Australian and New Zealand copyright law for databases, compilations, and directories

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In December 2010, the Full Court of the Federal Court of Australia delivered another landmark decision for Australian copyright law. In *Telstra Corporation Limited v Phone Directories Company Pty Limited* [2010] FCA 44, the Court unanimously held that the Yellow Pages and White Pages telephone directories are not protected under the Copyright Act 1968 (Cth).

The findings of the Court can be summarised as follows. First, due to the high number of persons involved in the database creation process, it was not possible to accurately identify who provided the necessary authorial contributions. Secondly, the work was not the result of human authorship, but was generated by computer software. The directories were therefore not considered “original works” because their creation did not involve independent intellectual effort or the exercise of sufficient literary effort.

Given the importance of the directories to Telstra’s revenue, it is likely that the decision will be appealed to the Australian High Court. However, the Federal Court’s decision was unanimous, the chance of a reverse finding is unlikely.

New Zealand Copyright Law

This issue has not been determined in the New Zealand courts, however, it is likely that they will find the Australian analysis persuasive. That said, there are a number of differences between New Zealand and Australian copyright law that may prompt different decisions.

Under the New Zealand Copyright Act 1994, a "compilation" is defined to include "a compilation of data"., whereas the Australian Act does not contain a definition of "compilation"

The New Zealand approach to "original works" may also differ to the Australian approach. In the Court of Appeal case of *University of Waikato v Benchmarking Services Limited* (2004) 8 NZBLC 101,561, the determining factor for originality was deemed to be whether sufficient time, skill, labour, or judgment is expended in producing the work.The originality or creativity of the ideas embodied in the work may be considered less important than the work's form of expression. In other words, compilations may attract copyright protection if sufficient time and labour has been expended in collecting, selecting, and arranging the data.

Implications

Producers of databases, compilations, and directories in Australia and New Zealand should be aware of the possible implications for their work. Producers of publicly available databases in Australia will need to accept that competitors can copy their data. For example, telephone directories, classifieds, real estate sites, and television

guides are all comprised of data that may not be subject to copyright protection. Owners of private databases should also be wary, and should consider systems for the protection of their data, whether technological or contractual.

Of course, the decision is a positive one for technology innovators and newcomers to the market who will now be able to develop their own databases, without the fear of infringing copyright. More freely available information may be considered by some to be a positive. Owners of databases on the other hand, who rely on public databases as a source of income, are likely to be disappointed with the Court's decision.

If New Zealand courts follow the Australian precedent, simply adding financial or human resources may not afford adequate protection to the resulting work. The New Zealand legislature may well be looked to for change or clarification in the coming years.

The European Directive

It should be noted that the European Union has a Database Directive 96/9/EC protecting databases, which "by reason of *the selection or arrangement* of their contents, constitute the author's own intellectual creation" (Article 3(1)). Article 7(1) further grants the producer of a database the copyright if he or she "shows that there has been qualitatively and/or quantitatively a *substantial investment* in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database". Databases may be protected by copyright under certain circumstances amounting to substantial investment.

Australian copyright law as it currently stands, is very different to the European Directive. The position under New Zealand copyright law on this matter is less certain but it would seem that courts are more likely to make a decision in line with the European Directive than follow the Australian approach. However, producers of databases on both sides of the Tasman should be aware of the possibility of competitors copying of databases with impunity.