Copyrights & Database rights

Readings: Tavani, Chapter 8: “Intellectual Property Disputes in Cyberspace”
Further readings: F. Bott: Professional Issues in Information Technology. British Computer Society, 2005.Chapters 1, 11-13

“Copyright, Designs and Patents Act 1988 (CDPA 1998): http://www.legislation.gov.uk/ukpga/1988/48/contents
“The Copyright and Rights in Database Regulations 1997” http://www.legislation.gov.uk/uksi/1997/3032/made

Schemes to protect IP

- Copyright (music, art, film, literary works..)
- Patent (inventions and processes)
- Trademark (word, name phrase, or symbol that identify a product or service; a “brand identity”)
- Design (what a product looks like)
- Trade Secret (information used in the operation of a business or other enterprise)

- leaving copyright for last…

Patents

- form of legal protection given to individuals who create an invention or process.
- software can be patented in some countries, e.g. USA
  - more than 40k software patents are issued every year in US
  - exclusive rights for a particular software technique
    - (many frustrating cases, e.g. “using XOR to draw a cursor on a bitmap display”)
  - be aware if you want to export software or services to the USA

Patents in UK

- in UK, patents **cannot describe algorithms** or mathematical methods
    - (these are classed as "**discoveries**")
- but, software that make a technical contribution or solve a technical problem can be patented
    - (e.g. Nokia application to patent software to programme a mobile phone system remotely was (eventually) approved in UK on the basis that it made a technical contribution when compared to current technology)

Trademarks

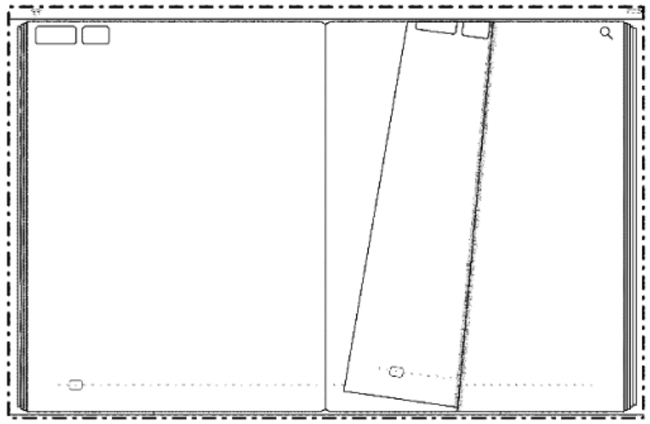
- sign which can distinguish the goods and services of an organisation from those of others
- a sign includes words, logos, pictures or a combination of these
- a trademark gives the owner the legal right to take action against anyone who used their mark or a similar mark on the same or similar goods and services
- however, you can use a trademark to identify the source of goods and services
- To qualify for a trademark, the "mark" or name is supposed to be distinctive
    - however, a (not so distinctive) trademark for "uh-huh" was granted to Pepsi
    - but AmericaOnLine (AOL) could not trademark “You’ve Got Mail!”, “Buddy List” or “IM” (for instant messenger)

Design

- Design relate to the physical appearance of an item (industrial or handcrafted)
    - lines, contours, colours, shape, texture, material
- to qualify, design must be new and individual in character
- can protect design of devices (the design of a specific tablet as a, say, rectangular shape, rounded corners, set of colours, position and shape of buttons)
- or can protect graphical user interfaces (GUIs), any elements of these (icons) or animated features

Design

- For example, Apple filed a design patent for the page turning animation
- doesn't cover any animation for turning a page, but rather the appearance of Apple's design in turning a page
- so other key players (e.g. Amazon for Kindle or Barnes & Noble) cannot exactly copy this particular turning animation



Apple's Design Patent D669,906

Physical page turn

Trade secrets

- information that is highly valuable and considered crucial in the operation of a business or other enterprise (e.g. formula for Coca-Cola, a chemical compound, a blueprint)
- used when an invention does not meet the patentability criteria, or when disclosing it through the patenting process is considered harmful to the business
    - trade secrets are valuable only as long as they are not disclosed
- in the UK are protected by common law under the law of confidence
- Best example in software? Google search algorithm!

First ever copyright law!

- Concerns arose with the widespread publishing of pamphlets made possible by the printing press:
    - the British monarchy wanted to control the spread of "subversive" and "heretical" works being printed;
    - and
    - authors wanted to protect their creative works from being reproduced without their permission.
- The *Statute of Anne*, also known as the Copyright Act 1710, is an act of the Parliament of Great Britain which was the first statute to provide for copyright regulated by the government and courts, rather than by private parties
- It became statutory with the passing of the Copyright Act 1911. The current act is the Copyright, Designs and Patents Act 1988.

Copyright, Designs and Patents Act, 1988

Copyright is a property right which applies to

- original literary, dramatic, musical or artistic works (literary work covers also computer programs)
- sound recordings, films, broadcasts or cable programmes (sound recording is a recording of sounds, from which the sounds may be reproduced, regardless of the medium)
- the typographical arrangement of published editions

Copyright lies with the **author** of a work, or, if the work has been created by an employee in the course of his employment, with the **employer**

Duration of Copyright

- literary, dramatic, musical or artistic works: **70 years**
  from the end of the calendar year in which the last remaining known author of the work dies, or from the end of the calendar year in which a work was created or made public, whichever occurred later, if none of the authors is known(*)

- But, if the work is **computer-generated** copyright expires at the end of the period of **50 years** from the end of the calendar year in which the work was made.

  (*) An author is unknown if it is not possible for a person to ascertain their identity by reasonable inquiry

- Note: These rules also apply if the owner of the copyright is the employer of the authors

Duration of Copyright (2)

- sound recording, broadcast or cable programmes: **50 years** from the end of the calendar year in which the work was created or the work was first released, if released within 50years of being created

- films: **70 years** from the end of the calendar year in which the last known principal director, author or composer dies, or the year in which the film was created or made public if they are unknown

- typographical arrangement of published editions: **25 years** from the end of the calendar year in which the work was first published

The “rights” in copyrights

- Copyright restricts what actions one might perform with the copyrighted work

- The owner of the copyright has the exclusive right:
  (a) to copy the work
  (b) to issue copies of the work to the public
  (c) to rent or lend the work to the public
  (d) to perform, show or play the work in public
  (e) to communicate the work to the public
  (f) to make an adaptation of the work or do any of the above in relation to an adaptation.

“The owner of © has exclusive right to communicate the work to the public”

- The Copyright and Related Rights Regulations, 2003 (which extend and amends the 1988 act) clarifies the notions of communication to the public, which include:
    - the broadcasting of a work
    - the making available to the public of a work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them
        - this covers YouTube, BBC iPlayer, and similar services

What is copying?

- In most cases copying does not mean reproduction or reusing of ideas or information
- Copying in relation to:
  - a literary, dramatic, musical or artistic work means reproducing the work in any material form, including storing the work in any medium by electronic means
  - a film or a broadcast includes making a photograph or the whole or substantial part of any image forming part of the film/broadcast
  - the typographical arrangement of a published edition means making a facsimile copy of the arrangement

"The © owner has exclusive rights to copy the work"

- There are no "fair use" exceptions in UK law
- But **fair dealings** with copyright works in form of quotation and excerpts are allowed provided:
    - quoted material is justified & the source of the quoted material is acknowledged

  and the quotation/excerpts are used

    - for the purpose of critical review, news reporting, non-commercial research or education
- Incidental copies (e.g. incidental recording of images or music in a home movie) or temporary copies (e.g. web cache) are also allowed
- THESE EXCEPTIONS NEED TO BE STRICTLY CHECKED (many misconceptions on what is allowed, esp. under "fair dealing")

"The © owner has exclusive rights to copy the work"

- Since Oct. 2014 there is an exception for personal copies for private use:
- A copy of a work **other than a computer program** by in individual is not infringing copyright if:
  - it is a copy of the individual's own copy,
  - and is made for the individual's private use
- Private use include making a copy as a back-up, or for format shifting, or for the purpose of storage (including storage via internet)

It is therefore ILLEGAL

- to copy or distribute software or its documentation without the permission or licence of the copyright owner
- to run purchased software on two or more computer simultaneously unless the licence specifically allows it
- to knowingly, or unknowingly, allow, encourage or pressure employees to make or use illegal copies within an organisation
- to infringe laws against unauthorised software copying because a superior, colleague or friend compels or requests it
- to loan software in order that a copy be made of it

Also ILLEGAL

- to import an infringing copy other than for personal use (importing into the UK, without the licence of the copyright owner, otherwise than for personal use, what one knows or has reason to believe is an infringing copy of a work)
- to possess or deal with (sell, let, rent, offer, expose, distribute…) an infringing copy of a work
- to provide means for making infringing copies
- to make, import, sell, offer, advertise devices or means, or publish information intended to enable or assist persons, to circumvent an electronic form of copy-protection

"The making of an adaptation of the work is an act restricted by the ©"

- In relation to a **computer program**, adaptation means an arrangement or altered version of the program or a translation of it
    - Translation includes a version of the program in which it is converted into or out of a computer language or code or into a different computer language or code
- In relation to a **database**, adaptation means an arrangement or altered version of the database or a translation of it
- Changing identifiers or swapping lines of code in a computer program **creates an adaptation** so it is restricted by copyright

Exceptions for computer programmes

- Problem: you can't do anything with a program without… copying it! Installing "is" copying, and even executing "is" copying (into the computer memory)
- Lawful use of computer programs are guaranteed the right:
  - to use computer programs (includes transferring, installing and running)
  - to make backup copies (as necessary)
  - to decompile computer programs in order to obtain information necessary to create an interoperable program (not a similar one!)
  - to observe/study/test the functioning of the program in order to determine the ideas and principles underlying it

More specific to DBs: Definition of database

- The Copyright, Designs and Patents Act 1988 defines a database as a *collection of independent works, data or other materials which are:*
  - *arranged in a systematic or methodical way, and*
  - *individually accessible by electronic or other means*
- Hence a database can be both an electronic artefact and a paper record.

What covers databases

- Two legal rights are typically applied to databases of all sorts (electronic or otherwise):
  - Copyright
    - May or may not apply, depending on whether the DB qualifies as “literary work”
  - Database right
    - Always applies
    - duration is **15 years**, but may be renewed if substantial changes occur in the DB

DB as literary work?

- "Literary works" are defined in s.3(1) of the 1988 Act as being "*any work, other than a dramatic or musical work, which is written, spoken or sung*"
- in order to be a literary work, "*the selection or arrangement of the contents of the database*" must constitute the author's own *intellectual creation* (s.3A of the 1988 Act)
- In this case, copyright extends to the author's life + 70years

Database rights

- Main document: : “The Copyright and Rights in Database Regulations 1997”
  - http://www.legislation.gov.uk/uksi/1997/3032
  - “*sui generis*” law (“of its kind” or “unique” law made in recognition of a singularity)
- Implements the The EU Council Directive 96/9/EC on the Legal Protection of Databases
  - aimed at standardising the legal protection provided to databases across the EU

Why *sui generis*?

- Copyright does not apply to DBs whose aims are to be complete and objective (i.e. when the creativity of the author is not a crucial element)

- A *sui generis* database right applies to protect the "*qualitatively and/or quantitatively substantial investment in either the obtaining, verification or presentation of the contents*" (art. 7(1) of the EU directive)

    - The "substantial investment" must be present, even if it doesn't need to be financial

Aim of the regulation

- To define “measures relating to the prevention of unauthorised extraction of the contents of a database and of unauthorised re-utilisation of those contents”
- Two notions introduced by the regulation in relation to any contents of a database are then:
  - **Extraction**: “the permanent or temporary transfer of those contents to another medium by any means or in any form”
  - **Re-utilisation**: “making those contents available to the public by any means”

Database rights

- The owner of DB right is (art. 14 UK 1997 regulations):
  - “the person who takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation shall be regarded as the maker of, and as having made, the database.”
  - “Where a database is made by an employee in the course of his employment, his employer shall be regarded as the maker of the database, subject to any agreement to the contrary”

Infringements

- “a person infringes database right in a database if, without the consent of the owner of the right, he extracts or re-utilises all or a substantial part of the contents of the database” (Art. 16)

- “the repeated and systematic extraction or re-utilisation of insubstantial parts of the contents of a database may amount to the extraction or re-utilisation of a substantial part of those contents” (Art 16)

How is this relevant to you?

- Suppose you are creating an app/website which automatically collects ("crawls") data from the web to present the users:
  - info on travel timetables from carriers
  - info on events from other websites or from venues
  - diet suggestions from food blogs
  - price comparisons from online retailers
  - info of ANY SORT from the web
- Should you be concerned?

Proving Infringement: Court cases

- There aren't many court cases of DB right infringements - the ones that there are serve as guidance on how to apply the law
- "famous" cases:
  - Football DataCo v SportRadar
    discussed at https://www.ashurst.com/en/news-and-insights/legal-updates/football-dataco-v-sportradar-ecj-ruling-supports-owners-of-database-right-ip-it-newsletter/
  - The Beechwood House Publishing v Guardian Products case
    discussed at http://www.francisdavey.co.uk/2010/10/database-right-proving-infringement.html
  - The British Horseracing Board's lawsuit and
    The Fixtures Marketing lawsuit
    both discussed at http://www.out-law.com/page-392

Beechwood House Publishing (BHP) v Guardian Products (GP)

- BHP maintains and sell a DB of addresses of people associated with local surgeries
  - BHP claims it costs around £110,000 a year to maintain the DB
  - in order to detect infringements, BHP included “seeds” in the DB, that is bogus entries, with address one of BHP staff
- in 2007, BHP received a letter addressed to one of the seeds
  - the letter came from GP, who had obtained the database from the second defendant (Precision Direct Marketing Ltd)

Beechwood House Publishing (BHP) v Guardian Products (GP)

- So, the original DB contained some seeds, one of which ended up in the GP database
  - how to prove this was a “substantial” extraction of data?
  - the comparison of the two DBs can only be revealing if there are many seeds
  - but, BHP would not tell how many seeds there were (reasonably enough)
    - (*just a thought: would it be reasonable to “contaminate” your DB to this extent?*)

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Patents County Court considers database right infringement – Beechwood House Publishing v Guardian Products and another, Patents County Court

24 August 2011
By: Mark Weston | Discussion topic: Intellectual Property, News, Upload-IT

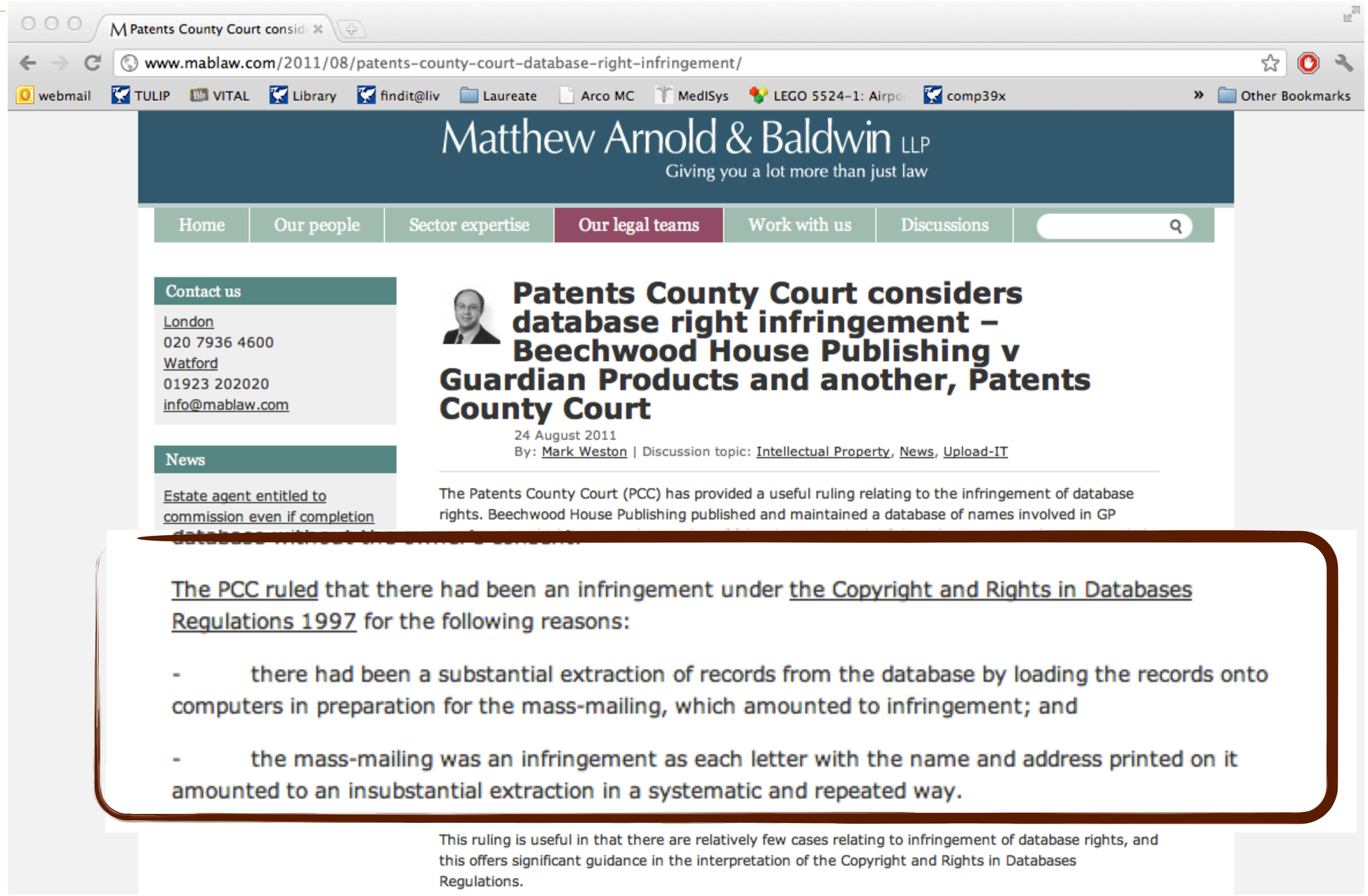
The Patents County Court (PCC) has provided a useful ruling relating to the infringement of database rights. Beechwood House Publishing published and maintained a database of names involved in GP practices, in which it inserted a number of fake identities which, if that identity received a mass-mailed letter at a fake address that could be tracked, would indicate the infringement of the database right. This occurred, and Beechwood House Publishing issued proceedings against Guardian Products, which had sent the letter, and Precision Direct Marketing, which had provided the data to Guardian Products, on the grounds that they had extracted and re-utilised all or a substantial part of the contents of the database without the owner's consent.

The PCC ruled that there had been an infringement under the Copyright and Rights in Databases Regulations 1997 for the following reasons:

- there had been a substantial extraction of records from the database by loading the records onto computers in preparation for the mass-mailing, which amounted to infringement; and

- the mass-mailing was an infringement as each letter with the name and address printed on it amounted to an insubstantial extraction in a systematic and repeated way.

This ruling is useful in that there are relatively few cases relating to infringement of database rights, and this offers significant guidance in the interpretation of the Copyright and Rights in Databases Regulations.



Patents County Court consid

www.mablaw.com/2011/08/patents-county-court-database-right-infringement/

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A case with an opposite decision

British Horseracing Board v William Hill

- *"British Horseracing Board (BHB) is the governing authority for horseracing in the UK. It maintains a database containing, inter alia, extensive pre-race information"*
- *"William Hill (WH), the leading bookmaker, repeatedly obtained information indirectly from BHB's database (via third parties licensed by BHB) and used it on its website"*
- *"BHB claimed that WH's use of the data infringed its database right contrary to the Database Directive 96/9/EC and Copyright and Rights in Databases Regulations 1997"*

Issue:

1. *"Whether WH's use of data indirectly sourced from BHB's database constituted extraction or re-utilisation of a substantial part of the BHB database;"*

2. *"Whether WH's actions amounted to a repeated and systematic extraction or re-utilisation of insubstantial parts of the database, such as to conflict with normal exploitation of the database or unreasonably prejudice the interests of the maker of the database."*

Held:

"Finding no infringement of BHB's right:

1. *The right under the Database Directive protects investment in seeking out and collecting existing independent materials and collecting them in a database. It does not protect investment in the creation of data. Indirect sourcing, as opposed to mere consultation, may constitute extraction and re-utilisation. The material used by WH was quantitatively insubstantial, and as it had not been the subject of investment independent of that required for its creation, it was not qualitatively a substantial part.*

2. *WH's repeated and systematic extraction and re-utilisation of insubstantial parts did not reconstitute and/or make available to the public the whole or a substantial part of the contents of the database, and so did not conflict with normal exploitation of it or seriously prejudice BHB's investment."*

More on aggregation sites

- Price
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  - "
    data is taken. Product names, descriptions and specifications will usually not be created by a website operator."
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How is this relevant to you?

- Suppose you are creating an app/website which automatically collects ("crawls") data from the web to present the users:
  - info on travel timetables from carriers
  - info on events from other websites or from venues
  - diet suggestions from food blogs
  - price comparisons from online retailers
  - info of ANY SORT from the web
- Should you be concerned?

More on aggregation sites

- Price comparison/aggregation sites: are they infringing rights?
- "Aggregation: Demystifying Database Rights" https://www.taylorwessing.com/download/article_aggdata.html#.WP42VVPyuRs
  - *"unless the website operator can show there has been substantial investment in verifying or presenting those listings, database right is unlikely to subsist and a scraper might be able to take created listings without infringing database rights."*
  - *"The difficulty comes when, as will usually be the case, more data is taken. Product names, descriptions and specifications will usually not be created by a website operator."*

Note to self: keep on top of current legislation

- best place to start: Intellectual Property Office (IPO): https://www.gov.uk/government/organisations/intellectual-property-office
- E.g. one of the latest reports:
  - International Comparison of Approaches to Online Copyright Infringement: Final Report