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RIGHTS IN DATA HANDBOOK

Protecting and exploiting IP in data and databases internationally



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INTRODUCTION

The value of data and databases to business is undeniable and continues to increase. As a result the laws which enable data to be protected and exploited are crucial to many industries, from horseracing to financial services. Nonetheless, while much has been written about the neighbouring area of data privacy/data protection, the issue of IP rights in data and databases has traditionally received almost no attention. This guide sets out an overview of the IP and related rights affecting data and databases in 12 key global jurisdictions.

How this Handbook Works

This handbook provides a high-level summary, with links to relevant sources, of the different types of protection which are available for data and databases in 12 key global jurisdictions. For each jurisdiction we consider three categories of database which may benefit from protection: original databases, databases in which investment has been made, and confidential databases.

As database law is only part-harmonised in the EU we have, in addition to a section on the EU, separate sections on six representative EU jurisdictions (France, Germany, Italy, The Netherlands, Spain and the UK). To assist you to navigate our European content and avoid repetition, there are cross-references between the EU section and the national sections.

Data privacy/data protection law is not the focus of this guide. However, we recognise that there is an overlap, in that data privacy/data protection laws do limit both database owners' ability to exploit data and database users' ability to use it. We have therefore very briefly summarised the scope of the data privacy/data protection regime in each country. More detailed information on data privacy/data protection regimes in 58 jurisdictions can be found in our separate [Data Protection Laws of the World Handbook](#).

The DLA Piper Rights in Data Team

The global DLA Piper Rights in Data Team pools and shares its extensive experience of working for different types of operators (and both public and private) in different sectors and jurisdictions. The team comprises specialists able to deal with all IP issues that may arise in connection with data and databases. In addition, we have in depth experience in related areas such as IT, media, sport, confidentiality, competition law and data privacy/data protection. The global nature of the team enables us to work efficiently and effectively on cross-border projects and litigation involving data supply and use. A few snapshots of our experience from around the world are on page 4; details of our extensive experience both at the global and local level, are available on request.

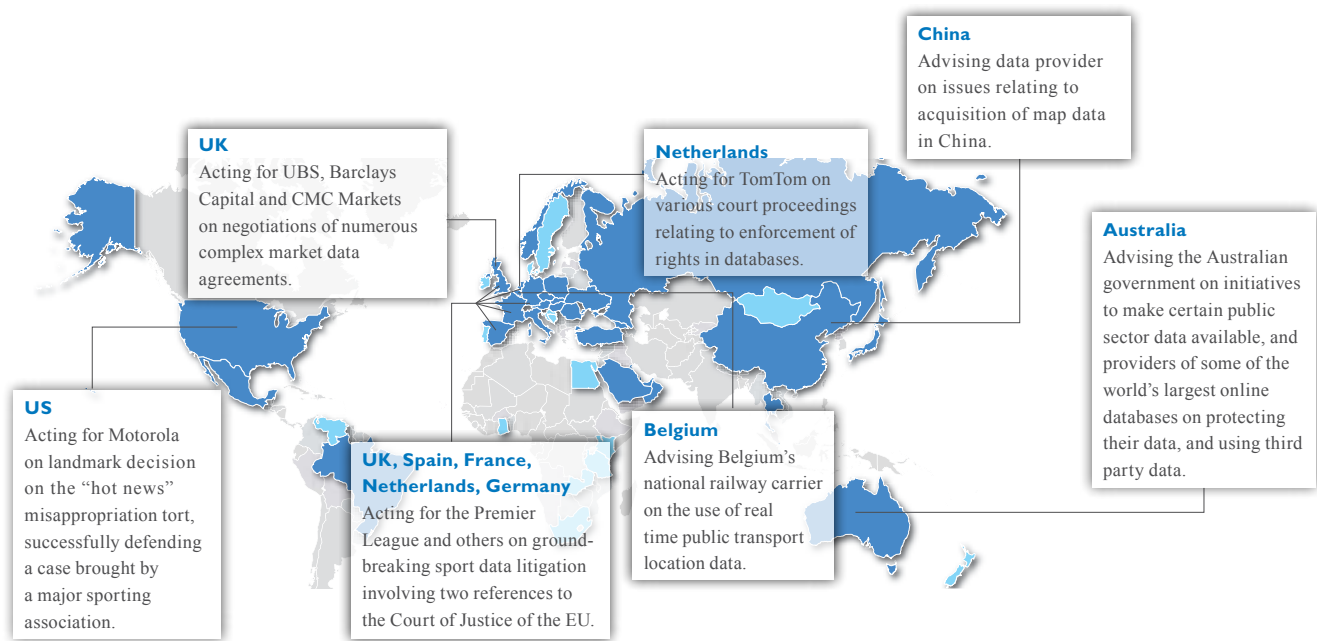
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Jurisdiction	Page No.	Are original databases protected?	Is investment in databases enough to secure protection?	Does a claim for misusing confidential information exist?	Is personal data subject to protection?	Key DLA Piper Contacts
Australia	06	✓	x	✓	✓	Alec Christie Caroline Atkins
China	10	✓	x	✓	✓	Richard Wageman
EU	13	✓	✓	✓	✓	See EU law section
France	17	✓	✓	x	✓	Sandrine Rambaud Stephane Lemarchand
Germany	19	✓	✓	✓	✓	Jan Pohle Christopher Goetz
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Spain	37	✓	✓	x	✓	Diego Ramos
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USA	43	✓	x	✓	✓	Andrew Deutsch James Halpert

This handbook is provided to you as a courtesy, and it does not establish a client relationship between **DLA Piper** and you, or any other person or entity that receives it. It provides a general overview of the law governing rights in data/databases currently in force in 12 jurisdictions. It is a general reference document and should not be relied upon as legal advice. The application and effect of any law or regulation upon a particular situation can vary depending upon the specific facts and circumstances, and so you should consult with a lawyer regarding the impact of any of these regimes in any particular instance. **DLA Piper** accepts no liability for errors or omissions appearing in the handbook. Please note that IP law is dynamic, and the legal regime in the countries surveyed could change. No part of this publication may be reproduced or transmitted in any form without the prior consent of the **DLA Piper**.

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Mwanza

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Ankara

VENEZUELA
Caracas

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Lusaka

SUMMARY OF KEY ISSUES FOR DATABASE OWNERS





Australia

China
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France
Germany
Hong Kong
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I. AUSTRALIA

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ORIGINAL DATABASES

Protected? Original databases may be protected in Australia by copyright as a ‘literary work’ (defined to include ‘a table, or compilation, expressed in words, figures or symbols’; databases may be protected as electronic ‘compilations’) under the Australian *Copyright Act 1968 (Cth) (Copyright Act)*.

Ownership The database author(s) are the first owner(s) of the copyright, unless made pursuant by an employee or employees within the scope of the author’s employment (in which case the employer is the first owner).

Pre-conditions The database must be ‘original’ in the sense that its creation must involve ‘independent intellectual effort’ and/or the exercise of ‘sufficient effort of a literary nature. Also, the database must have been reduced to material form (eg written down or stored on a disk). However, copyright does not protect the underlying data (ie facts or base information). If copyright arises, in the case of a database, it is the (non-trivial/non-obvious) form of the ‘compilation’ that is protected not the underlying data itself. A copyright notice is not required nor is there any requirement to register the copyright, Australia does not have a register of copyrights.

May cover Marketing databases with a complex structure (ie non-obvious format/choice of data types) based on an assessment of customer/business needs.

Unlikely to cover Telephone directories, databases structured on an obvious (eg alphabetical) basis, databases which are produced by an automated computer process.

Duration Copyright protection, if it arises, will apply automatically once an original database exists is reduced to a material form. Protection lasts for 70 years after the end of the calendar year in which the author (or the last author, if the database is a work of joint authorship) dies.

Scope of Protection Copyright is infringed by (without authorisation of the copyright owner) doing acts comprised in the copyright (eg reproducing the database, publishing the database, communicating the database to the public), authorising others to do the acts comprised in



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the copyright or by the sale or importation of unauthorised copies in Australia. Acts done in relation to a substantial part of the copyrighted work are deemed to be done in relation to the whole (eg infringement occurs if a substantial part of the database is reproduced without authorisation).

Remedies include Injunctions (interim and final), account of profits, damages, additional damages (eg due to flagrancy of infringement) and/or delivery up for destruction.

DATABASES IN WHICH AN INVESTMENT HAS BEEN MADE

Databases in which investments have been made do not receive protection beyond the protections described above and below or those under applicable contractual obligations (if any). The High Court of Australia has indicated that the commercial value of (or investment made in creating) a database is not relevant to subsistence of copyright. Additional contractual terms on access, use etc are the most effective way to protect databases which do not qualify for copyright protection.

CONFIDENTIAL DATABASES

Protected? It is possible for confidential databases to be protected under the law of confidential information. However, the equitable action for breach of confidence does not protect the information per se, but rather the unconscionable use (or threatened use) of such information when it is provided in circumstances of confidence.

Ownership The right to protection belongs to the confider of the database, but only in circumstances where the recipient of the information contained in the database owes the confider an obligation to keep the information confidential (ie only if a reasonable person in the position of the recipient would understand that the information was given in confidence). It is therefore recommended that any such obligation of confidence be clearly specified in relevant documentation in the contract and T&Cs.

Pre-conditions The information contained in the database will not be protected under the law of confidential information unless: (i) the information has the necessary quality of confidence; (ii) the owner has taken sufficient steps to preserve the confidentiality of its information; and (iii) a reasonable person in the position of the recipient would understand that the information was given in confidence.

May cover Databases containing information which is largely unknown outside the confider's business.

May not cover Databases which consist of readily available information/are not difficult for others to duplicate or which are licensed on terms which do not impose obligations of confidentiality.

Duration The protection arises from the time the obligation of confidence arises (ie on providing the confidential database) and lasts until the obligation ceases (eg usually until the information passes into the public domain).



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Scope of Protection The usual elements to establish breach of confidence are (in addition to those mentioned under “Pre-Conditions” above): (i) the information must have been imparted in circumstances importing an obligation of confidence; and (ii) there must be an unauthorised use (or threatened unauthorised use) of that information to the detriment of the party which communicated it.

Remedies Equitable compensation and other equitable remedies (eg an injunction) apply.

PERSONAL DATA

Is personal data given particular protection? The collection, use and disclosure of ‘personal information’ is protected under the *Federal Privacy Act 1988 (Cth) (Privacy Act)*, which establishes and regulates a national scheme for the collection, use and disclosure of personal data by organisations and agencies with a turnover of A\$3 million and more. Australia also has a variety of State and Territory privacy laws which apply in the health area and to State agencies.

Who can rely on it? The individual who is the subject of the personal information.

What data? Personally identifiable information, including health information, such as information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent or can reasonably be ascertained.

Scope of protection The legislation regulates the collection, storage, access, use and disclosure (including transfer) of personally identifiable information.

ANY OTHER FORMS OF PROTECTION FOR PARTICULAR TYPES OF DATA?

There are no other forms of general protection. However, there are some sector-specific laws which regulate the handling of certain types of data. For example, the Privacy Act also contains provisions that regulate consumer credit reporting and the *Telecommunications Act 1997 (Cth)* contains provisions that regulate the handling of telecommunications information held by telecommunications carriers and others (eg emergency call persons).

SIGNIFICANT RECENT CASES

IceTV Pty Limited v Nine Network Australia Pty Limited This case concerned weekly TV schedules and originality of TV program guides produced from Channel Nine’s database. IceTV used portions of Nine’s television program guide in compiling its own electronic guide. The High Court held that IceTV did not infringe copyright. In order to be protected as a ‘compilation’ (ie a literary work) the work must be ‘original’ in the sense that its creation must involve ‘independent intellectual effort’ and/or the exercise of ‘sufficient effort of a literary nature’ by humans¹.

¹ see *IceTV* at [33], [99], and [187]-[188]



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Telstra Corporation Limited v Phone Directories Company Pty Ltd The Full Federal Court held that copyright did not subsist in the White Pages or Yellow Pages directories. This case highlights the difficulty of a claim to copyright in a literary work which is compiled by an automated process. Keane CJ stated: ‘The dicta in *IceTV* shifted the focus of inquiry away from a concern with the protection of the interests of a party who has contributed labour and expense to the production of a work, to the “particular form of expression” (ie ‘creative spark’) which is said to constitute an original literary work and to the requirement of the [Copyright] Act “that the work originates with an author or joint authors from some independent intellectual effort”’. Labour (often referred to as ‘industrious collection’ or ‘sweat of the brow’) is relevant only to show that the compilation originated from the author (rather than being copied) not to show sufficient independent intellectual or literary effort.

UPCOMING LEGISLATIVE CHANGES

In relation to databases, some commentators have suggested that the recent *IceTV* decision would lead to calls for introduction of sui generis rights for databases in Australia. Further, in *Telstra Corporation Limited v Phone Directories Company Pty Ltd* (which followed *IceTV*), Justice Gordon suggested that legal protections for databases (such as those set out in the EU Database Directive 96/9) should be addressed by the Australian Parliament ‘without delay’. However, we are unaware of any significant public advocacy for the introduction of such rights.

In relation to the protection of personal data, in May 2012 the Federal Government introduced the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth) (Bill) into Parliament to amend the Privacy Act. If enacted, the Bill will strengthen protections for personal information in Australia.

TOP TIPS FOR DATABASE OWNERS

Protection of databases in Australia is assisted by:

1. Keeping records which identify the human authors (eg answering questions such as How did they collaborate? How did they determine how the database would function and be expressed?).
2. Ensuring that adequate contractual protections are in place/accepted prior to or at the time of accessing the database, including:
 - licensing provisions
 - contractual restraints on use
 - contractual requirements to return physical property on which the database resides
3. Confidential databases to be communicated/only disclosed with a clear message regarding the confidential nature of database and subject to the obligation to keep the database confidential.

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2. CHINA (PEOPLE'S REPUBLIC OF CHINA)

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ORIGINAL DATABASES

Protected? Original databases are protected by Copyright Law as a “compiled work” or works created through compiling works, segments of works or data or other materials not constituting a work, provided that there is sufficient originality in selection or arrangement of the compiled work. (Section 14, [PRC Copyright Law](#); link is to an English translation)

Ownership Copyright in the database vests with the compiler or author of the database. However, the compiler shall not infringe copyright in the original work when exercising their right.

Pre-conditions must be “original”, particularly the selection or arrangement. Copyright does not need to be registered to be protected however the PRC does have an optional procedure to register copyright, which is helpful when trying to prove ownership.

May cover marketing databases with more complex structures based on assessments of customer or business needs.

Unlikely to cover those databases which are produced by an automated computer process.

Duration Copyright protection in the PRC lasts for the duration of the author’s life plus 50 years after the death (this applies to the last author for instances of joint authorship).

Scope of protection Database owners may prevent others making the database (or copies) available to public and can also prevent other people altering, adapting, translating, copying or hiring out the database.

Remedies Infringement of copyright will result in civil liability and remedies include injunctions, requirement on the infringer to take steps to eliminate the harm caused, apologising or paying compensation for losses.

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DATABASES IN WHICH AN INVESTMENT HAS BEEN MADE

Databases that involve investment in their compilation do not have any separate protection in the PRC.

CONFIDENTIAL DATABASES

Protected? In addition to the copyright protection, confidential databases may be protected as commercial secrets under the [Anti-Unfair Competition Law](#), provided that such database is valuable for the company and has been kept confidential. (article 10 of the Anti-Unfair Competition Law)

Owner The law on Anti-Unfair Competition protects the rights of the owner of the database.

Pre-conditions Involves the efforts of the author to keep it confidential.

May cover Anti-Unfair competition law covers databases containing information which is largely unknown outside the confider's business.

Unlikely to cover Databases consisting of readily available information and databases that are not difficult for others to duplicate.

Duration Protection arises from when the database (which the owner has made efforts to keep confidential) is created and will last until publication by the owner or an authorised party.

Scope of protection Unauthorised acts include the unauthorised publishing or use of the confidential database.

Remedies A company may recover compensation for loss suffered from a breach and may obtain injunctions to prevent intended publication, where this has not already occurred.

PERSONAL DATA

Is personal data given particular protection? The PRC does not have comprehensive data protection law but there are general requirements to protect individual's data in the General Principles of the Civil Law of the People's Republic of China (**GPCL**), the Criminal Law of the People's Republic of China (**Criminal Law**) and the Tort Liability Law of the People's Republic of China (**Tort Law**). The three laws above are all national laws.

Who can rely on it? Individuals to whom the information relates may rely on the protection.

What data? The GPCL, Criminal Law and Tort Law are very general on the protection and we understand such protection applies to all data about individuals.

Scope of protection The scope of these laws are not specifically identified.



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ANY OTHER FORMS OF PROTECTION FOR PARTICULAR TYPES OF DATA?

Generally, personal data obtained by financial institutions (banks) is subject to more strict rules, requiring them to protect their clients' financial data.

SIGNIFICANT RECENT CASES

Most cases are not publicly available, and the PRC legal regime is not based on case-law precedents.

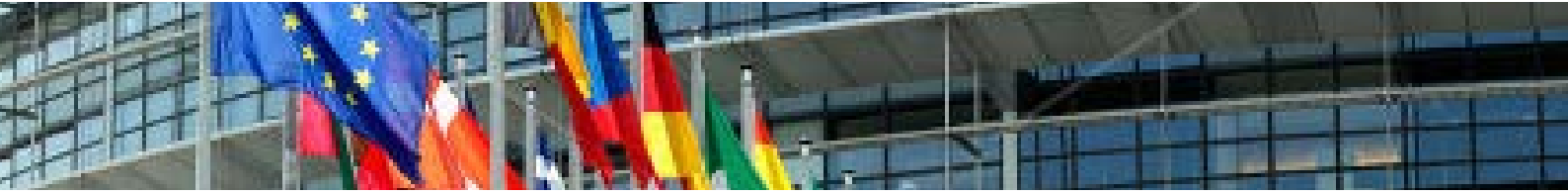
UPCOMING LEGISLATIVE CHANGES

The Chinese government is in the process of preparing comprehensive data privacy legislation. It is not known when this will be enacted.

TOP TIPS FOR DATABASE OWNERS

Protection of databases in the PRC is assisted by:

1. Keeping records which identify the authors of the information in the database.
2. Ensuring that adequate contractual protections are in place/accepted prior to or at the time of accessing the database, including:
 - licensing provisions
 - contractual restraints on use
 - contractual requirements to return physical property on which the database is stored
3. Confidential databases should be communicated/only disclosed with a clear message regarding the confidential nature of the database, and subject to the obligation to keep the database confidential.



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3. EU

EU law in this area is only partly harmonised; to the extent that there is national variation, this is dealt with in the national sections covering the representative EU jurisdictions [France](#), [Germany](#), [Italy](#), [The Netherlands](#), [Spain](#) and the [UK](#).

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ORIGINAL DATABASES

Protected? Databases are protected by copyright as a database. “Database” is defined as “a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means” under the [EU Database Directive 96/9](#).

Ownership The protection is given to the database author(s) or creator(s).

Pre-conditions A database must satisfy the definition above and “constitute the author’s own intellectual creation” by reason of the “selection or arrangement” of the database’s content. The author’s own intellectual creation requirement has been expressed as the author expressing “his creative ability in an original manner by making free and creative choices” and stamp a “personal touch”². There is no requirement for copyright in the database to be registered.

May cover Marketing databases with a complex structure, an anthology of poems structured by theme.

Unlikely to cover Telephone directories, record of live actions occurring during a sporting event.

² *Football Dataco v Yahoo*, see below.

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Duration Protection in the database applies automatically once the database exists in material form and will last for 70 years after the end of the calendar year in which the author died.

Scope of protection Infringement will arise by temporarily or permanently reproducing the database, translating, adapting or altering the database or distribution or communication to the public of copies of it without authorisation of the owner.

Remedies EU remedies include injunctions (both interim and final) and the recall or destruction of infringing materials or materials used to create infringing copies, damages and payment of legal costs.³

DATABASES IN WHICH AN INVESTMENT HAS BEEN MADE

Protected? Databases that involve investment are also protected as the definition of database under the Database Directive is the same as for copyright.

Ownership The maker of the database (the person who “takes the initiative and the risk of investing”) is protected; however, if the work is subcontracted it will be the commissioner of the sub-contract⁴.

Pre-conditions Investment in “obtaining” must not have been in the creation of the data which are the subject of the database, but rather in seeking out existing independent materials and collecting them in the database⁵.

May cover Marketing databases, a record of live actions occurring during a sporting event, case-law databases.

Unlikely to cover A list of runners and riders in a horse race.

Duration The right arises on creation of the database and lasts 15 years from its creation or (if later) it being made available to the public. A new 15 year period right is commenced when substantial updates or changes are made to the database.

Scope of protection The right can prevent:

- Extraction or reutilisation of the whole or a substantial part (evaluated by qualitative and/or quantitative analysis) of the contents of the database and
- Repeated and systematic extraction or reutilisation of insubstantial parts of the contents of the database

Remedies The remedies for infringement are broadly the same as for copyright, as above.

CONFIDENTIAL DATABASES

There is no EU wide law protecting confidential information – this is covered by national law.⁶

³ EU IP Enforcement Directive 2004/48

⁴ Recital 41 of the Database Directive

⁵ This results from CJEU case law, including in particular *British Horseracing Board v William Hill C-203/02*

⁶ The EU has commissioned a [comparative study of the protection of trade secrets across the EU](#).

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PERSONAL DATA

Is personal data given particular protection? Handling personal data is subject to the [EU Data Protection Directive 95/46](#), which has been implemented by national legislation across the EU.

Who can rely on it? Individuals who are the subject of the personal data (“data subjects”) are protected by the Directive. Data subjects have various rights, including the right to be informed when their data is being processed.

What data? “Personal Data” is a wide definition which includes any information relating to an identified or identifiable natural person. It can include contact information such as e-mail addresses and telephone numbers, financial information and health information.

Scope of protection The legislation regulates the processing of personal information, mainly through imposing obligations on data controllers. This can limit what the owner of a database can legitimately do with that database (particularly marketing databases).

ANY OTHER FORMS OF PROTECTION FOR PARTICULAR TYPES OF DATA?

In general terms there are no other types of protection for data or databases.

SIGNIFICANT RECENT CASES

Football Dataco v Yahoo: Court of Justice of the European Union ruled in a case dealing with football match schedules that the criterion of “author’s own intellectual creation” for database copyright:

- (i) requires that the author expresses his creative ability in an original manner by making creative choices and
- (ii) is not satisfied when the setting up of the database is dictated by technical constraints which leave no room for creative freedom.

Football Dataco v Sportradar: CJEU held (in a case involving a database of data gathered live during football matches) that a database owner can sue an online infringer of database right where internet users whom the infringer intends to target are located.

Directmedia v Albert-Ludwigs-Universitaet: the CJEU explained that the “extraction” act of infringement in relation to database right:

- (i) should be given a wide definition and
- (ii) would include transfer of material from a protected database to another database following an on-screen consultation of the first database and an individual assessment of the material contained in it.

This case involved an anthology of poems, which was used to produce a CD-Rom of a collection of poems.



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UPCOMING LEGISLATIVE CHANGES

A new Data Protection Regulation is currently being drafted, which is broadly expected to impose more extensive obligations on data controllers.

TOP TIPS FOR DATABASE OWNERS

1. Include “seeds” (deliberately inserted fake information) in your database, so that you can trace and prove infringement.
2. Obtain local advice on how best to protect your confidential information (law on this varies considerably across the EU).
3. Always consider data protection issues when looking to acquire a database: will you be able to use it as you wish?

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4. FRANCE

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The law is part-harmonised with general EU law (see [EU section](#)). In this section we therefore only highlight areas that differ from EU-wide law.

ORIGINAL DATABASES

Protected? The EU-wide Database Directive is implemented in France by article L. 112-3 of the [French Intellectual Property Code \(FIPC\)](#); link is to French-language version).

Pre-conditions In addition to the requirements under EU law, the arrangement of the data should not result from a simple compilation, but rather should result from free choices and constitute the author's own intellectual creation *SA les Editions du Boisbaudry v. SA le Pont Vétérinaire*⁷. There is no requirement for copyright notices or registration.

Scope of protection The infringing acts are set out in Article L.335-2 and seq. of the FIPC ([See EU law section](#))

Remedies Article L.331-1 onwards of the FIPC provides for:

- Injunctions (interim and final)
- Recall/destruction of infringing materials/materials used to create infringing copies
- Damages
- Payment of legal costs

⁷ September 2004 03/04746



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DATABASES IN WHICH AN INVESTMENT HAS BEEN MADE

The Database Directive is implemented by articles L.341-1 and seq. of the FIPC (please see [EU section](#)).

CONFIDENTIAL DATABASES

There is no right to prevent misappropriation/misuse of confidential information, other than via contractual obligations, under non-disclosure agreements.

PERSONAL DATA

See [EU section](#). The handling of “personal data” is subject to the [EU Data Protection Directive 95/46](#), which has been implemented in France by the Law of 6 January 1978 as amended ([English version here](#)).

ANY OTHER FORMS OF PROTECTION FOR PARTICULAR TYPES OF DATA?

Generally no, however access to public data is governed by special legislation.

SIGNIFICANT RECENT CASES

Precom and Ouest France v. Direct Annonce: the French Supreme Court refused the protection of sui generis database right to a database of real estate advertisements included in the different versions of a newspaper, because the investment was not related to obtaining the contents of the database but to the creation of the items included in this database and the purely formal verification operations, during this creation phase.

UPCOMING LEGISLATIVE CHANGES

None at a national level (see [EU section](#)).

TOP TIPS FOR DATABASE OWNERS

1. Include “seeds” (deliberately inserted fake information) in your database, so that you can trace and prove infringement.
2. Ensure all disclosures of confidential information are subject to prior signature of an appropriate NDA.
3. Consider data protection issues when looking to acquire a database.

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5. GERMANY

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The law is part-harmonised with general EU law (see EU section). In this section we therefore only highlight areas that differ from EU-wide law.

ORIGINAL DATABASES

Protected? Databases are protected by copyright as a “database”. Subject to the EU-wide [EU-Database Directive 96/9](#) (see EU section), implemented by the *Urheberrechtsgesetz* (German Copyright Act) – “**UrhG**”, section 4 para. 2 of which defines “database”.

Section 4 UrhG in its present form was implemented by Article 7 of the German Information and Communication Services Act of 1997.

Pre-conditions The “*author’s own intellectual creation*” is required (“*persönliche geistige Schöpfung*”) and is implemented by Section 2 para. 2 UrhG, and Section 4 para. 1 UrhG

Remedies In instances of intentional infringement there are potential criminal sanctions, including imprisonment up to three years or a fine (Section 106 UrhG). If intentional infringement is on a commercial basis (“*gewerbsmäßig*”), the sanctions can be imprisonment of up to five years or a fine (Section 108a UrhG).

DATABASES IN WHICH AN INVESTMENT HAS BEEN MADE

Protected? Some databases may be subject to the EU-wide [EU-Database Directive 96/9](#) (see EU Section), implemented in Germany by Section 87a – 87e UrhG. These Sections were implemented by Article 7 of the German Information and Communication Services Act of 1997.

Scope of protection Section 87b para 1 Sentence 2 UrhG states that the repeated and systematic extraction or re-utilisation of insubstantial parts of the contents of the database can only be prevented by the right holder if such acts do not amount to a “normal use” of the database or if such acts cause undue prejudice to the legitimate interests of the database owner.

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CONFIDENTIAL DATABASES

Protected? It is possible for confidential databases to be protected, under legal provisions that protect confidential information. In particular, Section 17 of the German [Unfair Competition Act](#) (*Gesetz gegen den unlauteren Wettbewerb* – “UWG”) renders it a criminal offence to disclose trade and industrial secrets. There is no parallel civil right of action for those whose confidential information is taken, unless they are able to sue for breach of contract under an NDA.

Ownership The law in this area protects the owner of the business to which the trade and industrial secrets belong.

Pre-conditions Protection will arise where there are “*Unauthorised communications*”, which includes:

1. communication of trade or industrial secret (facts, circumstances and procedures, which are not obvious, and only accessible to a limited circle of persons and with regard to which the right holder has a legitimate interest not to make them public)
2. by an employee of a business, who was entrusted with or who had access to such trade or industrial secret during the course of the employment relationship and
3. for the purposes of competition, for personal gain, for the benefit of a third party, or with the intent of causing damage to the owner of the business (Section 17 para. 1 UWG)

May cover Customer databases, databases of a company’s commercial or technical knowhow, databases of product ingredients.

Unlikely to cover Data which is published or licensed on terms which do not impose confidentiality obligations.

Duration The protection arises from the time the obligation of confidentiality arises, and will last until the obligation ceases (eg usually until the information passes into the public domain).

Remedies Potential remedies in this area involve criminal sanctions (either imprisonment or fines). Industrial espionage by employees or others (Section 17 para.2 Nr. 1 UWG), and unauthorised exploitation of trade and industrial secrets (Section 17 para 2 Nr. 2 UWG) can also give rise to criminal liability.

PERSONAL DATA

The handling of “personal data” is subject to the Federal Data Protection Act ([Bundesdatenschutzgesetz](#) – **BDSG**; link is to English translation).

The EU Data Protection Directive has been implemented into the BDSG by the German Act to Modify the BDSG, dated May 18, 2001. Additional data protection provisions are provided in legislation such as the German Telecommunication Act ([Telekommunikationsgesetz](#)) and the German Telemedia Act ([Telemediengesetz](#)).

Failure to comply with data protection law is aggressively prosecuted in Germany. Infringements may lead to the imposition of severe (criminal and administrative) fines and even imprisonment. (See [EU section](#))

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ANY OTHER FORMS OF PROTECTION FOR PARTICULAR TYPES OF DATA?

Generally, no. With regard to personal data collected by the state and other public bodies, there are specific provisions within the BDSG.

SIGNIFICANT RECENT CASES

Deutsche Bahn AG – In 2009, the German data protection authorities imposed an administrative fine of €1,100,000 on Deutsche Bahn AG. This is the highest administrative fine ever imposed in Germany for non-compliance with data protection law. Deutsche Bahn AG monitored thousands of its employees to seek to expose illegal connections between those employees and sub-suppliers of Deutsche Bahn AG, without any definite grounds for suspicion of these employees, in order to fight corruption. Deutsche Bahn AG even expanded such monitoring to family members and other people outside the organisation. Deutsche Bahn AG carried out three periods of monitoring between 1998 and 2005, and also inspected medical files. In 2009, Deutsche Bahn AG accepted the fine to avoid further negative press releases. German authorities, however, continued to prosecute individuals at Deutsche Bahn AG, and imposed criminal sanctions in several cases.

UPCOMING LEGISLATIVE CHANGES

A new [European-wide Data Protection Regulation](#) is currently being drafted, which is expected to modify the current German data protection law. On 30 March 2012 the German Federal Assembly (*Bundesrat*) issued a formal complaint (*Subsidiaritätsrüge*) on this new regulation since – in the Bundesrat’s view – the regulation does not comply with Art. 5 Para. 3 of the Treaty on European Union.

TOP TIPS FOR DATABASE OWNERS

1. Audit the data you own: Consider the range of potential rights regarding your data. Ensure that you are the right holder of all the data. In cases of personal data, ensure that you are compliant with the BDSG.
2. Audit the data you collect, process or use: ensure that you obtain all necessary rights to exploit such data (eg licence agreements). Clarify whether the data contains personal information. In cases of personal data, make sure that you are compliant with the BDSG (eg by obtaining the consent of the individuals who are the subjects of the personal data).
3. Protect your data: Enter into non-disclosure agreements with your employees and third parties, who have access to your databases.

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6. HONG KONG

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ORIGINAL DATABASES

Protected? Original databases are protected by copyright as a ‘literary work’, which includes compilations of data or other material, in any form which, by reason of the selection or arrangement of their contents constitutes an intellectual creation⁸. Such compilations of data may be expressed by hand or otherwise and are protected by copyright regardless of the method or the medium in or on which they are recorded⁹. The relevant legislation in this area is the [CAP 528 Copyright Ordinance](#).

Ownership Generally the author of a work is the first owner of any copyright. If the database is computer-generated, the author is taken to be the person by whom the necessary arrangements for the creation of the work are undertaken. Unless the work is created by an employee in the course of his employment (in which case the employer is the first owner, subject to any agreement to the contrary.)¹⁰

Pre-conditions In order for a database to be protected, the following requirements must be met:

- The database must be “*original*” in that it must not have been copied from another and must have originated from the author¹¹
- The author must have put in a sufficient level of skill, judgement and labour in the making of the database¹² and

⁸ Section 4 of the Copyright Ordinance.

⁹ Section 198(1) of the Copyright Ordinance.

¹⁰ Sections 11, 13 and 14 of the Copyright Ordinance.

¹¹ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 608-609.

¹² *Greyhound Racing Association Ltd v Shallis* [1923-28] MCC 370 at 373, per Eve J.

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- The database must have been reduced to material form (eg recorded, in writing or otherwise)¹³. Note that copyright protects the expression of ideas, not the ideas themselves. In the case of a database, if copyright arises, it is the selection or arrangement of data that is protected, not the underlying data itself.

May cover marketing databases with more complex structures based on assessments of customer or business needs.

Unlikely to cover Databases which are, to a significant degree, produced by an automated computer process and the making of which involves little or no skill, judgement and labour.

Duration Copyright is an automatic right which arises when a work is created. It is not necessary to register copyright in Hong Kong in order to qualify for protection. There is no official registry in Hong Kong for registration of copyright works. Protection generally lasts for 50 years after the end of the calendar year in which the author (or the last author, if the database is a work of joint authorship) dies. If the database is computer-generated, copyright expires at the end of 50 years from the end of the calendar year in which the database was made.

Scope of protection Copyright protection gives the owner the exclusive right to do the following acts in Hong Kong:

- Copy the database
- Issue/rent copies of the database to the public
- Make copies of the database available to the public
- Perform, show or play the database in public
- Broadcast the database or include the database in a programme service
- Make an adaptation of the database or do any of the above in relation to an adaptation

Copyright is infringed by a person who, without the license of the copyright owner, does or authorises another to do any of the acts above in relation to a database as a whole, or any substantial part of it, either directly or indirectly.

Remedies A copyright owner may take civil legal action against any person who infringes copyright in the work. The owner may seek all necessary relief against the infringer, including injunctions to prevent further infringement, an order for delivery up of the infringing items, disclosure of information about the supply and/or dealings of the infringing items and an award for damages, accounts of profits as well as costs.

¹³ Section 4 of the Copyright Ordinance.

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DATABASES IN WHICH AN INVESTMENT HAS BEEN MADE

Databases in which investments have been made do not receive protection beyond the other protections discussed above and below.

CONFIDENTIAL DATABASES

Protected? It is possible for confidential databases to be protected under the law of confidence, arising from contract (expressed or implied) or under the common law of confidence. The right to restrain a breach of confidential relations is preserved by the Copyright Ordinance.

See the case law in the [UK section](#) below (*Coco v AN Clark (Engineers) Ltd*) which applies to Hong Kong. Unlike other commonwealth common law jurisdictions, which see confidentiality and trade secrets as equitable rights, in Hong Kong it has been held that confidential information can be property. The threshold for breach of confidentiality depends upon the circumstances of the case (eg employment¹⁴).

Owner The confider of the database is the person protected, but only in circumstances where the recipient owes the confider an obligation to keep the information confidential (ie if a reasonable person in the position of the recipient would understand that the information was given in confidence).

Pre-conditions The information contained in the database will not be protected under the law of confidential information unless:

- (i) the information has the necessary quality of confidence
- (ii) the owner has taken sufficient steps to preserve the confidentiality of its information and
- (iii) a reasonable person in the position of the recipient would understand that the information was given in confidence.

May cover Databases containing information which is largely unknown outside the confider's business.

Unlikely to cover Databases which consist of readily available information or are not difficult for others to duplicate or databases which are licensed on terms which do not impose obligations of confidentiality.

Duration Protection arises from the time the obligation of confidence arises (provision of the confidential database), and lasts until the obligation ceases (until the information passes into the public domain).

¹⁴ See *Faccenda Chicken Ltd v Fowler* [1987] Ch. 117

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Scope of protection In addition to the items listed above it is necessary to establish that

- (i) the information was imparted in circumstances importing an obligation of confidence and
- (ii) there has been an unauthorised use (or threatened unauthorised use) of that information to the detriment of the party communicating it.

Remedies

- Injunctions (interim and final)
- Damages or an account of profits
- Delivery up or destruction
- Payment of legal costs

A claimant may be required to elect whether to claim damages for breach of confidence or for infringement of copyright.

PERSONAL DATA

Is personal data given particular protection? [Personal Data \(Privacy\) Ordinance Cap. 486](#) (“PDPO”) covers the law in this area.

Who can rely on it? The individual who is the subject of the personal information may rely on the law.

What data? Any data that relates directly or indirectly to a living individual (the “data subject”), from which it is practicable to ascertain the identity of the individual and which is in a form in which access or processing is practicable (“Personal Data”).

Scope of protection The Privacy Commissioner of Personal Data regulates the control, collection, holding, processing and use of Personal Data.

ANY OTHER FORMS OF PROTECTION FOR PARTICULAR TYPES OF DATA?

No

SIGNIFICANT RECENT CASES

There have not been any significant recent cases in respect of rights in data/databases in Hong Kong.

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UPCOMING LEGISLATIVE CHANGES

In relation to the protection of personal data, in June 2012, the Legislative Council of Hong Kong passed the Personal Data (Privacy) (Amendment) Bill (**PDPAB**) which sets out amendments to the existing PDPO and will be implemented in multiple phases starting from 1 October 2012. Once implemented, the PDPAB will strengthen protections for personal data.

The most significant amendments to the PDPO include:

- Regulation of the use and provision of personal data in direct marketing
- Regulation of third party data processors
- New powers of the data privacy regulator to provide assistance in civil actions
- New powers of the data privacy regulator to verify the accuracy of data user returns and
- New offence for unauthorized disclosure of personal data and repeated contravention of enforcement notices

These amendments apply to all Personal Data, regardless of the form in which they are stored or compiled. Accordingly, to the extent that databases contain Personal Data, those who control them have to comply with the PDPAB once it is implemented.

TOP TIPS FOR DATABASE OWNERS

Protection of databases is assisted by:

1. Ensuring that adequate contractual protections are in place/accepted prior to or at the time of accessing the database, including:
 - (i) licensing provisions
 - (ii) contractual restraints on use and
 - (iii) contractual requirements to return physical property on which the database resides
2. Confidential databases to be communicated/only disclosed with a clear message regarding the confidential nature of the database and subject to the obligation to keep the database confidential.
3. When compiling a database that contains personal data, ensure that the data subjects are properly notified of the purpose(s) for which their personal data is being collected/used and that the database will solely be used for the purpose(s) as notified. Databases containing personal data can only be sold pursuant to the written consent of all data subjects to which the personal data relates.



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7. ITALY

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The law is part-harmonised with general EU law (see EU section). In this section we therefore only highlight areas that differ from EU-wide law.

ORIGINAL DATABASES

Protected? Italy is subject to the EU-wide Database Directive 96/9 (see EU section), implemented in Italy by Italian Copyright Law (ICL), [Law No. 644/1941](#) (the link is to an unofficial English translation). The definition of “database” is set out in article 2, N. 9, article 64-quinquies and article 64-sexies of the ICL.

May cover Based on case law, databases that result from a selection of data and material, with a complex structure.

Unlikely to cover A list of clients arranged by name and addresses, databases including all data and material available on a certain topic (eg a telephone directory) and databases with selective criteria, alphabetical or chronological order.

Scope of Protection See EU section above; the relevant Italian provision is ICL Section 64-quinquies.

DATABASES IN WHICH AN INVESTMENT HAS BEEN MADE

Protected? In Italy, there is protection with the *sui generis* right under article 102-bis of the ICL (see EU section above).

May cover Telephone directories in the event that a relevant investment has occurred (in the collection of all the consent from the subjects); a football fixture list (upon the same condition).

Unlikely to cover A collection of funny and ironic SMS messages.

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CONFIDENTIAL DATABASES

Protected? According to section 98 of the Italian Industrial Property Code (Legislative Decree No. 30/2005, “IIPC”) regulating trade secrets, company information and technical/industrial knowhow, including commercial information, under the legitimate control of the holder, are protected, provided the pre-conditions listed below are met.

Alternatively, Section 2598 of the Italian Civil Code prevents use of unfair competition practices that are non-compliant with professional fairness and cause harm to another company. Use of a confidential database may result in an unfair commercial practice.

Ownership Rights belong to the holder of the confidential database.

Pre-conditions Information is protected under the IIPC where it:

- is secret (not generally known or accessible to the public)
- has an economic value given the secrecy and
- is subject to measures taken by its holder which are reasonably adequate to keep them secret

May cover Commercially sensitive database of a pharmaceutical company

May not cover Databases which are publicly accessible.

Duration From creation of the information until disclosure to the public.

Scope of protection The holder of the IIPC right can exclude parties from acquiring, revealing or using the information or knowhow unless consent is given or third parties have independently acquired the information/knowhow. The holder of a database can prevent competitors from using the database unless the third party has independently acquired the data or the data has been published or licensed without imposing confidentiality.

Remedies Injunctions, recall or destruction of infringing materials or materials used to create infringing copies, damages and reimbursement of legal costs.

PERSONAL DATA

Is personal data given particular protection? The handling of personal data is subject to the [Italian Data Protection Law No 196/2003](#) (link is to English translation).

(See EU section above)

ANY OTHER FORMS OF PROTECTION FOR PARTICULAR TYPES OF DATA?

Generally no.

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SIGNIFICANT RECENT CASES

Trib. Bologna Sez. spec. propr. industr. ed intell., 10/08/2011 (*Porfiri G. c. Franco Cosimo Panini Editore S.p.A.*). A collection of funny and ironic sms messages was held not to be a database under the ICL, and so did not qualify for database right.

Corte appello Milano Sez. spec. propr. industr. ed intell. 21/11/2011, No. 3206 (*R. C. B. F. v. A. B. and S.A.G.I*) This decision, considered whether the sui generis database right (under section 102-bis ICL) protects a database consisting of a book containing genealogical information. It was held that such a book could be protected by database right, provided there had been substantial investment in obtaining the contents of the book.

Tribunale Roma, Sez. spec. propr. industr. e intell. 01/10/2008 (*Pre-View S.a.s. C. Wyeth Lederle S.p.A. and others*). DLA Piper Italy represented Pre-View S.a.s. in this case obtaining a finding of infringement of database rights and unfair competition in respect of the use of a pharmaceutical database by a competitor. The assignee of the competitor, however, was considered not liable since the use of the database was made according to a contract lawfully entered into by the assignee with a third party, which had warranted that it was the rightful owner of copyright in the database; this released the assignee from any liability.

UPCOMING LEGISLATIVE CHANGES

See EU law section

TOP TIPS FOR DATABASE OWNERS

1. Regulate confidentiality in the agreements providing access to confidential databases, also including penalties in case of infringement. Ensure written NDAs are in place with all those given access to confidential databases.
2. Include “seeds” (deliberately inserted fake information) in your database, so that you can trace and prove infringement.
3. Always consider data protection issues when looking to acquire a database: will you be able to use it as you wish?

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8. JAPAN

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ORIGINAL DATABASES

Protected? Databases may be protected by copyright as a database if, by reason of the selection or systematic construction of information contained therein, they constitute intellectual creations, under the [Japanese Copyright Act 1970 \(Act\)](#). Advanced creativity is not required in Japan for protection as a copyright work, and most databases are considered to be protected under the Act.

Ownership The database author(s)/creator(s) (Article 2, paragraph 1, item 2 of the Act) are the owners of the rights and protection.

Pre-conditions The database must:

- (i) satisfy the definition of “Database” prescribed in Article 2, paragraph 1, item 10-3 of the Act, under which “Database” means a collection of information, such as dissertations, numerical values or diagrams, which is systematically organized so that such information can be searched by use of a computer and
- (ii) constitute intellectual creations, by reason of the selection or systematic construction of information contained therein (Article 12-2, paragraph 1 of the Act).

There is no requirement for a copyright notice or registration (Article 17, paragraph 2 of the Act)

May cover telephone directory sorted by occupation or marketing databases with a complex structure.

Unlikely to cover case law search databases covering all precedents posted on the published digest.



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Duration Copyright protection starts at the time of database creation (Article 51, paragraph 1 of the Act). Protection generally lasts for 50 years (Article 51, paragraph 2 of the Act) after the end of the calendar year in which such author dies (Article 57 of the Act).

Scope of Protection Infringement results from doing the following:

- temporary or permanent reproduction
- translation, adaptation or other alteration
- distribution or communication to the public of the database or copies of it or
- reproduction, distribution, communication, display to the public of the results of the above acts

Remedies include Injunctions (Article 112 of the Act), presumption of amount of damages (Article 114 of the Act), measures for restoration of honour (Article 115 of the Act) and penal provisions listed under Articles 119 – 124 of the Act.

DATABASES IN WHICH AN INVESTMENT HAS BEEN MADE

Databases in which investments have been made do not receive separate protection beyond the protection described above or under contractual obligations.

CONFIDENTIAL DATABASES

It is possible for confidential databases to be protected by certain specific laws (eg Unfair Competition Prevention Act, Civil Code, Penal Code etc.). There is no specific law which protects confidential databases in Japan.

PERSONAL DATA

Is personal data given particular protection? The handling of “Personal Information” is subject to the [Act on the Protection of Personal Information \(APPI\)](#).

Who can rely on it? The individual who is the subject of the personal information.

What data? “Personal Information” is defined in Article 2, paragraph 1 of the APPI as information about a living individual which can identify the specific individual by name, date of birth or other description contained in such information (including information that will allow easy reference to other information and thereby enable the identification of the specific individual).

The APPI also defines “Personal Information Database, etc.” in Article 2, paragraph 2, as an assembly of information systematically arranged in such a way that specific Personal Information can be retrieved by a computer; or an assembly of information designated by a

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Cabinet Order as being systematically arranged in such a way that specific Personal Information can be easily retrieved. The term “Personal Data” is defined in Article 2, paragraph 4 of APPI as Personal Information constituting a Personal Information Database, etc.

Scope of protection The legislation regulates the usage of Personal Data by business operators handling Personal Information. The following are the main provisions for the protection:

- Specification of the purpose of use (Article 15)
- Restriction by the purpose of use (Article 16)
- Proper acquisition (Article 17)
- Maintenance of the accuracy of data (Article 19)
- Supervision of employees (Article 19)
- Restriction of provision to a third party (Article 23)

If business operators handling Personal Information do not follow the regulations, such acts are subject to criminal charges.

ANY OTHER FORMS OF PROTECTION FOR PARTICULAR TYPES OF DATA?

On 28 March, 2002, the Tokyo District Court ruled that even if a database is not protected under the Japanese Copyright Act, the reproduction of such database may constitute a tort in certain circumstances under Article 709 of the [Civil Code](#).

Also, the [Act on the Protection of Personal Information Held by Administrative Organs](#) (APPIHAO) was made in order to protect the rights and interests of individuals while achieving proper and smooth administrative management, in view of a significant increase in the use of personal information by administrative bodies, by providing for basic matters concerning the handling of personal information by such bodies.

Under the APPIHAO, the same definition for “Personal Information” is used (Article 2, paragraph 3 of the APPIHAO) and there are specific requirements relating to retention of Personal Information (Article 3 of the APPIHAO), clear indication of the purpose of use (Article 4 of the APPIHAO), and maintenance of accuracy (Article 5 of the APPIHAO) when administrative bodies handle Personal Information.

SIGNIFICANT RECENT CASES

There have not been any significant recent cases in respect of rights in data/databases in Japan.

UPCOMING LEGISLATIVE CHANGES

Currently, we do not foresee any amendment or legislation regarding database protection.

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In order to promote fair use of copyright works and secure protection of copyright, in June 2012 the Japanese Copyright Act was amended.

With respect to databases, the Institute of Intellectual Property has carried out research on protection of intellectual property rights of database creators¹⁵. In 2001, the Science Council of Japan opposed the enactment of legislation on the sui generis right¹⁶. Its reason was that it would interfere with the academic, cultural and economic development of the country.

TOP TIPS FOR DATABASE OWNERS

1. In Japan, there is no specific statute which governs database protection like the EU Database Directive. However, as a general rule, advanced creativity is not required for databases to benefit from copyright protection, and most databases are recognised to be protected under Japanese law. Therefore, substance and infringement of copyright in databases may be more straightforward to establish in Japan than in other countries.
2. Databases which are not protected under the Act due to lack of creativity can potentially be protected by general tort rules.
3. But care must be taken to secure confidential databases and make them subject to NDAs, because of the lack of comprehensive protection for confidential information.

¹⁵ The research result (in Japanese) can be obtained from www.iip.or.jp/summary/pdf/detail06j/18_15.pdf

¹⁶ The statement (in Japanese) can be obtained from www.scj.go.jp/ja/info/kohyo/pdf/kohyo-18-k136.pdf

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The law is part-harmonised with general EU law (see [EU section](#)). In this section we therefore only highlight areas that differ from EU-wide law.

ORIGINAL DATABASES

Protected? Under Dutch law, original databases are protected under art. 10(3) of the [Dutch copyright act](#). This is in conformity with the EU-wide Database Directive (see [EU section](#)). Even prior to the enactment of the Directive, the Dutch Supreme Court afforded similar copyright protection to databases, applying a test which is similar to the EU threshold requirement that the collection of the database constitutes an “intellectual creation of the author”.¹⁷

Remedies. Right holders of such original databases are entitled to the usual remedies against copyright infringement, warranting both injunctive and monetary relief. Injunctive relief is also available in the shape of ultra-fast temporary restraining orders (usually granted within 24 hours), which can be particularly helpful in internet cases.

¹⁷ Dutch Supreme Court 4 Jan. 1991, *NJ* 1991, 608 (*Van Dale/Rome*).

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DATABASES IN WHICH AN INVESTMENT HAS BEEN MADE

Protected? In The Netherlands, protection is provided in the so-called [Databases Act](#) (*Databankenwet*), which implements the EU-wide Database Directive (see [EU section](#)). The Netherlands has seen increased industry activity, and also increased litigation, in the field of database protection. Much attention centred on the so-called (in)admissibility of dedicated search engines re-utilizing data from information portals involving eg real estate (eg *Zoekallehuizen.nl*; *Jaap.nl*; *El Cheapo*) and used cars (*Gaspedaal*).¹⁸

Remedies. See above. Provided infringement is properly framed, the Dutch courts even allow cross-border temporary restraining orders, in which the Dutch court grant an ex-parte injunction which extends to the entire EU without the (alleged) infringer being heard. This is particularly helpful for example in cases of infringing Apps sold on eg *iTunes* or *Android*. In such cases right holders always need to follow-up with *inter partes* proceedings on the merits (unless settlement materializes) and also are sometimes expected to post a bond.

CONFIDENTIAL DATABASES

Protected? The Netherlands provides for protection of confidential databases, primarily on the basis of the general doctrine of tort (art. 6:162 Dutch Civil Code) and the over-arching obligation in art. 39 TRIPs to protect confidential information and trade secrets. A recent example is found in *GBT v Ajinomoto*.¹⁹ The confidential information itself, is not protected: it is rather the unlawful violation of the obligations of confidentiality which constitutes the tort. This is often accepted in case of breach of contract, abuse of trust and inducements to violate confidentiality obligations.

Ownership The protection of confidence may cover the confider of the database, but only in circumstances where the recipient of the information contained owes the confider an obligation to keep the information confidential (ie if a reasonable person in the position of the recipient would understand that the information was given in confidence).

Pre-conditions The information needs to be ‘confidential’, in the sense that the information was not generally known and the proprietor of the confidential database took reasonable measures to safeguard such confidentiality.

Duration Protection arises from the time the obligation of confidence arises (providing the confidential database) and lasts until the obligation ceases (usually until the information passes into the public domain).

Remedies Injunctions (interim and final), damages or destruction.

¹⁸ Dutch Supreme Court 22 March 2002, *NJ* 2003, 149 (*NVM/Telegraaf*); Court of Appeal Arnhem 4 July 2006 LJN AY0089 (*Zoekallehuizen.nl*); Court of Appeal Amsterdam 13 Dec. 2007 LJN BC0125 (*Jaap.nl*); Court of Appeal The Hague 27 March 2012 IEPT20120327 (*Gaspedaal.nl*)

¹⁹ Court of Appeal The Hague 29 March 2011 IEF 9507 (*GBT/Ajinomoto*).



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PERSONAL DATA

See [EU law section](#). The Netherlands implemented the EU Data Protection Directive 95/46/EC on 1 September 2001 with the Dutch Personal Data Protection Act (“Wbp”). Enforcement is through the Dutch Data Protection Authority (“College Bescherming Persoonsgegevens”).

ANY OTHER FORMS OF PROTECTION FOR PARTICULAR TYPES OF DATA?

No.

SIGNIFICANT RECENT CASES

Autotrack v Gaspedaal.nl this involved a case where a dedicated search engine provided by *Gaspedaal* re-utilized data from the *Autotrack* database. The Court of Appeal referred no less than 9 questions for clarification by the [European Court of Justice](#) (case C-202/12), focusing on when the extraction and/or re-utilization involves a substantial or insubstantial part of the contents of the database involved, as mentioned in art. 7(1) and (5) of the EU Directive. The EU’s judgment is awaited.

PR Aviation v Ryanair the Court of Appeal denied Ryanair’s claims that PR Aviation infringed upon its database rights. Ryanair’s database containing data on its flights did not qualify as a database ‘in which a substantial investment had been made’. Ryanair also alleged that its collection of data qualified as an ‘original database’, warranting injunctive relief against copyright infringement. This claim was also dismissed, based on the statutory exemption in the Directive that this involved lawful use necessary for the purposes of access to the contents of the database (art. 6). This exemption is also implemented in art. 24a of the Dutch Copyright Act which PR Aviation was able to invoke in its favor.

UPCOMING LEGISLATIVE CHANGES

See [EU Section](#).

TOP TIPS FOR DATABASE OWNERS

1. Documentation is key: documenting the investments and structure underlying your database is as important as building the database itself. How the information is arranged and made accessible and how much you have invested, is critical to invoke protection. Lack of such evidence is often a cause for delay or difficulty in enforcing your rights in the database later on.
2. Get expert advice early on: regardless of whether you have an existing database or plan to start a new one, choosing the right business model is critical, not only for maximizing revenue, but also for maximizing legal protection.

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10. SPAIN

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The law is part-harmonised with general EU law (see [EU section](#)). In this section we therefore only highlight areas that differ from EU-wide law.

ORIGINAL DATABASES

Spain is subject to the EU-wide Database Directive (see [EU section](#)), implemented by the [Spanish Intellectual Property Act \(SIPA\)](#); link is to Spanish-language version), article 12.2 defines “database”. SIPA is applicable all over the territory of Spain. Such copyright protection would be independent from copyright in the individual items forming part of the database.

DATABASES IN WHICH AN INVESTMENT HAS BEEN MADE

The EU-wide Database Directive (see [EU section](#)) applies and was implemented by [SIPA](#), article 133.1 of which provides for the database right.

CONFIDENTIAL DATABASES

There is no general civil right in Spain to prevent misappropriation of confidential information, other than where a contractual obligation of confidentiality has been agreed. The Spanish Criminal Code prohibits (in articles 278 and 279) the misappropriation and disclosure of business secrets. However, the Spanish criminal courts will not normally enforce these provisions, other than where there is a very carefully drafted contractual obligation of confidentiality in place, which qualifies the information as “valuable trade secrets”.



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PERSONAL DATA

See [EU section](#) above. The handling of “personal data” is subject to the [Spanish Data Protection Act 1999](#) (link is to English translation). As a peculiarity of the Spanish system, lack of compliance with data protection law is aggressively prosecuted by the authorities, in most cases through hefty financial penalties.

ANY OTHER FORMS OF PROTECTION FOR PARTICULAR TYPES OF DATA?

Generally, no. Personal information databases owned by the State and other public bodies enjoy special rules within the Spanish Data Protection Act 1999, especially regarding creation, registration and enforcement, but otherwise follow the general rules.

SIGNIFICANT RECENT CASES

There has been only very limited recent case-law in Spain on the protection of databases.

In relation to (personal) data protection, in [Saberlotodo.com](#) the leading portal supplying personal information to the financial services and debt recovery sectors was fined €5 million in 2011, after the Spanish Data Protection Commissioner found that it had built up personal information databases using data that could be handled only with the informed prior consent of the data subjects. The database owner was also found to have resisted the investigations launched by the Commissioner and provided incomplete information to investigators.

UPCOMING LEGISLATIVE CHANGES

Nothing at a national level (see EU section above)

TOP TIPS FOR DATABASE OWNERS

1. Make filings of the database structure and contents from time to time with Notaries Public.
2. Make sure that the contracts with employees and external contractors clearly state that both the copyright and database right derived from SIPA are vested in you.
3. Make any disclosure of confidential data subject to prior signature of an appropriate NDA, bearing in mind the lack of non-contractual protection of confidential information in Spain.

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The law is part-harmonised with general EU law (see EU section). In this section we therefore only highlight areas that differ from EU-wide law.

ORIGINAL DATABASES

See EU section. Under English case law the infringing acts can be undertaken in relation to a substantial part (measured qualitatively), or the whole of the database. This must now be read in the light of CJEU case-law which expressed the relevant test as whether the part reproduced expresses “the intellectual creation of the author”²⁰

²⁰ See *Infopaq*

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DATABASES IN WHICH AN INVESTMENT HAS BEEN MADE

Subject to EU-wide Database Directive (see [EU section](#)), implemented by the [UK Copyright and Rights in Databases Regulations 1997](#).

CONFIDENTIAL DATABASES

Protected? It is possible for confidential databases to be protected under the law of confidence. The equitable action for breach of confidence does not protect the information per se, but rather the unconscionable use or threatened use of such information when it is imparted in circumstances of confidence. See eg. *Coco v AN Clark (Engineers) Ltd*²¹, which is national law.

Ownership The protection of confidence may cover the confider of the database, but only in circumstances where the recipient of the information contained owes the confider an obligation to keep the information confidential (ie if a reasonable person in the position of the recipient would understand that the information was given in confidence).

Pre-conditions The information contained in the database will not be protected under the law of confidential information unless:

- (i) the information has the necessary quality of confidence;
- (ii) the owner has taken sufficient steps to preserve the confidentiality of its information; and
- (iii) a reasonable person in the position of the recipient would understand that the information was given in confidence.

May cover Customer databases, databases of a company's commercial or technical knowhow, databases of product ingredients.

Unlikely to cover Data that is published or licensed on terms which do not impose confidentiality obligations.

Duration Protection arises from the time the obligation of confidence arises (providing the confidential database) and lasts until the obligation ceases (usually until information passes into the public domain).

Scope of protection Usual elements to establish breach of confidence are (in addition to those listed above) that:

- (i) the information must have been imparted in circumstances importing an obligation of confidence and
- (ii) there must be an unauthorised use (or threatened unauthorised use) of that information to the detriment of the party communicating it

²¹ [1969] RPC 41



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Remedies Injunctions (interim and final), damages or an account of profits, delivery up or destruction, payment of legal costs.

PERSONAL DATA

See [EU law section](#). The EU-wide Data Protection Directive is implemented in the UK by the [Data Protection Act 1998](#).

ANY OTHER FORMS OF PROTECTION FOR PARTICULAR TYPES OF DATA?

No.

SIGNIFICANT RECENT CASES

Football Dataco v Sportradar the English High Court held that that a database of data relating to match events such as goals and bookings collected live during football matches was protected by database right. It said “factual data which is collected and recorded at a live event such as a football match about events outside the control of the person doing the collection and recording is not created by that person, but is obtained by him”. The court distinguished this database from a list of runners and riders in a horse race (which had previously been found not to attract database rights in the *BHB v William Hill* case). The list of runners and riders was created by the organiser of the events, but “the organisers of a football match do not create the goals: that is the province of the footballers”.

BSkyB v Digital Satellite Warranty Cover the English High Court held that database right subsisted in BSkyB’s database of customer details, rejecting an argument that because the details were entered by BSkyB the contents of the database were “created” by BSkyB.

UPCOMING LEGISLATIVE CHANGES

The on-going Hargreaves Review of intellectual property in the UK is considering widening certain defences to copyright infringement, including potentially introducing a defence to allow text and data mining for non-commercial research.



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TOP TIPS FOR DATABASE OWNERS

1. Audit the data you own: consider the range of potential rights available to protect the data, and take steps to ensure you benefit from such protection, such as obtaining IP assignments from all those who could potentially own the rights.
2. Audit the data you consume: are appropriate licence terms in place? Do those using the data know what they are? Does the licensor own all the relevant rights?
3. Trade marks may be an appropriate further protection for certain types of data (such as financial indices).



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12. USA

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ORIGINAL DATABASES

Protected? Databases are considered to be compilations under US copyright law; they may be protected by copyright if their selection and arrangement is creative, under the federal [Copyright Act](#). However, the data within databases, if factual, may not be copyrighted as a matter of both U.S. constitutional law (see [Feist Publications, Inc. v. Rural Telephone Service Co.](#)) and statutory copyright law (federal Copyright Act 17 U.S.C. § 102(b)).

Ownership Copyright belongs to the author of the database, or, where the database is created by an employee in the course of employment, the copyright belongs to the employer.

Pre-conditions Copyright protection arises upon creation of a copyrightable work, and registration is not needed. Registration *is* needed (for U.S. origin works only) in order to bring an infringement suit. Registration prior to infringement (or within three months of first publication, if infringement occurs prior to publication) is required to enable the copyright owner to (i) elect to receive statutory damages if it prevails in an infringement suit, and (ii) be eligible for a discretionary award of attorney's fees.

May cover compilations of estimated values of used automobiles; systems for classifying diseases.

Unlikely to cover telephone directories organized alphabetically; lists of sequentially numbered machine parts.

Duration the right arises upon creation. For works created since 1978, US copyright law gives a copyright term of the life of the author plus 70 years.



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Scope of protection copyright is infringed through unauthorized reproduction, distribution, or display of the original work, or preparation of a derivative work from the original work, which takes non-de minimis copyrightable elements of the original (eg, the selection or arrangement of otherwise non-copyrightable facts), so that there is substantial similarity between those copyrightable elements and the infringer's work.

Remedies include (i) damages; (ii) infringer's profits, to the extent not considered in the calculation of damages; (iii) if the copyright holder has timely registered its work, and at its election, it may recover, instead of actual damages and profits, statutory damages in the discretion of the Court, which may range from \$750 to \$30,000 per infringed work for ordinary infringements, or up to \$150,000 for wilful infringements; (iv) if the copyright holder has timely registered its work, the costs of the action, including a reasonable attorney's fee, in an amount to be determined by the Court.

DATABASES IN WHICH AN INVESTMENT HAS BEEN MADE

There is no additional protection – copyright protection for selection and arrangement is not dependent upon whether investment has been made.

CONFIDENTIAL DATABASES

Protected? Most states have adopted the [Uniform Trade Secrets Act](#), which defines confidential information subject to protection, and databases may fall under it. State common law may impose a duty on employees and others in a position of confidence to refrain from copying or disclosing confidential information. State contract law may also provide protection against copying databases by contract signatories. The courts have distinguished between negotiated contracts and “clickwrap” agreements (under which clicking a link is intended to constitute agreement to non-disclosure terms). Some courts have been reluctant to enforce the latter, particularly where there were questions as to whether a user was aware of and assented to restrictions.

Ownership In common law cases of duty not to disclose, protection will be granted to the employer or party disclosing in confidence. Protection belongs to the creator of the database in contract cases.

Pre-conditions In cases of common-law duties not to disclose, while there is some variation in state law, the requisites are usually (i) that the information is not generally known, (ii) the owner of the database has taken reasonable measures to protect the confidentiality of the information, and (iii) that the party receiving the database is an employee or is otherwise under an implied legal duty to protect the confidentiality of the information. In contract cases, the terms of the contract determine the position, and must clearly establish an intention that the party bound by the contract will not copy from the database or disclose its contents except as provided by the terms.

May cover Customer lists; commercial or technical knowhow, product formulations; software and informational tables.



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Duration In cases of common-law duties not to disclose, protection arises upon the disclosure of the information to the person bound by the duty, and is perpetual, unless the information enters the public domain without involvement of the party to whom it is disclosed, or is published by the owner. In contract cases, protection arises upon disclosure and lasts for the period stated in the contract. In non-disclosure agreements, the obligation to maintain information as confidential continues after the term of the agreement, until the information enters the public domain or is published by the owner without a restriction on further dissemination or use.

Scope of Protection Contract cases will vary according to the terms of the contract however, typically, infringement occurs upon disclosure to an unauthorised person, unauthorised publication, or upon use in violation of the terms of the agreement. The same scope of protection is generally imposed in cases where a common-law duty not to disclose is found.

Remedies Preliminary and permanent injunctive relief, and compensatory damages measured by the economic injury to the party owning the database. There is potential for award of punitive or exemplary damages in common-law duty cases where the confidential information is wilfully used in disregard of the rights of the owner. Punitive and exemplary damages are not awarded in contractual cases.

PERSONAL DATA

Is personal data given particular protection? There is a variety of laws and regulations at national and state level protecting personal data.

Who can rely on it? Data subjects and national and state consumer protection authorities can assert these rights.

What data?

1. personal health data
2. personal information in presented in credit reports and other reports bearing on a data subject's reputation
3. non-public personal data compiled by a financial institution
4. educational records regarding students
5. data regarding subscribers to communications services or video services
6. taxpayer data
7. data collected online from children; and a variety of other specific contexts.

Scope of protection This will depend upon the type of data or industry regulated. Typically this will include requirements of notice, consent, user access and correction of data and provisions requiring the data is kept secure.



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ANY OTHER FORMS OF PROTECTION FOR PARTICULAR TYPES OF DATA?

Databases created by employees of the United States Government are not entitled to copyright protection, under s105 of the federal [Copyright Act](#). Databases created by state or local governments, in contrast, may be protected by copyright.

SIGNIFICANT RECENT CASES

[Feist Publications v. Rural Telephone Service Co.](#) in which the US Supreme Court held, as a matter of constitutional law, that copyright law cannot protect the contents of databases against extraction and copying, but may provide a “thin” copyright for the original selection and arrangement of the data.

[Bellsouth Advertising and Publishing Corp. v. Donnelley Information Publishing, Inc.](#) in which the 11th Circuit of the US Court of Appeals held that classification and factual information from “yellow pages” directories are not protected by copyright and may be freely copied.

UPCOMING LEGISLATIVE CHANGES

Not currently – a number of bills that would have created a *sui generis* protection were considered but not enacted.

TOP TIPS FOR DATABASE OWNERS

1. Where at all possible, establish strong protection rights through individually negotiated contracts. If databases are made available to a mass market and negotiation is not possible, make sure that contractual provisions against disclosure/dissemination are visible to the user and that the user’s assent to those conditions can be clearly evidenced.
2. Establish strong technological protection (eg passwords) against unauthorized access or copying. Frequently update databases, where possible, so that if a user violates the terms of an agreement, its access can be terminated, and the value of data it still possesses will decay over time.
3. Consider (particularly in the case of sophisticated corporate users) whether to make contractual rights in the database subject to the laws of a country with stronger database protection than the US, if either the provider or user has some connection to that country. US courts will frequently enforce a choice of foreign law among sophisticated parties, even though due process may require the use of a US forum to enforce those rights.



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