mining exception: *"it may be necessary to create a clear exception for the use and access of the database for data-mining. In the circumstance where a person/entity intends to extract data from the social media or on a website, the codes/software or other technologies that enable the process normally consists of procedure to scrape the whole content on the relevant webpage and the procedure to clean the data for further use. Scraping the whole content of webpage alone may be held as invading the copyrighted Dataset. However, holding such duplication as infringement and prohibiting any duplication on the basis of copyrights might harm the competition in the market"*.
The Australian report considers that *"The fair dealing defences, in particular fair dealing for purpose of research or study and temporary reproductions of works as part of a technical process of use. However, in addition it would be useful to include an express exception for text and data mining undertaken by research organisations and cultural heritage institutions"*.

- About half of the reports from EU NGs considers that the exceptions to the database protection should be enlarged and/or clarified.
  For instance, the Italian report underlines: *"the need to provide for new and more extensive exceptions and limitations"*.
  The Polish report indicates that the proper protection of legitimate interests of users to access information collected in databases should be clarified within the EU directive on database.

11) Rules on contract law, *e.g.*, prohibition of contractual override, etc.?

- 18 reports (60%) consider that the rules on contract law could not be improved.

- 11 reports (40%) consider that rules on contract law could be improved.

  The US report considers that the contractual autonomy should be limited by the laws on competition: *"Parties should be permitted to freely contract concerning their rights in databases, subject to the laws of competition".*
  The German report points out the difficulties with the current legislation: *"There are no specific legal regulations for such contractual agreements on data. On the one hand there is the problem of contractual autonomy. Particularly in the case of data that is not freely accessible, but which is highly relevant, for example, for science and research or for sovereign purposes, contractual autonomy can lead to interested parties being denied access to this data or to it not being sufficiently defined how and under what conditions access can be granted. On the other hand, there is also the problem of the relativity of obligations. Third parties who have not become contractual partners are not excluded from using the data in purely factual terms".*
  This report considers that above all, data should be clearly defined as a legal object.

  3 reports consider that one improvement could be the prohibition to override exceptions to the database protection.
  For instance, the Chinese and Italian reports consider that it should be clear that exceptions are mandatory and that contractual provisions cannot exclude them.
  The Philippine report proposes to introduce specific provision relating to the prohibition of contractual override: *"A possible improvement would be the addition of a prohibition on contractual override, especially in connection with the use of health databases".*

  In Croatia, a Law draft proposal contains provisions relating to the prohibition of contractual override: *"The new Draft proposal specifically predicts prohibition of contractual override as envisaged by the Directive on copyright and related rights in the Digital Single Market. That is, the Draft proposal states that it is not possible to contractually override exceptions regarding text and data mining for the purposes of scientific research, use of works and other subject matter in digital and cross-border teaching activities and use for purposes of preservation of cultural heritage".*

12) Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

4 reports raise the issue of access to data.

For instance, the French Report proposes two different limitations: the public interest and competition Law. *"The law could specify the criteria in accordance with which derogations for access to data and/or access to and processing of data are possible, subject to appropriate guarantees, where it is in the public interest to do so, in particular for purposes of security, health monitoring and alerts, of prevention and control of communicable diseases and other serious threats to health. These derogations should also be considered for archive-related purposes that are in the public interest, for scientific or historic research purposes, or for the purposes of identifying criminal offences.*
Competition law could also be clarified to expressly include data in the concept of "essential facility". This doctrine is based on the idea that a party which, in a situation where it has a monopoly or is dominant on a market, possesses an essential "infrastructure" which cannot be reproduced under reasonable economic conditions and without which resource competitors could not serve their clients or carry on their business, may be compelled to allow its competitors to access this resource in order to protect competition in an upstream, downstream or complementary market".

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III. Proposals for harmonisation

13) In your opinion, should the protection of mere data and/or database be harmonized? For what reasons?

- The vast majority of reports (24 reports, about 80%) consider that harmonization of legislation relating to mere data and/or database is desirable.

  The main reasons are:
  - Most data and databases move between multiple legal jurisdictions. For instance, most internet companies and data service providers conduct business in different markets of various countries.
  - To encourage the circulation of data and secure data transactions. Indeed, a uniformity of laws would mean that transaction and legal advisory costs would be reduced, and legal certainty increased.
  - To encourage investments and foreign direct investments.

  One other reason pointed out for instance by the US report is the development of AI: ***"****there remains a need for a sui generis form of data protection that would enable further development of AI systems. However, any such debates over policy changes or new laws should be guided by the fact that AI is a data-driven technology that could involve various types of databases and data sets".*

  The Chinese report also points out the importance of international standards for harmonization: *"To formulate international standards of data/database contributes to establishing a uniform rule of data and a standardized protection system, and can promote data sharing, data transactions, improve data utilization efficiency and promote the development of data industry further".*

- A minority of reports (4 reports, 15%) considers that the harmonization of substantive rules regarding the protection of mere data and databases is not desirable.

Protection of mere data

14) Should mere data be subject to a specific protection, *e.g.* an IP right or other type of right?

- The vast majority of the reports (23 reports, about 80%) consider that the protection of mere data by IP right or other type of right is not desirable.

  Diverse reasons are expressed:
  - Granting exclusive rights to mere data involves the risk of monopolisation of information and could hamper the functioning and development of new technologies (Finish, Indian and Italian report);
  - To preserve the freedom of contract (French report);
  - If another IP right is created, the amount of IP rights that need to be harmonised is increased even more (German report);
  - Such protection would require a difficult coordination with the protection of personal data under data protection laws (Italian report).

Among these reports, 5 reports (about 20%) consider that mere data should be protected by others means, such as trade secret and/or unfair competition.

2 reports consider that there are still several issues that need to be solved before considering protection or harmonization of protection.

For instance, the German report points out that in the absence of clear definition of "mere data" in the legal sense, it is difficult to create a right for the protection of a not clearly defined subject.

According to the Dutch report, *"the question whether such data should be protected strongly depends on whether there is clear evidence from economic research that protection of Data would lead to more information/knowledge /innovation which could be valuable for society. If there is no clear evidence showing this, awarding protection is likely to have an overriding negative effect in the sense that it could stifle innovation. If there would be clear evidence showing that protection of Data would lead to more information/knowledge and innovation, the Dutch group is in favour of a right protecting data"*.

- 7 reports (about 25%) support the protection of mere data by an IP right or other type of rights (among others US, Chinese and Japanese reports).

  The expressed reasons are:
  - To facilitate the circulation of data and secure data transactions (Chinese report);
  - To enable further development of AI systems (US report);
  - To facilitate commercial activity and proprietary research (Bulgarian report).

  The Finish report proposes to protect mere data through some other type of protection instead of an IP type of exclusive right, *i.e.* a limited protection against unauthorised access to mere data.

15) If yes, what should be the requirements for such protection?

7 reports support the protection of mere data through IP right or other type of right.

- The first issue is to determine if <u>all data</u> or <u>only a certain type of data</u> should benefit the protection by a *sui generis* right.
  The reports don't propose any distinction between different types of data (except for PSI and health data), except the Japanese report that proposes that only data that are <u>economically valuable</u> should deserve protection: *"the types of data to be protected should be limited to those that are economically valuable and would bring substantial damage to its owner when infringed".*

- Regarding the requirements to benefit from the protection by a *sui generis* right, diverse requirements to grant such protection are proposed.
  The Chinese report proposes <u>3 cumulative requirements</u> for such protection: *"First, the <u>permission of original right holders</u> shall be collected and obtained through legal ways; Second, the <u>control over data</u> shall be an actual control (different from control in form); Third, such data must have been <u>recorded</u>"*.
  The Japanese report recommends the requirements of its current legislation: "*data that is <u>accumulated in considerable amounts</u> by electromagnetic means, <u>managed</u> by electromagnetic means (e.g. access to the data is controlled by the use of ID/password, encryption, and dedicated lines), and <u>provided to specific people</u> in the course of trade"*.

- Regarding the cumulation of protection by different IP rights or other regimes (*e.g.* trade secret, copyright, etc.), the Hungary report considers that data that are protected under another regime (trade secret, copyright, etc.) should not be eligible to the *sui generis* protection.

16) Who should be the owner of this right / IP right?

Few reports give precise indication on the owner of the *sui generis* right on mere data.

But the data collector, data owner and data holder are proposed by 2 reports (Chinese and Indonesian reports).

The Japanese report precises that: *"When a person lawfully manages the data and his/her business profits are or can be eroded by the wrongful acquisition/use of the data, such person should be entitled to enforce the right (e.g. to file a claim for an injunction and damages)"*.

17) What acts should be prohibited to third parties to avoid infringement?

- The most mentioned prohibited acts to third parties proposed by the 7 reports in favour of the protection of mere data by IP right are:

    - Access/extraction/acquisition of the data;
    - Copy of the data;
    - Use/utilization of the data for gaining profit or other economic advantage;
    - Disclosure of the data.

- The Japanese report recommends to distinguish according to whether the third party is acting in good or bad faith. The following acts should be prohibited: *"i) an act of acquiring data by theft, fraud, duress, or other wrongful means; (ii) an act of using or disclosing the wrongfully acquired data, and (iii) an act of acquiring, using, and disclosing data with the knowledge that the data was wrongfully acquired or disclosed"*.

18) Which exceptions, if any, should apply to this protection (*e.g.* access right for data mining, etc.)?

- The most cited exceptions are:
    - Text and data mining (TDM) (1 report);
    - Exceptions in the public interest, *e.g.* research, health, security (5 reports).

For instance, the Chinese report proposes to introduce a regime of fair use or a system of compulsory license: *"Considering the need for public governance, education and scientific research, a regime of fair use of data shall be established by specifying circumstances of fair use or compulsory licensing for the purpose of non-profit and in combination with the comprehensive "four-factor test", so as to promote scientific and technological development and effective use of data resources"*.

The Japanese report recommends to distinguish according to whether the third party is acting in good or bad faith: *"if a person acquires data through a transaction without knowing that the data was wrongfully acquired or disclosed, but later, he/she learns of the wrongful acquisition or use, he /she should be all owed to continue to use or disclose the data to the extent of title to the data obtained through the transaction".*

- Regarding the dual protection of the same mere data, the Swiss report underlines that the protection of mere data should not hinder the independent generation of the same data by a third party, even if it results in the exact same result.

  The Japanese report proposes the same principle: *"If a considerable amount of accumulated data is identical to another collection of data that is accessible for free to the public, the sui generis right should not be enforceable"*.

19) What role should contract law play (*e.g.,* prohibition of contractual override)?

The majority of the reports that support the protection of mere data by IPR or sui generis right consider that the override of exceptions to mere data protection should be prohibited (5 reports).

Protection of databases

20) Should databases be subject to a specific protection, *e.g.* an IP right or other type of right?

- The vast majority of the reports (26 reports, about 90%) consider that databases should be protected by an IP right.

  There is a debate regarding the most appropriate way to protect databases.

  1*/* A majority of these reports (75%) proposes to protect databases through a *sui generis* right (19 reports - 12 reports from EU countries and 8 reports from countries outside the EU).

  Regarding reports from EU NGs, 5 reports propose to update the EU directive on databases.
  For instance, the French report indicates that: "*harmonisation of the protection of databases could occur by means of a sui generis right of the database producer conceived in a modernised form in that it also protects substantial investments dedicated to the production of data"*.
  The Polish report proposes to encourage private entities to make their databases accessible under FRAND terms.

  2*/* 5 reports (20%) consider that the protection through trade secret and copyright is sufficient (Chinese Taipei, Mexican, Ecuador, Philippines, India).

- Only 3 reports (Swiss, Paraguay and Azerbaijan – about 20%) reports consider that databases should not be protected by an IP right.
  For instance, the Swiss report considers that the protection by trade secrets and unfair competition is sufficient enough.

21) If yes, what should be the requirements for such protection?

- The most frequently cited requirement (17 reports, about 60%) is the actual and substantial investment to create the database.
  For instance, the Chinese report indicates that*: "The specific protection is conditioned on the actual and substantial investment of manpower, material resources, fund, time and other resources by the database producer".*

- The 5 reports that support the protection of databases by copyright consider that requirements to benefit copyright should apply.

- The Turkish and Japanese reports propose to limit the protection to data that have an economical value.

- The Brazilian and Polish reports consider that the registration of the database should be a supplementary requirement for such protection.

  The Polish report adds that: *"The obligation to register or notify the databases (as an independent protection condition, in addition to actual investments made to create the base) is one of potential options. But as an alternative to the registration/notification duty, the obligation of a producer/owner to provide the electronic database with a unique identifier, ensuring its traceability to the owner, allowing to precisely and easily determine the ownership and the scope of protection, should also be considered"*.

22) Who should be the owner of this right / IP right?

- The majority of the reports (17 reports, about 60%) indicates that the owner of such right should be the producer of the database, *i.e.* the natural person or entity that made the investments - either financial or others- for making the database.

- The 5 reports that support the protection of databases by copyright consider that copyright regime should apply.

23) What acts should be prohibited to third parties to avoid infringement?

The most cited acts that should be prohibited to third parties are:

- Extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database (12 reports – 40%);
- Use;
- Reproduction;
- Distribution of copies;
- Creation of derivative works;
- Data mining (Brazilian report).

- The Japanese report recommends to distinguish according to whether the third party is acting in good or bad faith. Following acts should be prohibited: *"i) an act of acquiring data by theft, fraud, duress, or other wrongful means; (ii) an act of using or disclosing the wrongfully acquired data, and (iii) an act of acquiring, using, and disclosing data with the knowledge that the data was wrongfully acquired or disclosed"*.

24) Which exception should apply to this protection (*e.g.* access right for data mining, etc.)?

- The vast majority of the reports (about 80%) considers that exceptions in the public interest, *e.g.* scientific research, health and safety, security, should be provided.

  Reports from EU countries (12 reports) consider that exceptions provided by the EU directive on the protection of databases are adequate, *i.e.* extraction for private purpose (also supported

by 3 reports from outside the EU), extraction or the re-use of an insubstantial part of a database, and exceptions in the public interest.

The Chinese, Chinese Taipei and US reports mention the exception of fair use.

Furthermore, 7 reports mention the Text and Data Mining exception (TDM). In that regards, the Belgian report points out that the EU directive 2019/790 on copyright and related rights in the Digital Single Market provides an explicit exception regarding text and data mining, defined as "*any automated analytical technique aimed at analyzing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations"*. This directive provides for several TDM exceptions, *e.g.* for scientific research, teaching activities and cultural heritage.

The UK report indicates that *"the temporary copying of elements of a protected database for the purpose of automated analysis may be desirable in order to develop AI systems".*

- The Polish report considers that (i) databases created by public institutions or with public funds and (ii) databases related to non-commercial use of already disseminated databases, including datamining for scientific purposes, should not be protected.

- The Japanese report recommends to distinguish according to whether the third party is acting in good or bad faith: *"if a person acquires data through a transaction without knowing that the data was wrongfully acquired or disclosed, but later, he/she learns of the wrongful acquisition or use, he /she should be all owed to continue to use or disclose the data to the extent of title to the data obtained through the transaction".*

- Regarding the dual protection, the Japanese report points out that: *"If a considerable amount of accumulated data is identical to another collection of data that is accessible for free to the public, the sui generis right should not be enforceable"*.

25) What role should contract law play (*e.g.* prohibition of contractual override)?

The majority of the reports (80%) considers that principle of autonomy of will and the freedom to contract should be limited by the legal provisions of public policy, *e.g.* the legal exceptions to the protection of databases and competition law.

For instance, the Japanese report indicates that: *"contractual agreement between the parties should prevail over the legal provisions for database protection. However, it is possible that a certain mutual agreement may be excluded from the viewpoint of the antimonopoly or consumer protection legislation".*

The Polish report insists on the fact that: *"the most reasonable way is to propose recommendations or model solutions (soft law instruments) for the interested parties (rather to impose absolute and very rigid regimes) assuming however that in extreme cases, the competition laws would apply to eliminate the most abusive practice, including unfair contractual arrangements"*.

The German report suggests adapting licencing rules in order to avoid obstruction: "*there should be more legal certainty as a basis for establishing a contractual regime. This could also be achieved by an adaptation of licensing rules. Particular emphasis is placed on the platform economy, which cannot function without data transfer. In this respect, the explicit inclusion of an abusive element in the denial of access to data and also in the context of relative market power is to be welcomed as an undue obstruction of a dependent company"*.

Specific regimes

26) Should Public Sector Information (PSI) be subject to a specific regime, *e.g.* regarding the control and access to such data/databases?
If YES, please explain the desirable regime.

- 21 reports (about 70%) consider that PSI should be subject to a specific regime, for diverse reasons.

  For instance, the Polish report indicates that: *"Any data held by the public sector should, as a rule (i.e. except for certain, although limited exceptions such as protection of classified information, privacy-related restrictions, or third parties' rights) be available for access and use by all interested persons or entities (for free, or for a consideration which should not exceed the costs of providing or preparing such information)".*

  Among these 21 reports, 11 reports consider that the EU Directive 2019/1024 of 20 June 2019 on open data and the re-use of public sector information is a possible legal regime of PSI.

  The Japanese report considers that works created on the basis of PSI should be protectable by IPRs: *"It is desirable that PSI owned by administrative organizations be made available as "open data" for secondary use in the private sector, from the viewpoints of popular participation in administrative activities, economic revitalization, improvement of administrative efficiency, transparency and reliability, etc. If a third party creates any works (the "secondary works ") that are subject to IP or other property rights such as patents and copyrights during the secondary use of open data, such third party should be allowed to acquire such an IP or other types of property rights"*.

- 4 reports indicate that PSI should not be subject to a specific regime.

27) Should health data be subject to a specific regime, *e.g.* regarding the control and access to such data/databases?
If YES, please explain the desirable regime.

- 22 reports (about 75%) consider that health data should be subject to a specific regime.

  The most important reason is privacy (15 reports).

  The UK report distinguishes between public sector health data and private sector health data: *"Health data in the public sector should be subject to a specific set of procedures, policies and rules regarding the control and access to those data and relevant databases. Health data in the private sector should not the subject to a specific set of procedures, policies and rules regarding the control and access to those data and relevant databases".*

  The French report considers that: *"It would seem desirable for health data to benefit from protection which reserves access to it while providing specific arrangements for access by certain categories of persons (…) it would also be desirable for the criteria to be specified according to which derogations for access to data and/or access to and processing of data are possible, subject to appropriate guarantees, where it is in the public interest to do so, in particular for purposes: - of security, - of health monitoring and alerts, - of preventing or controlling communicable diseases and other serious threats to health, - that relate to archives*

and are in the public interest, - of scientific or historic research, - of identifying criminal offences. A harmonised competition law could also expressly include data in the concept of "essential facility".

- 7 reports consider that health data should not be subject to a specific regime.

General

28) Please comment on any additional issues concerning any additional aspect of Rights in Data you consider relevant to this Study Question.

The German report is of the opinion that legislative action is required, in order to provide more legal certainty as a basis for establishing a contractual regime for data, e.g. rights of control and access.
It proposes an adaptation of licencing rules, e.g. the explicit application of antitrust legislation to data. For instance, it emphasis that the platform economy cannot function without data transfer. In this respect, it supports the explicit inclusion of an abusive element in the denial of access to data and also in the context of relative market power as an undue obstruction of a dependent company.

29) Please indicate which industry sector views provided by in-house counsel are included in your Group's answer to Part III.

10 reports indicate that in-house counsel's opinions are included in their report, from very diverse sectors, e.g. automotive, wine, pharma industry, life science, hospitals, internet, AI, microelectronic, educational industry, marketing and information services, service industry, academic and research institutions, business intelligence services, non-profit data scientist, energy, etc.

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IV. Conclusions

- The majority of the reports considers that harmonization of legislation relating to the protection of mere data and database is desirable.

Protection of mere data

The majority of the reports is not in favour of the protection of mere data through an IP rights (existing IPR, sui generis right), in order to avoid the risk of monopolisation of information and of hampering the functioning and development of new technologies.

The majority of the reports considers that the protection through trade secret and unfair competition is sufficient.

Although various differing opinions are reflected in the reports, areas where there may be some consensus include:

- The scope of protection of mere data should, in any case, cover the data recorded, but not the information itself.

- The protection of mere data should not hinder the independent generation of the same data by a third party, even if it results in the exact same result.

- Many reports express particular concern about access to data. In this respect, many reports point out the crucial role of competition law (anti-trust rules) to ensure access to mere data in certain anti-competitive situations.

Protection of databases

The majority of the reports considers that databases should be protected by an IPR, such as a sui generis right.

Although various differing opinions are reflected in the reports, areas where there may be some consensus include:

- A requirement to benefit from such protection, *i.e.* the existence of substantial investments (financial or of other nature) to create, *i.e.* to generate, to produce the data, and/or to collect the data.

- The original owner of the IPR could be the investor.

- The scope of the protection of databases should prohibit to third parties extraction, re-utilisation, and distribution of copies of a substantial part the contents of the database.

- Exceptions to the protection which may include Text and Data Mining (TDM), private copying, temporary copying of elements for the purpose of automated analysis by AI, fair use and exceptions in the public interest, *e.g.* scientific research, health and safety, security.

- Protection of databases should not hinder the independent generation of the same data by a third party, even if it results in the exact same result.

- The important role of competition law (anti-trust rules) to ensure access to databases in certain anti-competitive situations.

Specific regime for PSI and health data

- Some consensus among the Groups may exist on the following issues:

    - PSI should be subject to a specific regime and, as a principle, should have open access.

    - Health data should be subject to a specific regime,in order to take into consideration privacy. Access to health data in an anonymous form, should be encouraged.

Date: 24 July 2020