Workshop on legal aspects of geographic data and spatial data infrastructures
Friday 19 March 2010 – ICRI, K.U.Leuven

Report

The Spatialist project and the Interdisciplinary Centre for Law and ICT (ICRI) organized a workshop on legal aspects of geographic data and spatial data infrastructures at the Department of Law of the Katholieke Universiteit Leuven on the 19th of March 2010.

This workshop intended to bring together the members of the GI&SDI community whose work or activities are aimed to progress the research, policy and practice with regard to the legal aspects of geographic data and SDI, either as a lawyer or as a researcher or professional in other fields closely related with law or policy. As the objective was to stimulate discussion on the different topics of the agenda, the number of participants was deliberately kept small, in order to facilitate interaction and debate. The workshop was attended by 24 people.

The objective of the workshop was to get an overview of existing research and practice, to consolidate possible synergies and to develop a common research agenda for the future. The workshop was divided into four blocks, each with a particular theme. The four themes that were addressed are 1) privacy and security, 2) intellectual property rights, 3) public-private sector relationships and competition, and 4) the future of legal SDI-research and practice.

This report tries to give an overview of the most important elements that came up in the presentations and discussions throughout the day. For more information on the day, please contact Katleen Janssen (katleen.janssen@law.kuleuven.be).

Agenda

9:00 – 9:30 **Coffee**

9:30 – 9:45 **Welcome and planning of the day**

9:45 – 11:15 **Privacy and security**

- **Jos Dumortier (K.U.Leuven, TimeLex, Belgium) – Privacy and Personal Data Processing: the Perspective of the EU Regulatory Frameworks**
- **Kevin Pomfret (LeClairRyan, Centre for Spatial Law and Policy, US) – Three pillars of privacy in the United States**
- **Discussion**

11:15 – 11:30 **Coffee break**

11:30 – 12:45 **Intellectual property rights**

- **Chris Luton (British Geological Survey, UK) – BGS - Managing the UK Government's Drive to make Public Spatial Data Public**
- **Harlan Onsrud (University of Maine, GSDI, US) – Open Access Licenses & Lessons for a Creating a Global Marketplace in Geographic Data**
- **Discussion**

12:45 – 13:45 **Lunch**

13:45 – 15:15 **Competition and public-private sector relationship**

- **Karen Donders (Vrije Universiteit Brussel, Belgium) - Defining the public task or so-called 'public service remit' of public broadcasters**
- **Michael Nicholson (Intelligent Addressing, PSI Alliance, UK) – Who's data is it anyway?**
- **Discussion**

15:15 – 15:30 **Coffee**

15:30 – 16:45 **The future of research and practice on legal aspects of geographic data and SDI**

- **Andrej Osterman (European Commission) – Legal aspects of PSI - the Commission's perspective**
- **Discussion**

16:45 – 17:00 **Wrap-up and close of the meeting**

First session – Privacy and security

The first session started with a presentation of prof. dr. Jos Dumortier of Katholieke Universiteit Leuven (Belgium), who gave an overview of the legal framework in the European Union with regard to the protection of privacy and personal data. This legal framework consists mainly of three elements: Article 8 of the European Convention on Human Rights, which guarantees the individual's right to privacy; the 1995 European directive on the processing of personal data, addressing the situations in which and the conditions for processing any data relating to an identified or identifiable person; and the 2002 directive on privacy in electronic communications that deals with traffic and location data. Prof. Dumortier questioned the broad scope and unclear character of the concepts and rules of data protection and warned that different national interpretations and applications make it even more difficult to understand the true scope of privacy protection. Full compliance with the rules of data protection is difficult and prof. Dumortier wondered if privacy and privacy protection have a future under their current form.

The second speaker, Kevin Pomfret of Centre for spatial law and policy (US), addressed the three pillars of the protection of privacy in the United States. First, the 1974 Privacy act deals with the collection of personal data by governments in the course of their activities. However, this is no longer considered sufficient and more guidelines on the use of location information by public agencies are called for. Second, with regard to the collection of personal data by businesses, there are several sector-specific regulations, but the collection of location data is not regulated. However, currently a number of actions are being undertaken and a legislative initiative may be underway. Third, the question arises to what extent government can use location data or tracking devices for law enforcement purposes, and in how far they can turn to private businesses for obtaining such data. Mr. Pomfret stated that the main question comes down to "what are we trying to protect?". However, he also found that with regard to spatial data, there are more questions than answers. What is privacy from a location stand-point? A lot of questions still remain and a good deal of work still needs to be done, as the legal and policy community is falling further and further behind on the technology.

The discussion following the two presentations dealt with a number of topics:

- Differences between the approaches to privacy protection: In the United States and the European Union, different legal paradigms lie at the background of the regulation on privacy protection in different parts of the world. In addition, there are many cultural differences between the attitudes towards privacy, even within the European Union. For instance, the availability of address data across the European Union is very different. Considering these big differences and the global character of data sharing, the suggestion was made by a participant to think more in terms of an ethics-driven design rather than regulation.
- The concepts of the 1995 European directive on the processing of personal data: some of these concepts are problematic. For instance, the question was raised if the consent of the data subject is a good basis to allow the processing of personal data, as many people don't know what they are consenting to. This could be dangerous for the data subjects, but also in a more general way lead to a threat for the democratic society. For instance, children cannot legally consent, but in practice there is no solution to stop this. And how do we reconcile consent as a form to give up your right of privacy with the general principle that people cannot give up their fundamental rights? Another concept that was addressed was the purpose for which data were collected. The rules that personal data can only be used for the purpose that they were collected for, can make it difficult for public bodies to provide other services, even though they are still acting for the public good or the data may even be already available elsewhere. Finally, the

concept of personal data itself is not always easy to apply to spatial data. For instance, the Norwegian Cadastral Law has tried to solve this by specifically listing which elements of cadastral information are not considered as personal data.

- Location data: the dynamic character of privacy with regard to location data deserves special attention. The question was raised whether special instruments are needed to address location data. In addition, there was concern about the particular character of tracking data, because even though this is very sensitive, it easily gets lost in the broader discussion on privacy. The spatial data community has a responsibility to share its knowledge in this field.

Second session – Intellectual Property Rights

The first speaker, Chris Luton, gave an overview of the activities of the British Geological Survey (BGS), its data management and its policy towards access, use and re-use of geological spatial data. In the United Kingdom, there is a growing drive within government to make public sector data more widely available for access and re-use. BGS is also moving towards making more data freely available and to simplify its agreements. However, it faces a number of challenges with regard to controlling the commercial use of datasets, the duty of care aspects of free data, and the concern that charging is still needed to prevent the erosion of the perceived quality and value of the data.

Prof. Harlan Onsrud of University of Maine (US) gave the second presentation, on open access licenses and the creation of a global marketplace for geographic data. He reflected on the changes in the effects of intellectual property rights in the digital society and on the Internet. Technology has shifted the balance towards a much broader protection of intellectual property rights. In addition, across the globe legislation is tightening in order to protect original material from illegal copying or distribution. For a user of spatial data, it is nearly impossible to know if the data he is using is protected and if he is violating any intellectual property rights. Therefore, one tends to avoid using such data. To change this, prof. Onsrud suggested creating an electronic commons that anyone can openly use in an easy manner. An example of this is creative commons. This allows the rightholder of the data to reserve some of his rights while still making the data available to any user. The creative commons licenses are valid across the globe, easy to understand and conclude, and allow a balance between the interests of the rightholder and the user.

The following discussion addressed several matters:

- The relationship between quality of information and charging: is it really the case that information that is charged for is of superior quality to information that is available free of charge? This debate is usually demonstrated by comparing the data quality in the United Kingdom and the United States. However, it was stated by a participant that such a comparison is difficult to make, considering the differences in size, population, political and organizational structure of both countries. Another participant added that the situation in the United States is also different, because better quality data from the public sector is not really needed, as the private sector is already providing such data. Next, the need for quality was also mentioned: the private sector just wants raw data, not necessarily good data?
- Financing issues: the issue of intellectual property rights and quality is linked to the question of how public bodies can finance their data. Discussion rose whether public bodies should think in terms of cost recovery or not. One participant mentioned that cost recovery only provides short term benefits, while open access to data allows more long-term benefits and triggers innovation. Public bodies should also be there to serve the

public, and not to make money. Another participant argued that the public sector will in many cases need good quality data for their own purposes, so they should not charge for making that data available to others. It was also argued that some core data sets should be selected, that can be considered as fundamental building blocks and that should be freely available to everyone.

- Services: The question was raised if public bodies should be providing services based on their data, and charge for these services. A participant felt that public bodies should create such services for the public, because the data as such are not useful for the public. Raw data are too difficult for the public to interpret. There were also some doubts on whether the services would be cheaper if they were provided by the private sector. However, this touches the heart of the debate: how far up the value chain should the public bodies go? Some participants even felt that the public sector should not create such services. However, the problem remains that the public sector itself has conflicted ideas on its role.
- Database rights: the question was raised how to reconcile the database rights of the public bodies with the continuously growing requirement for interoperability of data, e.g. in the INSPIRE directive. How should we deal with this paradox? And should the state even benefit from database rights? There are indications, for instance in Dutch case law, that this may be under discussion.
- Licensing conditions: it was argued that the private sector is not only concerned about the charges for the data, but also about the differences in licensing conditions. With easy access and harmonized licensing conditions, the private sector might even be willing to pay more.
- Legal uncertainty: how the laws on data sharing should be interpreted, will remain unclear until there is sufficient case law. Therefore, the argument was raised that we should start sharing in order to develop the law and move forward. It was also argued that this should happen not only by the policy-makers without any practical experience, but that different stakeholders should be involved.

Third session - Competition and public-private sector relationship

The third session started with a presentation by Karen Donders of the Vrije Universiteit Brussel (Belgium) on the discussion in the public broadcasting sector on the public service remit of public broadcasters. Ms Donders showed that this sector has struggled with comparable problems as the geographic data sector with regard to the scope of the activities of the public sector. She explained that the public remit for broadcasters has been defined very broadly, or based on different qualitative or quantitative objectives. Although the European Commission requires the Member States to have a definition of the public service remit, this definition remains a competence of the Member States. The Member States have taken a different approach to this definition, and Ms Donders highlighted the solution proposed in the United Kingdom, i.e. the public value test. Under this process, a new media concept proposed by the BBC is evaluated on its public value and on its market impact before it can be offered. In each stage of the process, public consultations are held. The system has advantages and drawbacks, but could be useful for the sector of geographic data.

Next, the presentation of Michael Nicholson (Intelligent Addressing, PSI Alliance, UK) went back to the relationship between the public and the private sector in the geographic data sector. Mr Nicholson explained the different advantages and concerns on the liberalisation of PSI for access and re-use. He stated that the debate is currently very confused and that we should consider the priorities in the debate. While the economic value of re-use is clear, its social value is also very important. However, the legal framework is complex and insufficient to realise this

value, and the national regulators do not have the power or the incentives to intervene. Given the developments of the information society, a solution to the conflicts of interest is urgent.

After the presentations, the following issues were discussed:

- Defining the public task: the question was raised whether politicians would be inclined to define the public task, as defining the needs of the public sector and the public interest is not so easy. However, sometimes they may be forced by the circumstances to define a public task in a particular case. Yet, it remains a work in progress; a definition of the public task will not be readily available in the short term. In addition, a definition of the public task will keep being redefined based on the changes in what the public wants.
- Characteristics of spatial data: in how far is the issue of the relationship between the public and private sector bigger with regard to spatial data than in other sectors? What makes spatial data unique? In any case, the problem with spatial data is that so many governments and public bodies are involved, which all have their own definition of their public task.
- Level playing field: the main issue for the private sector is that a fair and level playing field is guaranteed. If government has a monopoly on spatial data, it should act according to the rules of a monopolist. If it charges for its services on the market, this activity should be separated from the raw data production.
- Cooperation between the public and the private sector: a participant warned that the discussion should not be polarised by just looking at the public-private dichotomy. A constructive debate should be encouraged and the win-win situations for both sector should be emphasised.
- Characteristics of the private sector: it should be kept in mind that not only the big companies benefit from the availability of public sector data, but also small companies, which can generate a lot of innovation. The private sector is not homogenous and this should be taken into account when developing a data policy towards them.

Fourth session – The future of research and practice on legal aspects of geographic data and SDI

The final session started with an overview by Andrej Osterman from the European Commission on recent developments with regard to PSI in the Member States, including governmental and non-governmental initiatives. Mr. Osterman stated that the momentum is growing for the re-use of PSI and that the newly developed policies for PSI ensure easier access to data for re-use, but also greater accountability and transparency of the public bodies. He gave an overview of the state of play in the Member States, indicating that legislation is in place, but that there are only very limited success stories. He asked the participants why this is the case, and which factors have influenced these success stories? He believed the key to success to lie in political leadership, and in the collection of evidence for the political decision-makers on the impact of opening up PSI. Both the Member States and the re-users have to make an effort on this. As for the role of the European Commission in the debate, Mr. Osterman indicated that a further review of the directive will take place in 2012 and that the Commission is currently undertaking an initiative to develop economic indicators.

To close the day, the participants were asked to each identify three legal issues that they believe to be a priority for the future research and practice with regard to geographic data and spatial data infrastructures. From the different suggestions, it appeared that IPR, licensing and use conditions are a main group of issues that still require attention, particularly with regard to the elements, conditions and harmonization of license agreements. More attention to the scope and content of the concept of privacy, particularly with regard to location and tracking data, was

also demanded. Next, the relationship between the public and the private sector remains a point of interest, as does the coherence of the PSI directive with other legal initiatives, such as INSPIRE, the database directive, etc. While the topic was not discussed during the day, the issue of liability was also mentioned as a future concern. Finally, many of the contributions of the participants made it clear that the legal issues on geographic data should not be seen separately from other aspects, but that they should be seen in the light of institutional changes, impact assessment of legislation, business models, involvement of the stakeholders, etc. A global market for spatial data should be developed that takes into account not only legal issues, but also many other aspects.

Closing remarks

The meeting was closed by Katleen Janssen, who thanked the speakers and participants for their contributions. She felt that the workshop had proven to be a successful format for the start of an in depth discussion on some of the main legal barriers that still remain in the geographic data sector and in the SDI community. However, it also became clear that some of the issues that were discussed during the day have already been on the agenda for several years, and yet they are still seen as problematic. Hence, it is becoming crucial to move the debate forward. In order to obtain results, it became clear during the day that the different identified issues and problems cannot be addressed in isolation, but have to be seen in relation to other legal domains, and have to be embedded in a comprehensive analysis, including economic, political, social, organizational and technical aspects, supported by empirical evidence. In this process, the spatial law community has an important role to play in creating awareness of the legal challenges and pitfalls in the dissemination of geographic data and the development of spatial data infrastructures.

Ms Janssen finished with two announcements. First, a book on legal aspects of geographic data will be published with contributions from the participants, and with some conclusions drawn from the workshop and recommendations for future research and practice. Second, the next edition of the Spatialist workshop on legal aspects of geographic data will take place on **18 March 2011**.