Build an IP case to protect your database

It's time to treat your company data as proprietary and confidential.

Our predecessors have always been collectors. Hunter-gatherers survived in harsh climates by collecting stone axes, arrowheads, animal furs and the like. Today, as lawyers, many of us channel these basic instincts into feverish collection of electronic data — overflowing email in-boxes, Word documents, expert reports and sundry PDF forms with too-small print.

While electronic data would be cold comfort on a frozen tundra, collecting and protecting data can make or break many modern businesses. If the data is lost, the business could be in jeopardy. Consider departing employees taking customer lists, or a corporate partner may go rogue and misappropriate data and other proprietary information. Industrial espionage by an insider or hacker is becoming increasingly common.

Lawyers have raging debates about the extent of intellectual property protection in databases. It is important for all business to treat collections of data as proprietary and not get hung up by over-analyzing the extent of IP protection that may apply. The keys are to round up the data, treat it as proprietary and keep it confidential.

TRADE SECRETS
Many aspects of a business are routinely kept as trade secrets in a database, with little fanfare. Customer lists, engineering data, manufacturing protocols and secret formulas are all potential trade secrets. The trade secret is property (*RL Crain Limited v RW Ashton & Ashton Press Manufacturing Co*). It can be bought, sold or licensed, like other types of IP. You have to treat the information as a secret in order for it to be recognized by a court and enforced as a trade secret — control it confidentially and restrict access to it. The property in the trade secret lasts as long as the secret is kept. So trade secret protection is worthwhile for many collections of proprietary information, but not for database information made publicly available to subscribers.

Not all secret data qualifies as a trade secret either. However, it is a good company practice to treat it all as proprietary and a trade secret unless there is a definitive reason that it will not qualify.

COPYRIGHT
Copyright protection applies to many types of works produced by companies. If you have copyright protection, it would be an infringement for others to engage in unauthorized copying, for example, by printing or copying the database information to a hard drive.

The basic rule is that there is no copyright protection in mere facts or ideas. It takes more than mere effort to compile information. Sweat of the brow or industrious collection to compile facts for a database is not adequate for copyright in Canada. The work produced by the author must meet the originality requirement. A minimal level of skill and judgment is required to create a work that merits copyright protection. The arrangement or selection of facts in a certain manner may create copyright. Likewise, the database structure (e.g. the screens you navigate through) may trigger copyright. So would a user manual and flow charts. The time taken to manipulate and refine your database content and interface to make it more commercially useful may also be improving its IP strength. For technically inclined companies, original computer code that the company generates to customize a database also triggers copyright. There is no option for patent protection for database content, but if you develop a database system that has new and inventive technical features and function, it may be patentable subject matter.

CONTRACTS TO CONTROL AND RESTRICT ACCESS
There are many opportunities to generate IP during work on designing and implementing a database and its contents. Assignments of ownership should be obtained from anyone generating copyright or trade secret information on your company's behalf. Access to a database must be carefully limited. Employees and commercial partners must acknowledge and abide by confidentiality and restrictions on access to, and use of, the database contents. End user terms of use and click-through agreements can help control certain users. Strong passwords, firewalls and antivirus/malware protection are important.

Databases, like our ancestors, become more sophisticated with time. Rudimentary collections of information become great cities populated with valuable knowledge. Make sure you have a culture of IP in your city. ⬛

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