Law of Raw Data

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Introduction & Contents/Subjects

Books in this series are developed within the framework of the International Association for the Protection of Intellectual Property (AIPPI), a non-affiliated non-profit organization dedicated to the development and improvement of legal regimes for the protection of intellectual property at both national and international levels.

Objective & Readership

The aim is to publish innovative work appealing to practitioners, other users of IP systems and academics.

The titles in this series are listed at the back of this volume.

Law of Raw Data

Edited by

Christian Czychowski

Jan Bernd Nordemann

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About the Editors

Prof. Dr. Christian Czychowski

Partner | Attorney at Law (Germany) < www.nordemann.de > ; Certified Information Technology Lawyer; Certified Copyright and Media Lawyer. Christian Czychowski is an expert in all technology-based areas of contract law including implementation of M&A projects and R&D projects. As a pioneer in data law, he also has extensive expertise in all issues concerning the handling of non-personal data. Christian uses his expertise in R&D projects not least to contribute as a member of the respective working group at the German Federal Ministry for Economic Affairs and Energy.

Prof. Dr. Jan Bernd Nordemann, LL.M.

Partner | Attorney at Law (Germany) < www.nordemann.de > ; Certified Copyright and Media Lawyer; Certified Industrial Property Rights Lawyer. As one of Germany's leading copyright lawyers, Jan Bernd Nordemann represents national and international clients before the courts, provides expert legal opinions on copyright issues and drafts and negotiates copyright agreements. He is also an expert in trademark, trade secret, unfair competition, and IP related anti-trust law. Jan particularly works in the field of new technologies. The European Parliament and the European Commission have repeatedly consulted Jan as an expert, for example on the issue of the liability of internet service providers for IP right infringements or on intellectual property and 3D printing.

List of Contributors

Andrea Y. Alegre, attorney-at-law. She is an associate at Cruz Marcelo & Tenefrancia and holds a Bachelor of Science degree in industrial engineering. Her practice includes IP law and data privacy law, such as patent and trademark prosecution, IP litigation cases, review of IP policies and commercialization contracts, and data protection.

Andrea Andolina, LL.M. in Intellectual Property, lawyer based in Milan (IT) and senior associate at Clifford Chance, is an IP litigator specialized in new technologies, AI and data issues. He is frequently asked to give speeches and lectures in universities and LL.M programs as well as in various initiatives and seminars organized by IP think tanks in Italy. He is also author and co-author of different publications in the field of intellectual property and data law.

Kamila Blagopoluchnaya, lawyer specialising in IP law, Russian patent attorney, lecturer of intellectual property law at the Bauman Moscow State Technical University and Research and educational center under the Russian Patent Office. She is also a consultant for IT companies (especially at the information security area), start-up projects, business incubators, has a number of scientific publications in the field of intellectual property law. Member of Bureau the Russian Group of AIPPI.

Toby Bond, a solicitor with Bird & Bird in London specialising in the application of IP rights to data and AI systems. A member of AIPPI's Standing Committee on Digital Economy and the study question coordinator for AIPPI UK. Toby is also the co-author of the UK chapter of Thompson Reuters' Trade Secrets Throughout the World and a tutor in patent law for the University of Oxford's Postgraduate Diploma in Intellectual Property Law and Practice. He is one of Global Data Review's '40 under 40' data lawyers.

Gian Angelo E. Chua, attorney-at-law, is an associate at Cruz Marcelo & Tenefrancia. His practice includes all aspects of IP law and data privacy law, such as IP litigation, IP prosecution, data protection, and data security. He is also a professor at the University of the Philippines College of Law where he graduated salutatorian and cum laude.

Luca Dal Molin co-heads the data protection practice and the TechGroup of Homburger. He specializes in data protection, intellectual property and technology law, regularly advises tech companies and supports the implementation of innovative technology and digitalization strategies. In all areas of his practice, he also represents clients in litigation and regulatory proceedings. Luca Dal Molin studied law at the University of Zurich and graduated in 2008. From 2014 to 2015 he studied at Stanford Law School and obtained a Master of Laws (LL.M.) in Law, Science and Technology.

Thomas Dubuisson, LL.M. (George Washington University), Attorney at Law, is a senior associate at CMS Law Firm in Belgium. He specializes in data protection, intellectual property and related rights, and ICT. Thomas is an active member of several professional associations such as the IAPP and AIPPI. He has written numerous publications in the fields of intellectual property and data protection.

Hans Eriksson, attorney and partner at the Swedish law firm Westerberg & Partners. Hans specializes in copyright, trademarks, design, trade secrets and unfair marketing practices and advises and litigates nationally and internationally in these fields. Hans lectures and writes regularly on intellectual property topics and is a board member of AIPPI Sweden.

Ricardo Gómez-Barreda de la Gándara, LL.M with honours in Intellectual Property, Industrial Property and New Technologies from Universidad Autónoma de Madrid (UAM), associate lawyer at the Intellectual Property, Industrial Property & Digital Business department of the Spanish law firm CMS Albiñana & Suárez de Lezo. He specializes in several areas of intellectual property, unfair competition and technology, advising and representing national and international clients in high profile transactional and litigation matters. Ricardo has written numerous publications.

María González Gordon heads up the Intellectual Property, Industrial Property & Digital Business department at CMS Albiñana & Suárez de Lezo. She specialises in advising domestic and international companies on intellectual property, industrial property, copyright and technology. She has more than 20 years of experience in IP litigation, particularly in trademarks, designs, copyrights and unfair competition. Moreover, she is well versed in the drafting, negotiation and termination of a wide range of IP/IT agreements (licences, trademarks, designs, software, outsourcing, distribution agreements, transfers, assignments, etc.). During the last years she has won market reputation in advising on technology, digital transformation and data analytics in sectors such as insurtech, fintech, enertech, healthtech and proptech, among others. She is also an authorised representative before the Spanish Patent and Trademark Office (OEPM) and the European Union Intellectual Property Office (EUIPO). Maria is a member of the board of directors of the AIPPI Spanish group and also a member to the European Global Advisory Counsel at INTA.

Brian W. Gray, has practised intellectual property law for over forty years in Canada. He is a former co-chairman of the Intellectual Property and Entertainment Committee of the Intellectual Bar Association. He has published widely in the field, and has been selected by peer review publications as one of the leading and most frequently recommended intellectual property lawyers practising in Canada. Brian was formerly

head of intellectual property at two of Canada's leading law firms. His complete biography can be found at < www.briangraylaw.com > .

Bálint Halász (J.D.), is a partner at Bird & Bird's Budapest office. He advises on intellectual property, information technology and privacy and data protection matters for clients from various sectors, including electronics, pharmaceuticals, retail and IT. His particular focus is on domain names and he wrote the chapter on domain names in the ‹Commentary on Hungarian Trademark Law›.

Martin Hemmer, is the head of the IP, IT and Data Protection Practice Group of AKD in The Netherlands. He started his career as a general IP lawyer in 2003 and has focused on copyright, database, IT, and data protection law in the past ten years. He advises national and international clients with his team and regularly litigates in these fields. Martin is an active member of the AIPPI.

Bret A. Hrivnak, Partner, Hahn Loeser & Parks LLP, patent and trademark attorney, counsels clients on the protection of US and international intellectual property, including patents, trademarks, copyrights, trade secrets and domain names.

Dr. Gordon Hughes, principal lawyer at Davies Collison Cave Law. He has contributed to nine legal texts, including 'Data Protection in Australia'. He has received numerous awards, including the Lifetime Achievement Award at the Australian Law Awards in 2004 and an Order of Australia in 2017 'for significant service to the law, to professional organisations and to international affairs and legal practice in the Asia-Pacific region'.

Elisa Huusko, lawyer, licensed legal counsel in Finland, European Union trademark and design attorney specializing in copyrights and industrial property rights, disputes and agreements. She is a partner at the IP law firm Berggren Oy and she has published several intellectual property related articles in various channels including Lexology. Elisa has actively participated in preparing national reports for AIPPI in fields of copyright, trademarks and designs. She is also a member of the AIPPI Standing Committee Copyright.

Kalle Hynönen, attorney-at-law and authorised trademark attorney in Finland. He is a partner and head of TMT and Intellectual Property practices at law firm Krogerus. He advises on both contentious and non-contentious intellectual property matters with a particular focus on copyrights, and trademarks. In addition, he regularly provides counsel on data protection matters and he is a CIPP/E (Certified Information Privacy Professional/Europe). Prior to joining Krogerus, he worked as an in-house IPR counsel at a leading European media and learning solutions corporation. He is a member of the board of the Finnish AIPPI group.

Sophie Lens, admitted to the Brussels Bar in 2005, is a lawyer and counsel at the Belgian law firm ALTIUS. Sophie specialises in intellectual property, trade secrets and litigation. She is (co-)author of various publications, and frequently participates as a speaker, moderator and/or co-organiser in various conferences and seminars in her practice area. Sophie is an active member of several intellectual property associations, including AIPPI and APRAM.

Anne-Namalie L'Hôte is a legal advisor and consultant, specialized for 12 years in intellectual property, data protection and Information and communications technology law. She started her career as attorney at law in Paris. At IT Works, she advises international clients, particularly in the telecommunication sector, in Europe and Asia. She is co-author of various publications in intellectual property and teaches digital law, at the University of Nancy, in France. She is a member of several professional associations, including AIPPI and Iapp. She is also invested in pro-bono activities related to human rights and especially child rights, at both national and international level.

Yvonne Lin, Managing Partner of Formosan Brothers Attorneys-at-Law. She has been practicing for more than 25 years and possesses extensive knowledge and experience in the fields of: intellectual property, competition/antitrust, licensing, trade secrets, privacy law and data protection. She is also a committee member of the Patent Examination Quality Consultation Committee of TIPO. She has been active in many professional associations, including: IBA, INTA, AIPPI, APAA and LESCT.

Jinli (Jane) Liu, attorney at law, is a partner at the IP law firm Beijing TA Law Firm in China. She has gained particular expertise in IP and entertainment law. Having completed her law school education at Tsinghua University and the University of Southern California (USC), Jane practices entertainment law with a focus on international matters, including international co-production, and strategic IP planning.

Neel Mason, is the Managing Partner of Mason & Associates, Advocates which is a law firm that specialises in Intellectual Property law. He has extensive litigation experience over a span of more than 20 years in the field of copyright ,media and entertainment, trademark, internet laws with a focus on intermediaries. He is a member of several national and international Intellectual Property Law associations.

Gunther Meyer, attorney-at-law in Belgium. With over 20 years' of experience, he counsels clients in a variety of sectors and industries on all types of intellectual property rights, transfers of technology, and trade secrets (including knowhow protection). He is a regular speaker and author of several publications in his field of practice.

Francesca Milani, lawyer at the Milan Bar and senior associate at Mondini Bonora Ginevra law firm, specialises in intellectual property and in particular in copyright and data law. She is a lecturer in industrial law at Università Cattolica in Milan and she has been Research Paper's Adviser at the WIPO Master of Laws in Intellectual Property. She is the author and co-author of several publications on IP issues and she attends and is regularly speaker at industry events on intellectual property matters.

Giorgio Mondini, lawyer in Milan, is a name partner of the law firm Mondini Bonora Ginevra (formerly Mondini Rusconi), where he heads the IP department and has a specialist expertise and a very long experience in Intellectual Property and particularly in Copyright and Media law. He has contributed to various publications dealing with Intellectual Property and is a frequent speaker at Italian and international events in this field. He is an active member of various IP associations and is the chairman of the Italian Copyright group of AIPPI.

Rowanie A. Nakan, attorney-at-law and patent agent. She holds a Bachelor of Science degree in Applied Physics and is a partner and the head of the Patent Group at Cruz Marcelo & Tenefrancia. Her patent practice covering prosecution, litigation and commercialization spans almost fifteen (15) years. She has given lectures at the WIPO-IPOPHL Summer School and the IPOPHL-organized Mandatory Continuing Legal Education, as well as in the 2015 AIPPI World Congress.

Dr. Anke Nordemann-Schiffel, maître en droit, Partner | Attorney at Law (Germany) < www.nordemann.de > ; Certified Copyright and Media Lawyer; Certified Industrial Property Rights Lawyer. As one of Germany's leading trade mark lawyers, Anke represents national and international clients before the courts; she has particular expertise in international litigation and with private international law. Anke also provides expert legal opinions on trade mark, trade secret and unfair competition issues and drafts and negotiates trade mark agreements. She is also an expert in copyright and publish law. Anke works for clients in varuíous industries, such as the media, pharmaceutical, fashion or food. She is a member of the Federal Bar Association's standing committee on IP.

Hwan Sung Park, attorney-at-law and partner at the Korean law firm of Lee & Ko. He has represented and counselled major multi-national and domestic clients in IP area, and has also been involved in a number of landmark cases in Korea. Not only does he provide strategic advices on IP matters in perspective of clients' business, but is also well versed in cross-border IP disputes.

Carmen Paz Alvarez, partner at the Chilean law firm Muñoz Jeanneret Alvarez y Cia. She specializes in intellectual property law and holds an L.L.M. in Intellectual Property Law from the London School of Economics and Political Science. She is the author of different publications in the field of industrial property and has contributed to a number of books and articles within the field. Further, Carmen Paz is an appointed Arbitrator of NIC Chile's Domain Name Dispute Resolution Panel and country delegate for the Inter-American Association of Intellectual Property (ASIPI).

Raiza Alexis D. Radoc, licensed chemical engineer and attorney-at-law. She is a senior associate at Cruz Marcelo & Tenefrancia. Her IP practice includes patent and trademark prosecution, enforcement cases, IP valuation, and Freedom-to-Operate searches. She likewise handles IP litigation cases and reviews IP commercialization contracts.

Luisa Siesmayer, Associate | Attorney at Law (Germany) < www.nordemann.de > ; Luisa's practice focuses on copyright law, trade mark law, licensing contract law and IT law, including providing advice in complex legal disputes. She has many years of experience providing legal advice and guidance to IT service providers and supporting clients in the implementation of IT projects. In addition, her legal practice covers data law and all issues concerning the handling of non-personal data. Luisa advises local, national and international companies and associations, while her clients range from start-ups to globally operating corporations.

Dr. Tsuyoshi Sueyoshi, doctor in chemistry, attorney-at-law in Japan and partner at Yuasa and Hara. He specializes in intellectual property as well as technology-related disputes and transactions. He has advised domestic and foreign clients in many patent

litigations and invalidation actions as well as appeals thereof, including a Supreme Court case and Grand Panel cases in the IP High Court. He has published a number of publications about intellectual properties, especially patent matters.

Péter Sziládi (J.D.), is a junior associate in the data protection and employment team at Bird & Bird's Budapest office. He has been advising clients since 2019, and specialises in IP, IT law, employment, and data protection. He has taken part in research projects and has written for various publications in the fields of data protection and intellectual property.

Meng-Chin Tsai, Senior Associate of Formosan Brothers Attorneys-at-Law. She is an LL.M. of University of Pennsylvania, and M.B.L. of Freie Universität Berlin. She has been practicing privacy laws and compliance of data protection since the Personal Data Protection Act of Taiwan was first enforced in 2012. She is experienced in the field of: corporate laws, domestic and foreign investment, antitrust, and data protection.

Sarah van den Brande, an expert in intellectual property with close to 15 years' experience, specializes in copyright, trademarks, designs and trade secrets. As a Counsel at Liedekerke Wolters Waelbroeck Kirkpatrick, she advises clients in a broad range of sectors such as the software and technological industry, the media, the artist and fashion scene and consumer goods. An experienced litigator in complex cases praised by clients as 'a master negotiator', she also provides advice on strategically protecting intellectual property and know-how. Sarah has contributed to several publications on intellectual property and is a member of several professional associations including the International Association of Industrial Property, the Benelux Trademark and Industrial Design Association and the Belgian Copyright Association.

Catherine Verneret, Partner, is specialized in trademark, patent design and copyright law. She also practices personal data protection law. Catherine has developed a solid experience in the distribution, telecommunication and perfume sectors. Her practice is split between transactional and contentious matters. She has also been a lecturer for more than 20 years in the Professional Master Degree of Industrial Property at Paris II-Assas (European competition law) and since 2019 in the University Diploma on the GDPR at Paris Dauphine. She writes regularly in specialized Intellectual Property journals and, in particular, has written a leaflet of the Trademark 'Jurisclasseur' on trademark infringement proceedings. She is also member of AIPPI and chairs the commission on copyright applied to the digital world. In addition, Catherine participates in the drafting of reports within the framework of this association (in particular: 'GDPR and real estate', 'Exceptions to copyright protection and authorized uses of protected works in the high-tech and digital sectors', 'Limitations to the protection conferred by trademarks', 'Acceptance (tolerance) of infringement of Intellectual Property rights', 'Border measures and other means of intervention by customs against counterfeiters').

Julia Wagner, Legal counsel, Staatsministerin für Kultur und Medien | Attorney at Law (Germany). Julia is a lawyer specialising in intellectual property and media law. She has been practising copyright, trademark, patent and media law since 2018 and holds an LL.M. in media and entertainment law from the University of California, Los Angeles School of Law.

Dr. Kirsten Wesiak-Schmidt is an associate in Homburger's IP/IT and Data Protection teams and specializes in Swiss and European data protection and privacy, information technology and intellectual property law. She represents clients in litigation and regulatory proceedings in all areas of her practice. Kirsten Wesiak-Schmidt completed her legal studies at the University of Basel (MLaw, Dr. iur.) and was admitted to the Bar in 2017. She holds a Master's degree (LL.M.) from Boston University (2014) and is a Certified Information Privacy Professional (CIPP/E).

Courtney White, lawyer specialising in IP law in Australia at Davies Collison Cave Law. Her research on copyright ownership for works created by artificial intelligence has been published in the Australian Intellectual Property Journal. She has also contributed to a number of articles in relation to IP considerations for new technologies and Australian Federal Court judgments concerning patent, copyright and trade mark infringement.

Bram Woltering is an attorney at law at AKD Benelux Lawyer. He works in the IP & Technology practice group since 2011. Bram obtained a master's degree in Private Law as well as a master's degree in Law and Technology (both at Tilburg University).

Piotr Zawadzki, attorney-at-law, patent&trademark attorney, head of the IP&DP team at KRK Kieszkowska Rutkowska Kolasiński, specializing in trademark and patent law, copyrights, e-commerce, trade secrets, as well as personal and non-personal data regulations (including Big Data), author or co-author of over thirty publications on issues related to intellectual property, and a lecturer and speaker at trainings, courses and industry conferences.

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Foreword

Luiz Henrique do Amaral, President of AIPPI

Since its foundation in 1897, the International Association for the Protection of Intellectual Property, known as AIPPI, is the world's leading non-profit association dedicated to the development and improvement of laws for the protection of intellectual property. It is a politically neutral, non-profit organization based in Switzerland, with over 8,000 members worldwide from 131 countries across all continents.

AIPPI members include lawyers, attorneys and agents working across all fields of intellectual property in corporate and private practice throughout the world, as well as academics, judges, government officials and other persons interested in intellectual property.

AIPPI promotes the protection of all types of intellectual property through comprehensive analysis of existing and proposed intellectual property laws and policies, and formulates proposals to harmonize intellectual property laws and their application.

AIPPI values tremendously its cooperation and alliance with Wolters Kluwer to deliver the sixth volume of the 'AIPPI Law Series' – *Law of Raw Data*.

The protection of raw data has become a crucial subject for the intellectual property community.

The opportunities opened up by the internet and all new social media mechanisms have made access to research results easier and facilitate the interchange of information and data, but they also facilitate violation of confidentiality and improper access to data. When using raw research data, it is important to know the legal status of the material. It is natural that legal systems should afford proper protection to researchers and entities that developed the data to ensure that its re-use is authorized within the appropriate limits.

This book is the result of careful and dedicated analysis of the legal instruments and remedies that provide such protection and studies the limits to and consequences of the re-use of raw data.

AIPPI would like to cordially thank the volume editors of this book for this invaluable work and their dedication to accomplishing such an enormous task. Furthermore, AIPPI also expressly thanks the chapter contributors, all of whom

are active AIPPI members, for their dedication and diligence, without which this impressive global law review would not have been possible.

Wolters Kluwer has again partnered with AIPPI for the launch of this book, and AIPPI is grateful for our partnership and acknowledges this ongoing support and fruitful enterprise.

Luiz Henrique do Amaral
President of AIPPI
June 2021

The Netherlands

M.H.L. Hemmer & B.P. Woltering

1. LEGAL DEFINITION OF UNSTRUCTURED DATA

Despite the ever growing importance of data for the economy, there have been no specific national legislative developments with regard to protection of non-personal unstructured data since the introduction of the *sui generis* database right pursuant to the European Directive 96/9/EC of 11 March 1996 on the legal protection of databases ('Database Directive'). In the Netherlands, there is no legal definition of unstructured data, nor does data have a particular legal status.

2. PROPRIETARY RIGHTS IN UNSTRUCTURED DATA

a) Property Rights

i) Civil Law – Ownership Right

Under Dutch law ownership is the most comprehensive right that a person can have in a tangible object that can be controlled by humans (in Dutch: '*zaak*'), as codified in Article 5:1 juncto 3:2 Dutch Civil Code (DCC).

In light of the requirement that it must concern a 'tangible' object, it is considered not possible to qualify data (or unstructured data) as a '*zaak*'. As a consequence one can also not have an ownership right in unstructured data. The impossibility to have ownership rights in data is the common opinion among Dutch scholars.[1] Although a data carrier, on which (unstructured) data could be stored, is tangible and can be subject to ownership, the data on the actual data carrier cannot be owned.[2]

1. E. TjongTjin Tai, 'Data in het vermogensrecht', 149(7085) *Weekblad voor privaatrecht, notariaat en registratie* (2015) pp. 993-998.
2. J.L. Naves, 'Data in de rechtspraktijk', 2 *Computerrecht* (2018).

ii) Criminal Law

Dutch criminal law provides some interesting perspectives when it comes to the legal qualification of intangible objects.

It is interesting that in Dutch criminal law certain acts such as theft, initially could only relate to tangible objects, in Dutch criminal law defined as 'goods'. However, in case law an evolution has taken place over the years on the basis of which the qualification of a 'good' under criminal law was broadened.

The Dutch Supreme Court[3] ruled (in 1921) that electricity qualified as a good, although not tangible, reasoning that it had a certain existence/presence and was indirectly visible (given that it could be sensed by a human by means of a shock), represented a certain economic value, was controllable by humans, and could be transferred and accumulated. In a later case the Dutch Supreme Court[4] (in 1982) had to rule on whether bank money (scriptural money) could qualify as a 'good'. The Dutch Supreme Court deemed that this was the case, although bank money – unlike electricity – was not (indirectly) visible for humans. Of key importance for this interpretation was the purpose that the criminal law served and that the bank money represented (economic) value and bank money could only be controlled by one person (unicity). This requirement of unicity caused the Dutch Supreme Court[5] (in 1996) to reason that copying computer files could not qualify as theft of a 'good' since a theft of a unique good would imply that one who has actual control over it necessarily loses it if another gains control over it which is not the case when a computer file is copied.

iii) Criminal Law 'Theft' of Digital In-Game (Virtual) Items

Particularly noteworthy is a judgment from the Dutch Supreme Court in a criminal matter in 2012. The Dutch Supreme Court (ECLI:NL:HR:2012:BQ9251) held that under certain conditions digital items can be stolen. The case concerned the game Runescape, which allowed players to acquire, trade and lose in-game (virtual) items. In the physical world, two players had physically assaulted a third player and forced him to login to Runescape after which they proceeded to rob him of his in-game possessions (a mask and an amulet). After this assault these in-game items were no longer in the digital inventory of the victim.

The Supreme Court ruled that given the circumstances of the case, the mask and amulet were to be classified as a 'good' and not simply as 'data'. A key consideration was that given the rules of the game Runescape, the mask and amulet had unicity: they could only be in the possession of one account. The Supreme Court held that the Court of Appeal was right to consider that 'the victim had within the confines of the game the 'factual and exclusive possession' over the amulet and mask and has through the acts of the perpetrators lost possession of these objects'.

To date, in civil law there have been no similar developments in case law as to ownership on intangible 'things'.

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3. Dutch Supreme Court 23 May 1921, NJ 1921, 564 (*Elektriciteitsarrest*).
4. Dutch Supreme Court 11 May 1982, NJ 1982, 583.
5. Dutch Supreme Court 3 December 1996, NJ 1997, 574.

b) IP Rights

i) Copyright

Unstructured data as such will not be protected by an IP right such as copyright.

According to the Dutch Copyright Act (DCA) a copyright is the exclusive right of the maker of a literary, scientific or artistic work to make the work public and to reproduce it (Article 1 DCA). All literary, scientific or artistic works are eligible for copyright protection.

A non-exhaustive list of categories of 'works' that accordingly could be protected is provided in Article 10 DCA, which inter alia includes; books, brochures, newspapers, periodicals and all other writings, dramatic and dramatico-musical works, drawings, paintings, works of architecture and sculpture, other graphic works, photographic works, film works, works of applied art, industrial designs and models, and computer programs and preparatory materials.

Moreover, it is stipulated that generally any creation in the literary, scientific or artistic domain, regardless of the manner or form in which it has been expressed can qualify a work. The non-exhaustive list of works is based on Article 2(1) Berne Convention.

1) Originality Requirement

As also follows from the *Infopaq* case of the ECJ (ECJ 16 July 2009, C-5/08), originality is a requirement for copyright protection. First of all, a work should have an own original character in the sense that it is not derived from another work. Secondly, it should bear the personal stamp of the author (Dutch Supreme Court, 4 January 1991, NJ 1991/606 *Van Dale v Romme*).

The requirement that the work should bear a 'personal stamp of the author' in principle will prevent unstructured data being eligible for copyright protection given that this implies that a work must be created by humans.

2) Creation by Human

While the Copyright Act does not state that a work needs to be created by humans, such a requirement follows from case law. The requirement of a 'personal stamp of the author' implies that the work should be the result of creative human activity, which involves creative choices as a result of which it can be considered a product of human intellect. Accordingly, banal or trivial aspects that did not require creative activity are not eligible for copyright protection (Dutch Supreme Court, 30 May 2008, NJ 2008/556, *Endstra-tapes*).[6]

At least some degree of human creativity expressed in a specific work is required. A certain style in which various works can be created cannot be protected by copyright, nor will technical or objective results be protected. However, on the

6. *See also* Answer Dutch Group, AIPPI 2019 – 2019 Study Question – Copyright in artificially generated works.

other hand it is not required that the maker aimed at producing a coherent creation that was consciously made in a specific way (Dutch Supreme Court, 30 May 2008, NJ 2008/556, *Endstra-tapes* and Dutch Supreme Court, 28 June 1946, NJ 1946/712, *Van Gelder v Van Rijn*). The originality as such should not follow from the intention of the maker but from the work itself.[7]

The creation of (unstructured) data normally will not involve human activity or generally no involvement of creative choice. For instance, a supermarket collecting data on the use of a customer card will not involve any (creative) human activity. Developing a record of its customers could involve human labour, however such a creation will lack the involvement of creative choices. Hence, (unstructured) data will normally not be eligible for copyright protection.[8]

ii) Database Rights

A database can be protected by both a *sui generis* database right and copyright. The Database Directive is implemented into the Dutch Database Act, which contains the *sui generis* right, and an amendment to the Dutch Copyright Act. Both the Copyright Act and the Database Act offer protection to databases.

1) Protection of Databases under the Dutch Copyright Act

Article 10(3) of the Copyright Act stipulates that compilations can be protected by copyright:

> 'Collections of works, data or other independent materials arranged in a systematic or methodical way and individually accessible by electronic or other means, shall be protected as separate works, without prejudice to other rights in the collection and without prejudice to copyright or other rights in the works, data or other materials incorporated in the collection.'

The criterion for protection is that of Article 3(1) of the Database Directive. A database is protected by copyright if the database 'by reason of the selection or arrangement of its contents, constitutes the author's own intellectual creation.' The criterion has been interpreted by the European Court of Justice (ECJ) in its 2012 judgment in *Football Dataco v Yahoo*. According to the ECJ a database within the meaning of Article 1(2) of the Database Directive is protected by copyright provided that 'the selection or arrangement of the data which it contains amounts to an original expression of the creative freedom of its author'.[9] As a consequence:

- 'the intellectual effort and skill of creating that data are not relevant in order to assess the eligibility of that database for protection by that right;
- it is irrelevant, for that purpose, whether or not the selection or arrangement of that data includes the addition of important significance to that data; and

7. *See also* Answer Dutch Group, AIPPI 2019 – 2019 Study Question – Copyright in artificially generated works.
8. J.L. Naves, 'Data in de rechtspraktijk', 2 *Computerrecht* (2018).
9. ECJ 1 March 2012, Case C-604/10 (*Football Dataco v Yahoo*), paragraph 45.

– the significant labour and skill required for setting up that database cannot as such justify such a protection if they do not express any originality in the selection or arrangement of the data which that database contains.'[10]

In general, the level of originality required by Dutch courts is low.

It is clear that unstructured data in itself cannot be copyright protected as a database because such protection does not relate to the actual data itself but only that the selection or arrangement of the data which it contains amounts to an original expression of the creative freedom of its author.

2) Owner of Databases under the Dutch Copyright Act

Pursuant to Article 1 of the Copyright Act, the author of an original compilation is the owner of the exclusive rights thereto. In case of a compilation of various copyrighted works, the compiler is explicitly considered the author of the compilation as a whole (Article 5(1) DCA). Where labour which is carried out in the service of an employer consists in the making of certain works, the employer is considered the author (Article 7 DCA). A public institution, an association, a foundation or a company that communicates a work to public as its own, without naming any natural person, is considered to be the author, unless it is proven that the communication was unlawful (Article 8 DCA).

Under the Copyright Act, copyright passes by succession and is transferable by assignment in whole or in part (Article 2(1) DCA). In addition, the owner may grant a licence for all or part of the copyright (Article 2(2) DCA).

3) Protection of Databases under the Dutch Copyright Act

Third parties are prohibited from communicating a copyright protected compilation to the public, including the making available of the compilation to the public, from distributing copies of the compilation to the public (Article 12 DCA and Articles 3 and 4 of the InfoSoc Directive (2001/29)), and from reproducing a compilation (Article 13 DCA and Article 2 of the InfoSoc Directive), subject to the limitations laid down by law.

Again it is reiterated that the (unstructured) (individual) data itself will not be protected but rather the selection or arrangement of such data.

4) Protection of Databases under the Dutch Database Act

Pursuant to Article 1(1)(a) of the Database Act a collection of data must meet the following requirements in order to be protected by database law:

i) It is a collection of works, data or other independent elements;
ii) The works, data or elements are systematically or methodically organized;
iii) The works, data or elements are accessible separately by electronic means or otherwise; and

10. *Ibid.*, paragraph 46.

iv) The obtaining, verification or the presentation of the contents of the database testifies, qualitatively or quantitatively, to a substantial investment.

Re i) A collection of works, data or other independent elements

The requirement that a collection consists of 'independent elements' means that it should concern elements that can be separated from each other without affecting their independent informative content. The independent informative value of an element extracted from a collection should be assessed in light of the value that the information has for any third party interested in that element, and not in the light of the value that this information has for a typical user of the collection. A stand-alone element may also exist in a combination of data.[11]

Re ii) Systematically or methodically ordered

Requirement (ii) aims to exclude unorganized information from the definition.

This requirement in itself seems to bar unstructured data from database protection. However, if elements are not organized, the use of other means, such as a search engine, may turn a collection of unorganized/unstructured data into a protected database.

Re iii) Separately accessible

Requirement (iii) is fulfilled when the different parts of the database can be retrieved individually.[12] The (digital) database must be searchable in its entirety. The ECJ emphasizes that there must be a 'means' to retrieve each of the elements making up the database.[13]

Re iv) Substantial investment

Discussions on the applicability of database law to a data collection usually focus on the requirement under (iv) of a substantial investment. It is this investment that forms the basis for database protection. The investment may consist of money, but also, for example, of time and effort put into the database. The substantial investment must relate to the obtaining, verification or the presentation of the contents of the database.

The concept of 'investment in obtaining the content' means that the investment must relate to the means used to obtain existing elements and to collect them in a database, and not to the means used to create those elements.[14] In the British *Horseracing* case, for example, the question was whether an organizer of horseraces was entitled to database protection on race schedules. The Court ruled that, inter alia, the investments relating to the determination of the horses that were allowed to participate could not be taken into account in the assessment of the substantial

11. CJEU 29 October 2015, Case C-490/14 (*Freistaat Bayern v Verlag Esterbauer*), paragraphs 17, 20, 22, 23 and 27, referred to by the Dutch Supreme Court in its judgment of 8 June 2018, ECLI:NL:HR:2018:856 (*Pearson v Bär*).
12. Explanatory Memorandum to the Database Act, 1998/99, 26108, No. 3, p. 8.
13. ECJ 9 November 2004, Case C-444/02 (*Fixtures v OPAP*).
14. ECJ 9 November 2004, Case C-203/02 (*British Horseracing Board v William Hill*) and ECJ 9 November 2004, Case C-444/02 (*Fixtures Marketing v OPAP*) paragraph 40

investment, since those investments related to the creation of the elements making up the content of the database.

The term 'investment in verifying the contents' of the database refers to the investment made in verifying the accuracy and completeness of the contents of the database, both at the time it is set up and during its operation, in order to ensure the reliability of the information contained in the database.[15]

The term 'investment in the presentation of the contents' of the database refers to investments made with a view to the systematic or methodical arrangement of the elements and the organization of their individual accessibility, but also to investments in, for example, the user interface and the layout of the database, i.e. its visible exterior.[16]

5) Owner of Databases under the Dutch Database Act

The rights laid down in Article 2 of the Database Act are granted to the 'producer' of the database. The database 'maker' does not own any rights. Pursuant to Article 1(1)(b) of the Database Act, the producer is the person/organization bearing the risk for the investment in the database. The Dutch legislator has explained that this means that the factual manufacturer of a database is not the owner, but the customer ordering the database, if this customer is the one bearing the risk.[17] It is argued amongst Dutch legal scholars that this definition lays too much emphasis on the financial investment criterion.[18]

6) Protection of Databases under the Dutch Database Act

Extraction is the temporary or permanent transfer of the content of all or part of a database to another carrier (Article 1(1)(c) of the Database Act). It is not necessary that there is actual technical 'copying'. Also, for example, copying a database by hand may be considered an extraction.[19]

Re-utilization is making available to the public the content of all or part of a database, in any form, by means of distribution of copies, rental, on-line transmission or transmission in another manner (Article 1(1)(d) of the Database Act). The offering or provision of a dedicated search engine that can search a database may also fall within the scope of re-utilization under certain circumstances.[20]

The extraction or re-utilization of a 'substantial part' can be understood both qualitatively and quantitatively. This shows that it is not so much the quantity of data

15. ECJ 9 November 2004, Case C-203/02, *The British Horseracing Board v William Hill*, paragraph 34.
16. CJEU 9 November 2004, Case C-444/02, (*Fixtures Marketing v OPAP*), paragraph 34 and District Court of The Hague 22 February 2009, Media Forum 2009/10 (*Autotrack v Gaspedaal*).
17. Explanatory Memorandum to the Database Act, 1998/99, 26108, No. 3, p. 2.
18. *See* J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht* (Kluwer, Deventer 2019) p. 809.
19. ECJ 9 October 2008, Case C-304/07 (*Directmedia v University of Freiburg*).
20. ECJ 19 December 2013, Case C-202/12 (*Autotrack v Gas pedal*).

that is relevant, but its commercial value. According to the explanatory memorandum to the Database Act, a 'substantial part' is deemed to have been extracted if such a part is extracted that the user thereby benefits substantially from the commercial value of the database or causes substantial damage to the database producer.[21]

'Quantitatively' refers to the amount of data extracted or re-utilized in relation to the total size of the database. 'Qualitatively' refers to the size of the investment made in the obtaining, verification or presentation of the specific part of the database which is extracted or re-utilized, even if that part is negligible in quantitative terms.[22] From a human, technical or financial point of view, even such a part may represent a substantial investment. It should be noted that the intrinsic economic value of the individual elements of the database is irrelevant. For example, a current share price may have a high economic value, that does not mean that it is a qualitatively substantial part of the database.[23]

The acquisition of a qualitatively or quantitatively non-substantial part may also infringe a database right. This is the case if non-substantial parts of the contents of the database are repeatedly and systematically extracted or re-utilized. Such repeated and systematic extraction or re-utilization must be contrary to the normal exploitation of the database or cause unjustified damage to the legitimate interests of the producer of the database. The decisive factor here is whether the database is, as it were, reconstructed (to a substantial extent).[24]

The producer of the database is then in danger of losing exploitation proceeds. This deprives the producer of income which can cover the costs of his/her investment in the database.[25] Repeated and systematic extraction or re-utilization of non-substantial parts which are then immediately erased are not covered by this criterion.[26] In that case, there is no cumulative effect and there is no reconstruction of all or a substantial part of the contents of the database.

Note that the producer of a database cannot prohibit, on the basis of his *sui generis* right, the manufacture of a similar database by a third party who does not use data from the producer's database, since in that case no extraction or re-utilization would be involved. The producer may have cause of action based on copyright.

In addition, Article 5a of the Database Act provides that the person who bypasses effective technical provisions, and who knows or can reasonably be expected to know this, is acting unlawfully. Furthermore, Article 5b Database Act prohibits the removal or modification of electronic information concerning the management of rights and the distribution, entry, etc. of databases that have been removed or modified in an unauthorized manner. This provision applies only to electronic information.

21. Explanatory Memorandum II 1997-1998, 26108, No. 3, p. 10.
22. ECJ 9 November 2004, Case C-203/02 (*BHB v William Hill*) paragraphs 71 and 72.
23. J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Copyright, Neighbouring Rights and Database Right* (Kluwer, Deventer, 2019) p. 817.
24. ECJ 9 November 2004, Case C-203/02 (*BHB v William Hill*) paragraph 87.
25. ECJ 19 December 2013, Case C 202/12 (*Autotrack v Gaspedaal*) paragraph 41.
26. ECJ 9 November 2004, Case C-203/02 (*BHB v William Hill*) paragraphs 90 to 94.

iii) Copyright – Historical Protection for Non-Original Writings

In light of the originality requirement in copyright law it is noteworthy that the Copyright Act traditionally protected so called non-original writings, beings texts, compilations of data and other information products expressed in alpha-numerical form, that did not meet the test of originality. This regime was a remnant of an eighteenth-century printer's right.[27]

Typical examples of non-original writings include telephone directories, address books and TV guides. These non-original writings did not enjoy the full scope of copyright protection. Basically it protected non-original writings against literal reprinting and reproductions which showed minor changes compared to the reproduced writing.

The protection for non-original writings existed in addition to database rights. Databases that qualify for *sui generis* protection would not be (cumulatively) protected as non-original writings. As a consequence, producers of databases that did not meet the 'substantial investment' criterion of the *sui generis* right enjoyed the much longer copyright term of protection, which applies to non-original writings.

The survival of the Dutch quasi-copyright in non-original writings basically functioned as a 'safety net' for databases that did not meet the 'substantial investment' test. Databases were protected under a variety of legal regimes: 'copyright for original databases, database right for databases that reflect substantial investment, and quasi-copyright for non-original alphanumerical databases that lack substantial investment.'[28]

Based on ECJ *Football Dataco v Yahoo*,[29] the Dutch Supreme Court[30] ruled in 2014 that the protection of non-original compilations in the Copyright Act was contrary to the maximum harmonization in the Database Directive. Protection of non-original writings was subsequently removed from the Copyright Act on 1 January 2015.

c) Patent Rights

Unstructured data will also not be protected by patent right.

Under the Dutch Patent Act 1995 (DPA), patents are granted for inventions. Patent law has a completely different object of protection compared to for instance copyright. It does not protect the form/appearance of information, but its technical and commercial application (the invention).

It is noted that patent law stimulates access to information. Patent protection will only be granted for a limited period of time (20 years under the DPA), after which the invention falls within the public domain and everybody is allowed to use

27. P. Bernt Hugenholtz, 'Chronicle of The Netherlands, Dutch copyright law, 1995-2000', *RIDA* (January 2001).
28. *Ibid*.
29. ECJ 1 March 2012, Case C-604/10 (*Football Dataco v Yahoo*).
30. Dutch Supreme Court 17 January 2014, ECLI:NL:HR2014:88 (*Ryanair v PR Aviation*).

the technology. In addition, control over information is in practice lost by making knowledge publicly available through publication of the patent.[31]

i) Requirements

An invention is required to be new, involve an inventive step, and to be susceptible of industrial application (Article 2 DPA).

An invention is only novel if it does not form part of the state of the art available to the public by means of a written or oral description, by use, or in any other way, before the date of filing. Novelty is missing where a single item of the state of the art contains the elements of a claim in the application and enable the person skilled in the art to practise the technical teaching which is the subject of the document, taking into account also the general knowledge at that time in the field to be expected of the person skilled in the art.

To be patentable, an invention must involve an inventive step. An invention is considered to involve an inventive step if it is not obvious to the person skilled in the art taking account the state of the Article The 'problem-solution' approach is used to determine whether an inventive step is present in a claimed invention. The invention must provide a technical solution to a technical problem.

Lastly, the invention must relate to a technically demonstrable functioning product or production process. It must be possible to actually manufacture the new invention.

In light of these requirement for patent rights, 'unstructured data' as such will not qualify as an 'invention' that can be protected under a patent right. In theory, 'unstructured data' – in a fashion of research data – could be used as basis for an invention, showing new insights leading to for example novelty, but not be the invention itself.

ii) Derivative Products

An interesting angle in relation to unstructured data and patent rights relates to a patented process. A patent can confer on its owner the exclusive right over a patented product or a patented process. As to a patented process the owner has the exclusive right, inter alia, to 'use the patented process in or for his business or to use, put on the market, or resell, hire out or deliver the product obtained directly as a result of the use of the patented process or otherwise deal in it in or for his business, or to offer, import or stock it for any of those purposes' (Article 53(2) DPA). Hence, exclusive rights are granted to the products that are obtained through a patented process (derivative product protection).

Suppose a patented process would produce 'unstructured data', would said data be protected as a derivative?

31. J. Drexl, 'Data Access and Control in the Era of Connected Devices', Study on Behalf of the European Consumer Organisation BEUC, p. 31 http://www.beuc.eu/publications/beuc-x-2018-121_data_access_and_control_in_the_area_of_connected_devices.pdf.

This seems unlikely, since the concept of a 'product' in the DPA is treated as being a tangible object. Any such protection in any case would only become relevant where the patented process (resulting in the derivative) is used without the consent of the patent holder.

3. CONTROL OVER DATA BY CONTRACT INCLUDING BOUNDARIES FOR CONTRACTUAL RULES

Dutch law adheres to the doctrine of freedom of contract. Freedom of contract means that parties may, within the bounds of the law, freely enter, or choose not to enter, into contracts.

The party factually in control of (unstructured) data has the possibility to impose specific obligations upon its contractual partner in order to control access to, and use and dissemination of (unstructured) data. This can be done in general and/or by means of general terms and conditions. Typically, one could stipulate the conditions for access and use (limited to a specific purpose and/or limited in time) and stipulate rules as to whether or not the (unstructured) data may be shared with others and/or should be kept confidential.

4. OTHER FORMS OF LEGAL PROTECTION CONTROLLING ACCESS TO, AND USE AND DISSEMINATION OF UNSTRUCTURED DATA

a) Trade Secrets

Unstructured data could be protected under the EU Trade Secrets Directive which is implemented in the Netherlands under the Trade Secrets Act (*Wet bescherming bedrijfgeheimen*).

The Trade Secrets Directive and Trade Secrets Act lay down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets.

i) Requirements

The definition of a trade secret is flexible. A trade secret is defined as 'information' that complies with the following cumulative requirements (Article 1 Trade Secrets Act):

a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
b) it has commercial value because it is secret;
c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;

One of the aims of the Trade Secrets Directive is to establish a homogenous definition of a trade secret without restricting the subject matter to be protected against misappropriation.

According to the considerations, the definition was therefore constructed so as to cover know-how, business information and technological information 'where there is both a legitimate interest in keeping them confidential and a legitimate expectation that such confidentiality will be preserved'.[32] In addition, such know-how or information should have an actual or potential commercial value. The consideration as to when know-how or information has a 'commercial value' is linked to the interests of the person lawfully controlling it and whether his/her interest could be harmed in case of misappropriation. Specific examples of know-how or information having a commercial value include 'where its unlawful acquisition, use or disclosure is likely to harm the interests of the person lawfully controlling it, in that it undermines that person's scientific and technical potential, business or financial interests, strategic positions or ability to compete'.[33]

The Trade Secrets Directive considers that the definition of trade secret excludes 'trivial information and the experience and skills gained by employees in the normal course of their employment, and also excludes information which is generally known among, or is readily accessible to, persons within the circles that normally deal with the kind of information in question.'[34]

The definition of a trade secret is deemed flexible enough to also cover data whose commercial value only arises from the possibility to discover valuable information through the means of big data analytics.[35]

ii) No Ownership

It is emphasized that the person entitled to the trade secret is 'the natural or legal person controlling the trade secret'. The holder of the trade secret does not 'own' the underlying information. This is just one of the differences between the protection as a trade secret compared to protection as an intellectual property right. The Trade Secrets Directive also describes its protection as a 'complement' or an 'alternative' to intellectual property rights.[36] The Trade Secrets Directive and Trade Secrets Act are considered less intrusive instruments for protecting data than the *sui generis* database right or any potential data ownership right.[37]

The Trade Secrets Directive explicitly stipulates 'the provisions of the Directive should not create any exclusive right to know-how or information protected as trade secrets'.[38] That a trade secret is not 'owned' by its holder is illustrated in various articles of the Trade Secrets Act, inter alia:

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32. Trade Secrets Directive, consideration (14).
33. Trade Secrets Directive, consideration (14).
34. Trade Secrets Directive, consideration (14).
35. J. Drexl, 'Data Access and Control in the Era of Connected Devices', Study on Behalf of the European Consumer Organisation BEUC, pp. 11 and 96 http://www.beuc.eu/publications/beuc-x-2018-121_data_access_and_control_in_the_area_of_connected_devices.pdf.
36. Trade Secrets Directive, consideration (2).
37. . J. Drexl, 'Data Access and Control in the Era of Connected Devices', Study on Behalf of the European Consumer Organisation BEUC, p. 91 http://www.beuc.eu/publications/beuc-x-2018-121_data_access_and_control_in_the_area_of_connected_devices.pdf.
38. Trade Secrets Directive, consideration (16).

Article 3 Trade Secrets Act

Acquisition of a trade secret shall not be considered unlawful when the trade secret is obtained by any of the following means:

a) independent discovery or creation;
b) observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret; …

If another person makes a parallel and independent discovery, the holder of the trade secret cannot prevent this person from using this information.[39] Reverse engineering is allowed for the purpose of acquiring the trade secret. According to the Trade Secrets Directive the purpose of such a provision is to serve the interest of innovation and to foster competition.[40]

The Trade Secrets Directive, as well as the Trade Secrets Act, refrain from stipulating any 'rights' of the holder of the trade secret. Rather, they distinguish lawful and unlawful conduct in form of acquisition, use and disclosure of a trade secret. In case of unlawful conduct, various remedies are available to the person entitled to the trade secret.[41]

iii) Means of Protection

The acquisition of a trade secret without the consent of the trade secret holder shall be considered unlawful, whenever carried out by:

a) unauthorized access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced;
b) any other conduct which, under the circumstances, is considered contrary to honest commercial practices. The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder, by a person who is found to meet any of the following conditions:
    i) having acquired the trade secret unlawfully;
    ii) being in breach of a confidentiality agreement or any other duty not to disclose the trade secret;
    iii) being in breach of a contractual or any other duty to limit the use of the trade secret.

The acquisition, use or disclosure of a trade secret shall also be considered unlawful whenever a person, at the time of the acquisition, use or disclosure, knew or ought,

39. Trade Secrets Directive, consideration (16).
40. Trade Secrets Directive, consideration (16).
41. J. Drexl, 'Data Access and Control in the Era of Connected Devices', Study on Behalf of the European Consumer Organisation BEUC, p. 96 http://www.beuc.eu/publications/beuc-x-2018-121_data_access_and_control_in_the_area_of_connected_devices.pdf.

under the circumstances, to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully.

The production, offering or placing on the market of infringing goods, or the importation, export or storage of infringing goods for those purposes, shall also be considered an unlawful use of a trade secret where the person carrying out such activities knew, or ought, under the circumstances, to have known that the trade secret was used unlawfully.

b) Tort Law

If no contractual relationship exists, it is possible, depending on the specific circumstances of the case, that a claim can be made based on tort law to prohibit the use of the data that was unlawfully acquired. In most cases it will be at least required that the party using the information is aware that the information was disseminated in breach of a contract. It is conceivable that a wrongful act is based on the violation of a provision of the Criminal Code. Under the Dutch Criminal Code for example the 'intentional and unlawful intrusion in one's automated work or in part thereof' (hacking) is an offence.[42]

5. GENERAL LEGAL RULES ON ACCESS TO DATA

The Dutch competition laws do not have specific rules on access to data or unstructured data. More generally, abusing a dominant position is prohibited under Dutch competition law and European Competition Law. Whether a refusal to grant a licence for unstructured data will be regarded as abuse under Dutch competition law will depend on the circumstances of the case. Taking advantage of a dominant position is not abuse per se. In addition, enforcing an intellectual property right will be regarded as abuse only in exceptional circumstances.

In the literature relating to access to data under competition law on an EU level, further issues are identified as effectively applying the competition law in relation to access to data – which mutatis mutandis also will pose an issue under Dutch competition law.

An abuse can only be argued if the data holder holds a dominant position. As to the data economy, market definition and the assessment of dominance can be particularly difficult.[43] This will only prove more difficult in relation to unstructured data. A second hurdle is that the refusal to deal (license) has to constitute an abuse. Following the ECJ *Bronner*[44] case, such an abuse requires that what is refused to be supplied is 'indispensable', thereby preventing another from competing in a

42. J.L. Naves, 'Data in de rechtspraktijk', 2 *Computerrecht* (2018).
43. J. Drexl, 'Data Access and Control in the Era of Connected Devices', Study on Behalf of the European Consumer Organisation BEUC, p. 37 http://www.beuc.eu/publications/beuc-x-2018-121_data_access_and_control_in_the_area_of_connected_devices.pdf.
44. ECJ 26 November 1998, Case C-7/97 *Bronner* [1998] ECR I-7791 = ECLI:EU:C:1998:569.

downstream market.[45] According to this strict test, an input will not be considered indispensable if there are no 'technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult' to duplicate the resource. The individual data as information will often be publicly accessible and can simultaneously be collected by others. In principle there is little from preventing a competitor (of the holder of the unstructured data) to collect and store information in a digital format, which makes the information retrievable and treatable.[46]

6. SPECIFIC RULES FOR SPECIFIC DATA

a) Public Sector Information

The Netherlands has implemented a Law on the Re-use of Public Sector Information (*Wet hergebruik overheidsinformatie*) pursuant to Directive 2013/37/EU amending Directive 2003/98 on the re-use of public sector information.

b) Access to Public Sector Information

Based on the Law on the Re-use of Public Sector Information anybody can file a request for the re-use of specified information. It is not required to have a specific interest in the information. Some information is excluded such as information with regard to which third parties own an IP right and information from educational and research institutions.

c) Health Data

Under Dutch law, there is no tailored legislation or case law addressing the question of whether, and if so to what extent, health data is protected by IP rights.

For this purpose we consider 'health data' to be data generated and/or collected in connection with medical treatment or medical research (such as clinical trials).

In the context of medicinal products, Directive 2004/27/EC and Regulation 726/2004 provides rules regarding the dossiers (including clinical trial data) filed by a party with the marketing authorization authority for the purpose of obtaining a marketing authorization. Under these rules the dossier is not accessible for third parties during an eight-year period (the data exclusivity period). Thereafter the holder of the dossier is in principle obliged to release the dossier to companies wishing to develop generic versions of the medicinal product.

In the particular context of clinical trials, additional regulations apply, primarily pursuant to EU law, i.e. Regulation 726/2004/EC, Directive 2003/63/EC and the EMA Guideline on the content, management and archiving of the clinical trial master file

45. J. Drexl, 'Data Access and Control in the Era of Connected Devices', Study on Behalf of the European Consumer Organisation BEUC, p. 37 http://www.beuc.eu/publications/beuc-x-2018-121_data_access_and_control_in_the_area_of_connected_devices.pdf.
46. *Ibid*.

(paper and/or electronic).[47] The EMA Guideline contains wording that suggests that there is such thing as an owner of clinical trial data.[48] The concept of such ownership is, however, not further addressed, except that the EMA Guideline seems to assume that the owner of the clinical trial data would be the sponsor of the clinical trial.

d) Access to Health Data

Under Dutch law there is no tailored legislation or case law addressing the question of whether, and if so to what extent, health data can be accessed (other than in the context of personal data).

In the particular context of clinical trials, the EMA, in accordance with EU law (as referred to above), has set out a policy on the publication of clinical data.[49] The policy follows the line of an EU Regulation on clinical trials which has been adopted but yet has to enter into force.[50] The main principle laid down by the EMA is that clinical trials data are made available to the public through a publicly accessible database, subject to (i) personal data, and (ii) commercially confidential information. In two recent rulings,[51] the Court of Justice (EU) has confirmed that based on Regulation 1049/2001/EC (concerning the public access to documents) and the EMA's own policy, clinical trial reports cannot as such be considered commercially confidential information.

47. https://www.ema.europa.eu/en/documents/scientific-guideline/guideline-content-management-archiving-clinical-trial-master-file-paper/electronic_en.pdf.
48. *See* inter alia Directive 2003/63/EC, 5.2 under c; Guideline, p. 15 and chapter 6.4.
49. https://www.ema.europa.eu/en/documents/other/european-medicines-agency-policy-publication-clinical-data-medicinal-products-human-use_en.pdf.
50. Regulation (EU) No. 536/2014 of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC.
51. C-175/18 (*PTC Therapeutics International Ltd v EMA*) and C-178/18 (*MSD Animal Health v EMA*).