LEGAL PROTECTION OF DATABASES

I. Introduction: Why is protection of Databases important?

Creation of databases can involve a large amount of time, money and resources and therefore represents substantial investment (and in some types of business will represent the major asset).

• For these reasons businesses don’t want their employees moving to their competitors with a copy of their database on a disk in their pocket;
• Nor do they want anyone accessing their database and helping themselves to the information which is relevant to their own needs without receiving some sort of payment for this useful facility.

In addition, to the extent that a database contains information about individuals, statutory obligations in respect of security and content arise under the Data Protection Acts 1984 and 1998.

II. The Law

A. The history

In the UK and Eire copyright protection extended to databases. The law required only a minimal level of creativity for a work to acquire copyright protection. On the other hand, the other (civil law) jurisdictions in Europe all required a much higher level of creativity. There had to be some working of the mind, or intellectual activity shown before copyright protection was available. This meant that in civil law jurisdictions databases as lists of information were not protected.

With the computer age, databases are used to a larger and larger extent. The investment in them can be substantial. The EU therefore decided to legislate specifically to protect databases. This was effected by the EU Directive 96/9 on the Legal Protection of Databases. This legislation required each member state to legislate so that databases received their own specific protection to be implemented by 1 January 1998.

B. The current legal position in the UK

The UK protection for databases was, prior to the new legislation, afforded via copyright. A “table or compilation” received copyright protection in the same way as a book or a work of art. There was no specific protection for databases.

In the Copyright and Rights in Database Regulations 1997 (“the Regulations”) the UK legislated so that databases now have their own specific protection.

This protection is in addition to the copyright protection of a “table or compilation” as a copyright work which is not within the statutory definition of database.

The protection afforded specifically to databases comes in two forms: the first is copyright protection of a database and the second is a “database right”. This is a new intellectual property right.

Currently there are three different rights which may be available for “databases” (in the broad sense of the word). These rights run in parallel. However, not all of them are available for all databases.
C. How the legislation works

The three different regimes are: the original UK right of copyright as a literary work, copyright in databases, as that word is defined in the Regulations and database rights.

1. Three régimes

"Copyright as a literary work" is the original right which the UK gave to databases. This has been amended to exclude "databases" as defined in the Regulations as a "collection of independent works, data or other materials which are arranged in a systematic or methodical way and individually accessible by electronic or other means." If a database does not fit within that definition, it will still have copyright protection as a "table or compilation". The level of originality is low: it must just not be copied from another database.

"Copyright in Databases" gives “databases”, as defined, their own specific type of copyright. Because this is copyright, the characteristics of copyright in databases are extremely similar to copyright as a literary work (for example, duration and ownership). However, to obtain the copyright protection the "database" must achieve a greater level of originality in line with other European countries. It requires intellectual creation. This is generally thought to mean that a computer generated database (where a program is run to arrange unsystematic data into a systematic and methodical way) will probably not have the requisite intellectual creation.

A "database" as defined in the Regulations but which does not have the requisite intellectual creation will nevertheless attract the "Database Right" if there has been substantial investment in obtaining, verifying or presenting the contents of the database. If a "database" (as defined) has intellectual creation it can be protected both as a database in which copyright subsists and by database rights.

2. Who owns the database?

There is a distinction made between the author (or in the case of the database rights, the maker) and the owner. In the case of both the copyrights, the author is the person who quite simply "creates" the database. In the case of database rights the person who takes the initiative in the obtaining, verifying or presenting the contents of the database and assumes the risk (presumably the economic risk) in investing in that obtaining verification or presentation is the maker. Where several people are involved in this exercise they will be joint-authors or joint-makers. The author/maker is first owner unless this is an employee acting in the course of his employment when their employer is the first owner.

It should be noted that a consultant who creates a database under contract will, under the copyright rules, own the copyright in the database unless their consultancy contract states otherwise (which the person appointing the consultant will want to ensure). In the case of database rights, the position is less clear. If the consultant is being paid for the production of the database, both the initiative and the economic risk would appear to be borne by the person appointing the consultant. However, if the consultant is given a problem and if he suggests that the easiest way to deal with it is to create a database and he goes on to create one (or worse just goes ahead and creates a database and offers it as a solution to the problem raised). The issue of ownership of database rights should therefore be specifically dealt with in the consultant’s contract in case the initiative could be said to have been taken by the consultant.
3. **Infringement**

There are various ways in which rights in a database can be “infringed”. The one important feature of the two new protections for databases is that they recognise the particularities of databases. As with other copyright works making copies is an infringement, but as mentioned above, the owner of a database would also want to prevent someone accessing the database and extracting the pieces of information which are interesting to them. This is specifically dealt with in both of the new protections for databases.

“Copyright in Databases” has an extended definition of “adapting” a database compared with copyright as a literary work. “Adapting” with respect to a database (as defined in the Regulations) in which copyright subsists is defined as “adapting by making an arrangement or altered version or a translation”.

“Rights in Databases” has an even more extensive definition of what constitutes infringement. Consistent with what a database owner would want to protect, rights in databases are infringed by the “extraction or re-utilisation of a substantial part of the contents” without consent. In addition, where there is “repeated or systematic extraction …. of insubstantial parts”, this may amount to extraction or re-utilisation of a substantial part of the contents of the database.

4. **Exceptions to Infringing Acts**

Under the rules on copyright with regard to literary works, there is a “fair dealing” exception which allows copies to be made for research or private study. However where “research” is carried out on a database (as defined), both under the rules for copyright in databases and database rights, this exception to the rules on infringement is limited. Research is permitted only if it is not for a commercial purpose. This recognises that any research on a database when used in a commercial context is likely to be of financial benefit.

5. **Remedies**

*All rights:* If infringement is proved the copyright owner has a right to request an injunction, preventing further infringement, and either damages or an account of profits (i.e. a payment to the owner representing the net proceeds from using the infringing database). It is also possible to obtain an order for delivery up of infringing copies.

6. **Conclusion on the law**

As you can see from the table (page 9), the most advantageous protection is given by copyright as the term of protection is substantially longer. If the database is one which is covered by the definition of a “database”, it would be wise to try to ensure that there is some measure of “intellectual creation” to bring the database within the copyright protection.

Database rights can be particularly beneficial as they qualify for extended protection by virtue of the new enlarged “infringement” definition. This arises under an interesting provision which states that a “substantial change which results in a database being considered to be a substantial new investment qualifies for its own term of protection”. **Continual renewal** which brings about “substantial change” will start the fifteen year term again. This could continue indefinitely, ultimately giving protection which is even longer than the duration of copyright.
III. Other Protection

A. Legal Protection

The need for clauses in consultant’s contracts has already been mentioned above. There should also be clauses in employee’s contracts forbidding the extraction or copying of databases (although such a clause should be more general than this) other than for the purposes of their employment. Aside from this, employees do have a fiduciary duty of good faith as well as a duty of confidentiality towards their employer. In each case this may give rise to rights against the employee for infringement of rights in databases and for breach of their employment contract and/or the trust relationship. It is preferable to be able to point to an express term which has been breached than to rely merely on implied terms.

B. Practical Protection

There are other practical protections available to prevent or at least alert a database owner to unauthorised access and/or copying.

A date should automatically be printed on any printed copies of a database. This may enable you to show that the database has been “substantially changed” over time, giving rise to a new term of protection for database rights. This also prevents a third party stating that you copied their database if you have dated copies pre-dating the creation of their database.

A simple way of obtaining an indicator that a database has been accessed and/or copied without permission is to “seed” the database by inserting some bogus addresses in the list. If you receive a letter from a competitor which is addressed wrongly, reflecting the error in the database, you will know that there has very probably been an infringement.

Finally there are various technical mechanisms for hindering access and/or copying. Some of these are:

- online signal alerting someone to the access effected via a modem;
- an indelible water mark which is produced each time the database is printed;
- coding the text so that cut, copy and paste functions are not readily available; and
- passworded access.

Technical IT staff will usually be able to assist with the establishment of these practical protections.

Alison Dennis, Associate in Corporate, Commercial and Finance Department
<table>
<thead>
<tr>
<th>LEGISLATION</th>
<th>COPYRIGHT AS A LITERARY WORK</th>
<th>COPYRIGHT IN DATABASES</th>
<th>RIGHTS IN DATABASES</th>
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<tr>
<td>INFRINGING ACTS</td>
<td>Without consent of the owner: • Copying: reproduction in any material form; • issuing copies to the public; • rental or lending of copies to the public; • adapting</td>
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<td>Without the consent of the owner: extraction or re-utilisation of all or a substantial part of the contents of the database. Repeated or systematic extraction or re-utilisation of insubstantial parts may amount to extraction or re-utilisation of a substantial part of the contents.</td>
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<td>EXCEPTIONS TO INFRINGING ACTS</td>
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<tr>
<td>TERM</td>
<td>70 years from the end of the calendar year in which the author dies.</td>
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<td>15 years from end of calendar year in which the making of the database was completed. If made available to the public: 15 years from end of calendar year in which first made available to the public. Substantial change which results in database being considered to be a substantial new investment qualifies for own term of protection.</td>
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<tr>
<td>QUALIFICATION</td>
<td>Either: a) Author at the time of making or, if published, at time of publishing a British Citizen/ domiciled or resident in UK/ UK company; or b) Database is first published in the UK.</td>
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<td>One or more “makers” at time of making database: • an individual a national of an EEA state or habitually resident in the EEA; • a body incorporated under the law of an EEA state; • a partnership or unincorporated</td>
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<td>body which was formed under the law of an EEA state with central administration or principal place of business within the EEA or a registered office within the EEA and body's operations linked on an ongoing basis with the economy of an EEA state.</td>
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