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Technomed v. Bluecrest: UK High Court indicates broad scope of the database right

Technomed Limited and another v. Bluecrest Health Screening Limited, UK High Court, [2017] EWHC 2142 (Ch), 24 August 2017

This case saw the UK High Court indicate a broad scope for the *sui generis* database right (the 'Database Right') found within the EU Database Directive 96/9/EC, which rightsholders have found difficult to assert against a third party in light of numerous Court of Justice of the European Union ('CJEU') decisions in this area. The High Court found that a PDF of a document can be considered a database and thus the information contained can be protected by the Database Right, in a decision that may lead to more rightsholders utilising the Database Right against third parties who make unauthorised use of their databases.

In the 20 years since the Database Directive was enacted there have been relatively few cases asserting the *sui generis* Database Right against a third party. One reason for this might be that early CJEU decisions indicated it had a narrower scope than might have been anticipated - leaving rightsholders with an uphill struggle to try to assert and enforce it. However, a recent case, *Technomed Limited and another v. Bluecrest Health Screening Limited and another*, indicates that the works covered by the *sui generis* Database

Right might be broader than first thought. Will this lead to an increased willingness by rightsholders to rely on the right?

What is the Database Right?

The *sui generis* Database Right was created by the Database Directive 96/9/EC to encourage and protect the investment in databases which would not qualify for copyright protection under the national laws of many Member States. A database is defined in the Database Directive (Article 1(2)) as 'a collection of independent works,

data or other materials which are arranged in a systematic or methodical way and are individually accessible by electronic or other means.'

Databases may be protected by both copyright and the Database Right. A database will be protected by copyright if 'by reason of the selection or arrangement of the contents of the database, the database constitutes the author's own intellectual creation.' This imposes a requirement of original intellectual input, in order for copyright

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to subsist. However, the Database Right protects a database where there has been qualitatively and/or quantitatively a substantial investment in either the ‘obtaining, verification of presentation of the contents’ of the database. Thus, pure cost and effort can be enough for the database to be protected by this right.

The evolution of the CJEU’s interpretation of the Database Right: Earlier CJEU cases indicate a narrow scope for the Database Right

Unfortunately, the economic value and impact of the new Right has been limited by the interpretations given by the CJEU.

William Hill

The *William Hill* case was a reference from the English courts concerning William Hill’s use of the British Horseracing Board’s (‘BHB’) information for the purpose of organising betting on horseracing. BHB is the governing authority for the horseracing industry in the UK. It manages a database which contains a large amount of information supplied by horse owners, trainers, horserace organisers and others involved in the racing industry. That information includes race and track details, the distance over which the race is to be run, the names of horses and jockeys entering a race, their trainers and their handicap ratings. The database costs around £4 million per year to maintain.

The CJEU held that the Database Right did not subsist in the BHB’s database. It explained that for database rights to subsist there must have been “investment in the obtaining of the contents.” This referred to the resources used to seek out existing independent materials and collect them in the database. Any investment in the creation of the data which made up the database was not protected. Further, the CJEU noted that the purpose of the protection by the Database Right is to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database.

Similarly, in relation to the verification of the contents, any verification carried out in the creation of the data itself would not be covered. The CJEU noted that the expression

“investment in [...] the verification [...] of the contents” of a database refers to the resources used, with a view to ensuring the reliability of the information contained in that database and to monitor the accuracy of the materials collected when the database was created and during its operation.

Football Fixtures

The CJEU was subsequently asked to decide whether football fixture lists attract Database Right protection. In three joined cases on this issue, the CJEU again referred to the fact that the Database Right did not cover the resources used for the creation of materials which made up the contents of a Database Right. The term “investment in the obtaining of the contents of a database” referred to the resources used to seek out existing independent materials and collect them in a database. Therefore, in the context of football fixture lists, “the resources deployed for the purpose of determining [...] the dates and times of and home and away teams playing in the various matches, represent [...] an investment in the creation of the fixture list.” The investment described is linked to the creation of the data contained in the database and therefore is not investment of the type that can be taken into account for the purpose of determining whether the Database Right subsists. The CJEU also held that there was no investment in the verification of the database since there was no particular effort needed to monitor the accuracy of the data on league matches since the professional football leagues are so directly involved in the creation of the data.

A change in the tide - Football Dataco v. Sportradar

Following the CJEU’s initial decisions on the Database Right, rightsholders would have been forgiven for dismissing the Database Right as one which was narrow in scope and hard to enforce. However, the English courts gave hope to rightsholders in their decision in *Football Dataco and others v. Sportradar and others*. The database at issue was the live football data collected by Football Dataco concerning statistics in a football match such as the goals, free kicks and corners. The defendants in

this case argued that this database was akin to those in *William Hill* and *Football Fixtures* since the investment made by Football Dataco was in the creation of the data. They argued that this data did not exist until it was recorded and so it was created when Football Dataco recorded it in its database. However, the Court held that the Database Right did subsist in Football Dataco’s database since the data which was collected and recorded at a football match was not created by that person but merely recorded by them. As such the investment made by Football Dataco in the process of collecting the data was investment in obtaining that data. This more generous approach has now been taken a step further by the UK High Court in its latest decision.

Technomed v. Bluecrest - another step towards a broader scope for the Database Right?

Technomed provides an electrocardiograph (‘ECG’) reporting system for doctors known as ECG Cloud. ECG Cloud enables ECG readings taken in a clinic or hospital to be analysed remotely by reporters who are not themselves carrying out the readings. ECG Cloud processes data from a mobile ECG machine through a web-based system. It is a screening service which flags up potential problems to be referred to and investigated by cardiologists. The system uses a traffic light system where green indicates a normal result, and red indicates critical or urgent abnormalities. The patient data is reviewed by a qualified cardiac physiologist who selects from a range of options from menus. The menus correspond to each ECG variable in a database. Technomed alleged infringement of its copyright and Database Right in this database (the ‘Technomed Database’). The Technomed Database contains a set of classifications (the ‘Classifications’) such as the ventricular rate, and then contains a number of options to describe the Classifications (the ‘Options’) such as ‘normal’ or ‘bradycardia’ (slow), as recorded from the patient. Then, associated with each Option, is a risk status, or ‘Traffic Light,’ which is intended to reflect best medical practice for ECG screening purposes, and some text providing further information to the patient to help them understand the ECG reading (the ‘Patient Definitions’).

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To enable the patient to access the results of the ECG screening, ECG Cloud outputs an XML file with a standardised format. The XML file is then used to generate a report for distribution to the patient or GP. Finally, the Technomed Database also contains a feedback tool through which reviewing cardiac physiologists can edit various aspects of the reporting data. Each amendment is then reviewed and any necessary amendments are made to the components of ECG Cloud. As a result, the ECG Cloud system improves in accuracy the longer it is used.

On 31 October 2012, Technomed entered into a contract with Bluecrest to provide heart screening services. The contract was to run for over two years but, in December 2013, Bluecrest agreed to switch its services from Technomed to another company called Express. Bluecrest sent various emails to Express providing them with Technomed documents before they entered into the Express contract, asking them to replicate the service. One such document was a PDF document recording the Technomed Database. Express used this copy to create their own system.

Is the Technomed Database a database?

The High Court first had to determine whether the Technomed Database fell within the definition of a database under the Database Directive. The Judge rejected the Defendants' submissions that the PDF version of the Technomed Database, whilst being a collection of independent materials, did not qualify because those materials are not separable from one another without their informative values being affected. The Judge was also not convinced by the Defendants' submission that a PDF can never be a database on the basis that it is akin to a photograph of a database rather than the database itself.

The Judge held that the Technomed Database, whether in spreadsheet or

PDF format, importantly ties together a Classification, an Option and a Traffic Light. Individual Classifications are accessible either by reading the PDF with the human eye or accessing the spreadsheet electronically. By choosing one of the Options within the Classification, the relevant Traffic Light and Patient Definition are provided. The Judge went on to conclude that "the use to which the Database can be put (and indeed was put by the defendants) is no different to a telephone book (where accessing a name carries with it an address and phone number)." He therefore ruled that the Technomed Database is a database within the definition.

Does the Database Right subsist in the Technomed Database?

Technomed acknowledged that, as held by the Court in the *William Hill* and the *Football Fixtures* cases, the investment cannot lie in the creation of the contents of the database. However, they argued that the Classifications, Options and Traffic Lights record objective information which they have not created. They have also taken many hours to verify the information such as through the feedback tool. They also argued that investment was made in the presentation of the data since it was arranged in a structured format. The Judge agreed that there had been substantial investment in the obtaining, verification and presentation of the contents of the Technomed Database. Therefore the Database Right was held to subsist in the Technomed Database.

Conclusion

The Database Directive states at recital 19 that 'in addition to aiming to protect the copyright in the original selection or arrangement of the contents of a database, this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in

obtaining and collection of the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor.' Given that this legislation is now 20 years old this could be seen to be prophetic of the importance of data and databases in the digital age. However, in the light of the early CJEU decisions, to date there may have been limitations to its use. This has perhaps put off many rightsholders, and their advisers, from taking action to enforce rights in their databases.

The *Technomed* decision will be looked at with interest by rightsholders and may perhaps lead to an increase in reliance on the Database Right against third parties making unauthorised use of their databases. It is perhaps curious that the arguments over subsistence of Database Right focussed on the PDF record at all. The original database was electronic, and it would surely be arguable that it is this database which had been copied (albeit indirectly through the medium of the PDF copy). Nevertheless, the ruling that even the PDF copy was itself capable of falling within the definition opens the door to other, non-electronic databases also being protected.

It is notable also that the English courts have arguably been more willing to give a broad interpretation to the Database Right than the CJEU. The High Court (and the Court of Appeal appeared persuaded too) in *William Hill* held that the £4 million worth of investment in the BHB database was of the right nature to attract the Database Right. If the Copyright and Rights in Databases Regulations 1997 (which implemented the Database Directive) remains part of UK law post-Brexit, perhaps this could be an opportunity for the UK courts, through their interpretation of the Regulations, to broaden the scope of the Database Right further. This could prove beneficial in the digital age where the use of data is becoming increasingly valuable.