

# LEGAL PROTECTION OF TRANSIT DATA<sup>©</sup>

1

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# Introduction

2

- As one source states, much of the American economy is based on “the creation and compilation of information” that is not copyrightable or is “only weakly protected - by copyright.”
  - J. Wolfson, “Contract and Copyright are not at War: A Reply to “The Metamorphosis of Contract into Expand,”” 87 *Calif. L. Rev.* 79, 86 (1999).
- There is some protection for data under the copyright laws, but transit agencies protect their data primarily by contracts, licenses, and terms of use agreements, not the copyright laws.

# Introduction

3

- The source for the presentation is my article: Dr. Larry W. Thomas, “Legal Arrangements for Use and Control of Real-Time Data,” *Legal Research Digest* 37 (June 2011) or LRD 37 – see [http://www.nap.edu/catalog.php?record\\_id=14549](http://www.nap.edu/catalog.php?record_id=14549).
  - Citations and some quotation marks appearing in LRD 37 are omitted in the slides.
- The rules discussed in LRD 37 apply also to other data belonging to transit agencies.
- Another digest in progress is “Liability of a Transportation Agency for the Unintentional Release of Secure Data or the Intentional Release of Data on Monitoring the Movements or Activities of the Public.”

# Section 102(a) of the Copyright Act

4

- Under § 102(a) of the Copyright Act, “[c]opyright protection subsists ... in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”
  - An original work is protected by copyright law from the moment it is “first embodied in a tangible medium” and even “subsists” prior to a copyright registration.
  - An author’s copyright exists regardless of whether his or her work has been registered with the Copyright Office.
  - The failure to register a copyright may affect a copyright owner’s claim for damages against an infringer.

# Copyright by Federal and State Agencies

5

- The federal government may hold a copyright in a work transferred to the government, but the government may not copyright a work prepared by a federal employee.
- A work is copyrightable when commissioned by the government but written by an independent contractor.
- The majority rule appears to be that unless prohibited by state law state and local agencies may seek copyright protection for their works.

# Copyrightability of Data

6

- Although data are not copyrightable, a compilation of data having some originality is subject to the copyright laws.
- There is some copyright protection for a database as a compilation if it satisfies the test of originality within the meaning of the Copyright Act.
- Even when data are copyrightable as a compilation or database, the protection is “thin.”

# Requirements

7

- **There are three requirements for a compilation under the copyright laws:**
  - (1) the collection and assembly of preexisting data;
  - (2) the selection, coordination, or arrangement of that data; and
  - (3) a resulting work that is original, by virtue of the selection, coordination, or arrangement of the data contained in the work.

# Requirement of Originality

8

- Although a telephone directory is a compilation, in 1991 in *Feist Publications, Inc. v. Rural Tel. Serv. Co.* the U.S. Supreme Court held that a telephone directory was not protected by the copyright laws.
  - The Court stated that “facts are not copyrightable.”
  - A factual compilation may meet the originality test “if it features an original selection or arrangement.”

# Data may be Copied Freely

9

- There is no copyright protection for the underlying data, which may be extracted freely and copied and distributed by anyone without infringing the copyright for the compilation.
- In 2007 in *N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, a case involving real-time data, the United States Court of Appeals for the Second Circuit affirmed a federal district court's decision in New York holding that real-time data are not subject to the protection of the copyright laws.

# Obstacles to the Copyrightability of Data

10

- **There is an issue whether there is an author of data within the meaning of the Copyright Act.**
  - A discoverer of a fact is not an author.
  - Originality requires some independent, although minimal, creativity.
- **There is authority that a database produced automatically by a computer program is not copyrightable because there is no exercise of judgment and discretion in choosing the data to include.**

# Obstacles to the Copyrightability of Data

11

- There is also some authority that a reproduction captured momentarily in the memory of a computer is not a work fixed in a tangible medium of expression.
- When the process for the selection of data is too rote and mechanical even a compilation is not protected by the copyright laws.

# Obstacles to the Copyrightability of Data

12

- Copyright protection does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in a work.
  - Facts, ideas and processes are not copyrightable.
  - Numbers, short words, and phrases are not copyrightable.
- As discussed in the LRD 37, there are other issues that preclude the copyrightability of data other than in some instances as a compilation or database.

# Obstacles to the Copyrightability of Data

13

- When a database is copyrightable, according to a 1989 “Report on Legal Protection for Databases” by the Copyright Office, it is possible to register updates periodically to a database registered with the Copyright Office.
- Importantly, even with copyrightable compilations or databases, the data included in the work may be copied, used, or distributed without violating a copyright.

# Protection of Proprietary Rights in Data

14

- Although there is some authority to the contrary, it appears that the majority rule is that a contract or license may restrict access to or the use of data until the data becomes part of the public domain.
- According to one source, government agencies are protecting their non-copyrightable data by using copyright-like controls, such as:
  - licensing agreements, royalties for the use of data, restrictions on the re-disclosure of information, limitations on who may be qualified recipients, and denial of access to digital versions of publicly available information.

# Protection of Proprietary Rights in Data

15

- For example, a web site may constitute an original work of authorship protected by the Copyright Act.
- The owner of the web site may control the data accessible via the site by a terms-of-use agreement to which users must consent before having access to the site so as to restrict the further use, copying, and/or dissemination of the data.
- Several agencies responding to a survey for LRD 37 stated that they rely on contracts such as terms of use and other agreements to protect their data.

# Other Federal Laws Applicable to Data

16

- **The 1998 Digital Millennium Copyright Act applies only to a work protected by the Copyright Act.**
  - A copyright-holder may use digital rights management (DRM) technology to place a “digital fence” around any data provided to a requestor.
- **The Electronic Communications Privacy Act (ECPA), although a criminal statute, creates a cause of action for damages and other relief against electronic trespassers or “computer hackers.”**
  - Title I of the ECPA applies to the interception of electronic communications.
  - Title II created the Stored Communications Act (SCA) to cover unauthorized access to stored communications and records.
  - The SCA prohibits the intentional accessing of electronic data without authorization or in excess of one’s authorization.

# Other Federal Laws Applicable to Data

17

- **The Federal Wiretap Act proscribes the interception of electronic communications.**
  - The Act applies, *inter alia*, to any person who intentionally intercepts, endeavors to intercept, or procures another person to intercept an electronic communication.
- **The Computer Fraud and Abuse Act, directed primarily at the prevention of unauthorized disclosure of data involving the national defense or foreign relations of the United States, includes provisions that apply to damage caused by unauthorized access to or access in excess of authorization to a computer system.**

## Claims based on Unauthorized Copying or Use of Data

18

- As for claims under state law for unauthorized copying of data, the courts have ruled that some remedies are not available because they are preempted by the Copyright Act.
- State law claims are preempted when they are equivalent to a copyright claim applicable to an act of reproduction, performance, distribution, or display of a work in violation of an owner's copyright.
- Although there is some authority to the contrary, it appears that the majority rule is that a contract or license may restrict access to or the use of data until it becomes part of the public domain or appears in a compilation or database.

# Protection of Data as a Trade Secret

19

- Forty-five states and the District of Columbia have adopted some version of the Uniform Trade Secrets Act (UTSA), a model law defining rights and remedies regarding trade secrets.
- A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.
- Pursuant to the UTSA “any information” may constitute a trade secret.

# Protection of Data as a Trade Secret

20

- Under the UTSA a trade secret includes information, including a formula, pattern, compilation, program device, method, technique, or process, that:
  - derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use and
  - is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
- To preserve a trade secret the owner must be careful to limit access to the information, and such information should be disclosed only in confidence.

# Protection of Data as a Trade Secret

21

- Although a misappropriation of trade secrets is unlawful, trade secret law does not create a right in the information itself.”
- Thus, an owner has no proprietary interest in the information, and the public at large remains free to discover and exploit the trade secret through reverse engineering or by independent creation.

# Protection of Data as a Trade Secret

22

- A claim may be available for misappropriation of trade secrets under either the UTSA or at common law.
- However, a claim under state law for misappropriation of trade secrets could be preempted by the Copyright Act if the claim is merely, for example, for unauthorized copying.
- A claim for misappropriation of a trade secret based on a breach of trust or confidential relationship is less likely to be preempted.

# State Statutes Protecting Data

23

- **Some states have statutes that protect electronic communications or archived data, such as:**
  - California's Penal Code (§ 502) and
  - Pennsylvania's Wiretapping and Electronic Surveillance Control Act.

# Public Records Disclosure Laws

24

- Transit agencies may be requested to produce a database pursuant to a state public records disclosure law.
- Assuming that under applicable state law a database is subject to production, the courts in at least two states have held that a requester must sign an end-user agreement so as to restrict the further distribution or use of the database.

# Conclusion

25

- Copyright protection may be available for a compilation or database, but copyright is thin because the underlying data may be extracted without violating the copyright.
- Transit agencies rely on contracts to protect their data, such as a terms of use agreement.
- Some claims under state law for unauthorized use of data may be preempted by the copyright laws, but the majority rule appears to be that a claim based on a private contract is not preempted.

# Contact Information

26

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