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Database Protection: Legal Minefield or Valuable Investment?

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“Database” Defined

A collection of information, factual in nature, but comprising subject matter that may or may not be copyrightable.

OR

Circular 65: Copyright Registration for Automated Databases defines an automated database as, "a body of facts, data, or other information assembled into an organized format suitable for use in a computer and comprising one or more files."

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Examples of “Databases”

Financial data

Sports data

Airline data

News data

Real estate data

THE ROLE OF COPYRIGHT LAW

Feist Publications, Inc. v. Rural Tel. Service Co.,
499 U.S. 340 (1991)

- “Fact/Expression dichotomy” = principle of copyright law that “limits severely the scope of protection in fact-based works.”
- Copyright protection is limited to expression, not to facts or ideas.
- But, original factual compilations are copyrightable, and there is a very low threshold for originality/creativity.

Techniques for Protecting Databases

A. Copyright - selection, arrangement, layout

C. Contract

- Shrinkwrap, clickwrap, browsewrap agreements
- License agreements
- Encryption and password devices

D. Misappropriation

Copyright Cases

No copyright protection for telephone book directory.
Feist, 499 U.S. at 362-363.

Yes copyright protection for Red Book listing of used car values compiled via editor projections, judgment, experience *CCC Info Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 63 (2d. Cir. 1994).

No copyright protection for real estate value data collected by municipality. *Assessment Techs. Of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640 (7th Cir. 2003).

No copyright protection for settlement price on futures contracts. *New York Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, 497 F.3d 109, 113 (2d. Cir. 2007), cert. den., 128 S. Ct. 1669 (2008).

No copyright, No problem – Contracts That Worked

- A shrinkwrap agreement was enforceable to prohibit copying for a CD-ROM telephone directory product. *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).
- Terms of Use for a website were enforceable (a browsewrap agreement) for access to a website database. *Register.com v. Verio Inc.*, 126 F.Supp.2d 238, *aff'd*, 356 F.3d 393 (2d. Cir. 2004)(a WHOIS database); *Tickmaster L.L.C. v. RMG Techs. Inc.*, 507 F.Supp. 2d 1096 (C.D. Cal. 2007) (ticketmaster.com website).
- An agreement that prohibited copying uncopyrightable legal materials was enforceable against competitor. *Mathew Bender & Co. v. Jurisline.com LLC*, 91 F. Supp.2d 677 (S.D.N.Y. 2000).
- A shrinkwrap agreement was enforceable to prevent reverse engineering of patented software. *Bowers v. Baystate Tech., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003).

Contracts That Did Not Work

- A browsewrap agreement was not enforceable because the user could not see the agreement and was not invited to look at terms, i.e., no notice or assent. *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d. Cir. 2002).
- Terms of use agreement was not enforceable, but use of trespass to chattel theory was used to enjoin web crawlers capture and search for content on eBay. *eBay Inc. v. Bidders Edge, Inc.*, 100 F.Supp.2d 1058 (N.D. Cal. 2000).
- Software license agreement governing municipal ordinance codes not enforceable to prevent copying because the codes were not copyrightable. *Veeck v. Southern Bldg. Code Cong. Int'l*, 293 F.3d 791 (5th Cir.), cert. den., 539 U.S. 969 (2003).

Key Clauses in Database License

Terms of Use

Competitors vs. customer

Duration

Penalties

Warranties

Other Measures to Protect Databases

- Encryption and passwords – the DMCA prevents circumvention of such measures, or disabling them
- Trade secret protection
- The placement of deliberate errors and omissions in a program is known as the placement of "seeds" into a database, or "salting" a database.
- *But see - Financial Information v. Moody's Investors Service*, 808 F.2d 204 (2d. Cir. 1986): despite proof of copying by repetition of false information planted in a bond database, no infringement was found because the database required no originality or creativity. The database was therefore not protected by copyright.

Comparing the US to the EU

The EU Directive – copyright and *sui generis* right
Reconciling US practice with the EU

“HOT NEWS”

International News Service v. Associated Press,
248 U.S. 215 (1918)

- The Court recognized a limited property right in factual news content under a **misappropriation** theory - an exception to copyright law.
- Essentially, **protection for the work of the news gatherer.**

“HOT NEWS” Elements

National Basketball Ass’n v. Motorola, Inc., 105 F.3d 841 (2nd Cir. 1997)

Elements for a Hot News claim:

1. P generates information at a cost;
2. Info is time sensitive;
3. D’s use of info constitutes free-riding on P’s efforts;
4. D is in direct competition with a product or service being offered by the parties;
5. Ability of others to free-ride on P’s efforts would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

Search Engine Dilemma

Google, Yahoo!, etc. crawl all news of financial sites and re-publish headlines/factual snippets

- Is this directly competing with newspapers?
- Is this free riding?
- Are Google and Yahoo! diminishing incentive to produce news so that news gathers are substantially threatened?
- AP proposes tagging news articles (tracking author's name, publisher).
 - Once you track, is a fee/tax far behind?

EXPAND COPYRIGHT LAW?

“Expanding copyright law to **bar online access to copyrighted materials** without the copyright holder's consent, or to **bar linking to or paraphrasing copyrighted materials** without the copyright holder's consent, might be necessary to keep free riding on content financed by online newspapers from so impairing the incentive to create costly news-gathering operations that news services like Reuters and the Associated Press would become the only professional, nongovernmental sources of news and opinion.”
Judge Richard Posner, blog post June 23, 2009

([http://www.becker-posner-
blog.com/archives/2009/06/the_future_of_n.html](http://www.becker-posner-blog.com/archives/2009/06/the_future_of_n.html))

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SITUATION NO. 1

Joanne and Harold compete in the market for Wall Street and trader-oriented, real-time financial market information. Both run subscriber based audio and web based feeds.

Harold alleges that Joanne systematically accesses and copies its news feed. Joanne admits that it takes short factual phrases and snippets from Harold's publication, and re-publishes that information over Joanne's feed. Joanne is able to re-publish within 10-15 seconds after Harold's publication.

SITUATION NO. 2

Marc and The Kingdom. The Kingdom publishes a monthly business index survey called The Business Barometer. Index is created by The Kingdom's survey of all businesses in the metropolitan area. The Kingdom is the creator of this content (unlike The Bug, which is a news-gathering organization).

The Business Barometer is published monthly, on the last business day of each month, to The Kingdom's paying subscribers three (3) minutes before it is widely released to the public ("embargo period").

Marc accesses and publishes parts of The Business Barometer over its feed during the embargo period.

SITUATION NO. 3

Fantasy league operator, who previously licensed names and statistics from professional league, wants to use this information without license.

Is this information copyrightable? Can the use be proscribed by contract? What about the right of publicity for the players?

The Recent Cases

- *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball*, 505 F.3d 818 (8th Cir. 2007), *cert. den.*, 128 S. Ct. 2872 (2008).
- *CBS Interactive Inc. v. National Football League Players Assoc., Inc.*, 2009 WL 1151982 (D. Minn., April 2009).

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