

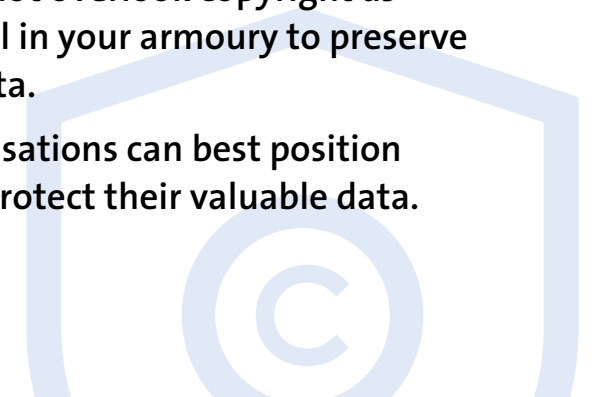
Data-driven business

The forgotten shield: How copyright can protect the value of your data

COVID-19 has accelerated the shift to digital, generating increasingly large volumes of data and, in turn, opening up opportunities for creating and protecting value.

With ever-advancing technology, it is also increasingly easy for competitors and bad actors to access your data and exploit it for their own gain. While you can impose confidentiality obligations and contractual restrictions, do not overlook copyright as another potentially effective tool in your armoury to preserve the commercial value of your data.

Our IP team explains how organisations can best position themselves to use copyright to protect their valuable data.



EVEN BEFORE
COVID-19, IT
WAS ESTIMATED
THAT **BY 2025**

463 ^{OR} **(1,000,000,000,000,000,000)**
exabytes OF DATA WOULD BE
CREATED **EACH DAY.** BYTES
(Source: the World Economic Forum]

Increasing by the day: the commercial value of data

Data often takes a great deal of time, money and other resources to gather, aggregate and process – in other words, to turn raw data into something that can be utilised, commercialised and monetised.

CONSIDER THE FOLLOWING:

ORGANISATIONS CAN DIRECTLY MONETISE DATA BY SUPPLYING DATASETS TO CUSTOMERS – eg ASX DataSphere is an online platform through which users can purchase various datasets of financial market information compiled by ASX Limited, and even upload and commercialise their own data.

DATA CAN ENABLE AN ORGANISATION TO UNDERSTAND AND CAPITALISE ON CUSTOMER BEHAVIOUR – eg many ecommerce platforms use Google Analytics, a service that reports on website traffic data so that platform operators can track how customers are navigating their websites, determine which products are most popular in which markets, identify problems with user experience, and so on.

DATA CAN ASSIST ORGANISATIONS WITH DEVELOPING AND IMPROVING PRODUCTS AND SERVICES – eg Gilead Sciences is currently gathering and synthesising clinical data concerning the molecule remdesivir to determine its safety and efficacy in the treatment of COVID-19. Organisations in the healthcare sector rely heavily on the data generated by clinical trials and scientific research to bring new drugs to market and to find new uses for existing drugs.

ORGANISATIONS USE DATA TO TRAIN THEIR ARTIFICIAL INTELLIGENCE TOOLS – eg Red Marker offers a software tool that scans marketing materials for legal and regulatory risks. Constantly feeding the tool new data, particularly as marketing laws change, ensures it remains accurate and up to date. Data is essential for such machine-learning.

MARKET-STANDARD APPROACHES TO PROTECTING THE COMMERCIAL VALUE OF DATA

Organisations have traditionally relied on statutory or general law confidentiality obligations to protect their data. That may be enough if the data comprises commercially sensitive information, trade secrets or know-how, and you have appropriate protocols and controls in place to maintain the confidentiality of the data.

When the data is out in the open, some organisations try to impose contractual restrictions on third parties to prevent them from using the data in particular ways or for certain purposes – eg an online platform operator might include a prohibition on web scraping in the Terms of Use available on its website homepage. This approach may not always be successful.

For privacy violations, cyber security incidents and similar data breaches, there are likely to be other avenues of recourse. See what our TMT team has to say: [Pulse: technology, data and cyber security](#).

Copyright as an added layer of protection

WHAT IT PROTECTS AND HOW

Copyright protects a range of materials, such as 'literary works'. It provides the copyright owner with several exclusive rights which, depending on the type of materials, may include the rights to reproduce the materials and to communicate them digitally. If somebody else exercises those rights in respect of a substantial part of the materials without a licence or a defence, they are likely to be infringing the copyright. That makes copyright a powerful and long-lasting bundle of rights which, in most cases, only expires 70 years after the death of the author of the materials.

Despite the term 'literary work', copyright does not require literary or creative merit. While copyright can protect a novel or a poem, it might also protect user manuals, advertising copy, computer source code, business correspondence and other documents. The key requirement for written materials to be eligible for copyright protection is originality. That is, they need to be the product of a human author applying some 'creative spark', 'independent intellectual effort' or 'skill and judgment', and not simply copied from another source.

COPYRIGHT IN DATASETS

Whether a dataset is protected by copyright will largely depend on how the data has been arranged, structured or presented. The *compilation* of the data, rather than the data itself, can be protected.

That is because data itself often comprises factual information: statistics, contact details, sales figures, testing results and so on. Copyright can protect the *expression* of facts, but not the facts themselves.

Actions your organisation can take now to optimise its chances of copyright protection

This Insight focuses on whether copyright can *subsist in* (ie protect) datasets. Whether your organisation *owns* that copyright, and whether a third party has *infringed* the copyright, are separate questions that raise different considerations.

1

ORGANISE OR ARRANGE THE DATA IN AS ORIGINAL A WAY AS POSSIBLE.

For some types of data, there are only so many ways it can be structured or grouped. However, the more creative, thoughtful and unique you can be, the more likely the dataset will be protected by copyright. In an important Australian case involving the copying of Channel Nine TV show schedules, the alleged copyright infringer conceded that copyright subsisted in the schedules, but the High Court questioned the wisdom of that concession: 'In this case, a chronological arrangement of times at which programmes will be broadcast is obvious and prosaic, and plainly lacks the requisite originality.' The Court might have treated a more unusual arrangement (eg where the TV shows are ordered by genre or ratings rather than timeslot) differently.

2

INVOLVE AS MUCH HUMAN INPUT AS POSSIBLE.

Relying too heavily on computers and automated processes when creating datasets may mean there has been insufficient human authorship to attract copyright protection. The courts have used helpful analogies to clarify the position at the two ends of the spectrum: copyright will not subsist if a computer has been primary responsible for the creation of the work like 'a plane with its autopilot engaged ... flying itself', but it could subsist if a human has operated the computer as a mere tool to create the dataset like 'a novelist uses a word processor'. But of course, disputes tend to arise in the grey area in between. In another seminal Australian case, the Full Court held that copyright did not subsist in the Yellow Pages directory, as its compilation was largely automated by a software program with only superficial human oversight.

3

KEEP AN EYE ON WHO IS COMPILING THE DATA, AND MAINTAIN DETAILED RECORDS OF THE COMPILATION PROCESS.

Datasets may be created over a long period of time, by a slow process of accretion and with input from multiple employees and other workers. The rules around copyright authorship are strict, and if you are unable to identify the various contributors or establish that there was sufficient collaboration between them, copyright might not protect the final product. Maintaining records of who created what and when will also place you in a better position to establish who owns any copyright in the final product. Ownership will depend on exactly who created the dataset and their contractual or other legal relationship with your organisation.

4

REMEMBER THAT COPYRIGHT WILL ONLY SUBSIST IN SOMETHING LIKE A DATASET IF YOUR EFFORTS IN CREATING THE DATASET WERE DIRECTED TOWARDS CREATING ITS 'MATERIAL FORM'.

Efforts directed towards antecedent or preparatory stages of the creation process will be irrelevant to the question of whether a dataset is protected by copyright. You might have spent millions of dollars in developing marketing surveys, holding focus groups and reviewing consumer responses, but that will not necessarily mean the resulting compilation of feedback data is protected by copyright, even if it is a work of real commercial value.

Copyright protection in play

In the 1990s, the European Union attempted to overcome these difficulties, and to recognise the resources that businesses often invest in datasets, by establishing a separate 'database right' alongside copyright. However, this right does not completely avoid the types of obstacles that datasets face under Australian copyright law. In any event, Australia has no similar database right and there are no current plans to introduce one. For more information about the Australian Government's current copyright policy agenda in the digital age, see our recent Insight: [From Notepads to iPads – copyright protection in a digital world](#).

While traditional copyright principles do not always apply easily to datasets, this does not mean copyright protection is impossible in Australia. Unlike the Yellow Pages and the Channel Nine TV schedules, Australian courts have found certain compilations to be protectable; see right-hand panel.

The best approach: If you implement appropriate IP protocols and frameworks in relation to the development of your data (and other key assets), you will place yourself in the best position to create, own and enforce strong IP rights, including copyright, which increase the value of your business and your longevity in the marketplace.

COMPATIBILITY INFORMATION ABOUT PRINTER PRODUCTS

Dynamic Supplies Pty Ltd, a wholesaler of office supplies, created a chart that consumers could use to determine the compatibility of certain printer products (such as ink cartridges) with certain printers. In copyright infringement proceedings against a competitor that copied the chart, the Federal Court held that the chart was protected by copyright:



Although the information in the [chart] dealt with known facts about known products, it represented a collection of information brought together in a particular convenient arrangement by [Dynamic] that was designed to facilitate the searching and cross-referencing of information relating to a particular universe of products (namely, printer and computer consumables supplied by Dynamic).

The Court awarded special damages to Dynamic, partially on the basis that the Court wanted to correct an apparent 'perception in the community that copyright cannot subsist in compilations of publicly-available data as a form of literary expression, and ... correspondingly ... a perception that works of that kind can, with impunity, be pilfered'.

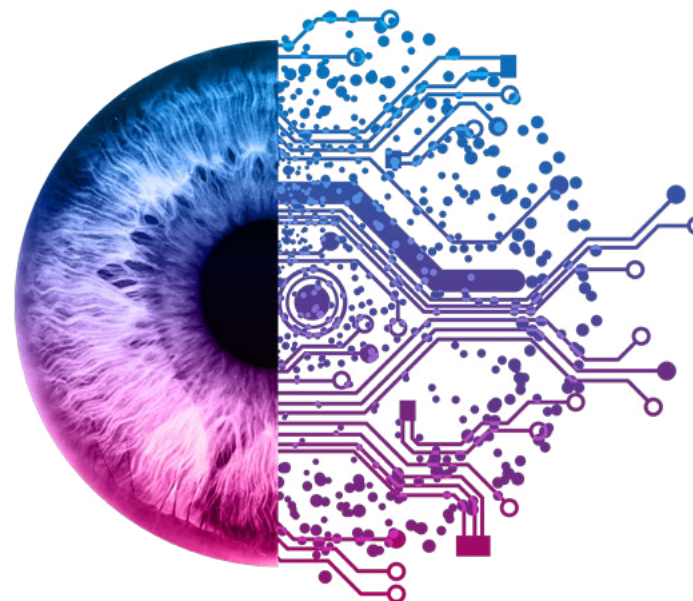


RUGBY LEAGUE STATISTICS Sports Data Pty Ltd was in the business of collecting and analysing sporting event data, and was the official supplier of statistics to the National Rugby League for many years. When the NRL terminated that arrangement and appointed a competitor in its place, Sports Data applied for an injunction on the basis that the competitor was using the template and criteria set for statistical analysis that Sports Data had created, thereby infringing copyright. Based on evidence about how employees of Sports Data had selected and arranged the materials, the Federal Court held that it had 'at least an arguable case that copyright subsists in the compilation of event descriptions that is found within fields in the specified tables extracted from the [so-called] NRLHistory database'.

Beyond data

Keep in mind that IP may also protect the thing that processes, analyses or creates the datasets. In the Yellow Pages example, the Court hinted throughout its judgment that the purported copyright owner might have fared better had it claimed copyright in the source code of the computer system that compiled the Yellow Pages, rather than the Yellow Pages itself. If the automated system was novel and inventive, its owner may have also been able to apply for patent protection, which lasts for 20 years (for standard patents) or eight years (for innovation patents).

At a time of unprecedented technological innovation, it is important to think holistically (including from an IP perspective) about your organisation and the assets that are being developed by and for your organisation, as well as how to safeguard them in this constantly evolving and uncertain environment.



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