Kluwer Copyright Blog

A list of permanent memory absolute addresses

Maurizio Borghi · Wednesday, December 14th, 2011

UK: High Court Chancery Division, 09-11-2011: Forensic Telecommunications Services Ltd v. Chief Constable of West

Copyright does not subsist in a list of permanent memory absolute ("PM Abs") addresses of mobile phones that are used to extract data from mobile phones in forensic investigations. There may have been an expenditure of skill, labour and judgement but it has not been of the right kind. If copyright did subsist in the list, the defendants would have infringed copyright by substantially reproducing the list. Fair dealing defences would not apply. However, the list is protected by the database right due to the investment made in obtaining the data. By posting the list on the Phone-forensics website, the defendants infringed this right. Since at the material time the PM Abs list was confidential to the claimant, breach of confidence claims were established.

Facts of the Case: Forensic Telecommunications Services ("FTS") recovers digital evidence from mobile telecommunications devices, such as mobile phones, and conducts cell site analysis of the location of the mobile devices in the context of forensic investigations. As part of the process of recovering deleted data from mobile phones, FTS has compiled a list of permanent memory absolute addresses ("PM Abs") for a considerable number of Nokia mobile phones. The PM Abs addresses have been obtained both with manual techniques from 2000 to 2002 and by use of a software from 2003 onwards. Mr Bradford was responsible for developing this software. In 2004, FTS agreed to supply the software and a list of PM Abs addresses to the UK security agencies but not to the UK law enforcement agencies, including the police. Mr Hirst, while employed by the West Yorkshire Police as detective constable, developed an in-house facility for extracting mobile phone data and created a list of PM Abs addresses similar to that provided by FTS. He did so by posting a list of these addresses to a secured phone-forensics website where other law enforcement officers could post additional entries to the list (the "WYP List"). He had received many addresses from a security service officer who had FTS software installed in his computer. FTS claimed that the WYP List was a copy of their own list. FTS also claimed that a further list of PM Abs addresses distributed in conjunction with a programme called "Pandora", developed by an American company in collaboration with Mr Hirst, was also a copy of their list.

Judgment of the Court: The Court found that copyright does not subsist in the PM Abs list. It subsists neither in the items of the numerical data that comprise the list nor in the collection of these data. To the court, the list is a table which is a database, albeit a very simple one, but it is not

a true compilation in any event due to the lack of planning and overall design. Citing Sawkins v Hyperion and Eisenman v Qimron as authorities, the Judge held that the originality threshold would not have been met as regards the PM Abs lists. To the Court, Mr Bradford "exercised no literary judgement even in the widest sense of the word literary, and he did not devise the form of expression of the work to any material extent".
Even though the Judge found that no copyright subsists in the PM Abs list, he moved on to consider whether infringement would have occurred. To the Judge, the similarities between the lists and the circumstances of the case raised a strong inference of copying. He refused to accept the defendants' submissions that two parties working independently towards the same end would have obtained similar outputs.

The judge moved on to say that if copyright subsisted in the list, the defendants would have infringed it and they would not be covered by the fair dealing defence. Although the Judge accepted that the use made by the defendants was "for a non-commercial purpose", he did not accept that it was "for the purpose of scientific research", since the defendants reproduced the PM Abs list for use in criminal investigations. The defendants' act was in competition with FTS and could not amount to fair dealing. If copyright did subsist in the list, the defendants would have infringed and it would have no "innocence defence" to damages.

The Judge moved on to consider whether the PM Abs list is protected by the database right. Even though the skill, labour and judgement expended in the creation of the list was not of the right kind to attract copyright protection, the investment made by the FTS in obtaining and verifying the data was substantial. The defendants were found to have extracted and re-utilised a substantial part of the contents of this database both qualitatively and quantitatively.

At the material time, the PM Abs list was confidential to the FTS and the defendants misused this confidential information. The Judge used the Coco v Clark test to submit that the quality of confidence was of the right quality.
Infringement of the database right and breach of confidence cover only the WYP lists but not the Pandora's Box list.

(Stavroula Karapapa & Maurizio Borghi, Brunel University).

For the full text of the judgment, click here.

A full summary of this case has been added be posted on www.KluwerIPCases.com

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