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Database rights and copyright infringed in Cloud based medical screening system

*Technomed Ltd & Technomed Telemedicine Ltd v. Bluecrest
Health Screening Ltd & Cardio Analytics*
[2017] EWHC 2142 (Ch)

Article by David Bowden

Executive speed read summary

Technomed provided a cloud based system for electro cardiogram ('ECG') called ECG Cloud. This system has been written by its founding director. Bluecrest signed up with Technomed for its services for an initial period of 2 years agreeing to pay £5.25 per patient for each ECG from Technomed. In January 2014 Bluecrest switched over and started to take its ECG analysis from Cardio Analytics using its EAnalyse system. Bluecrest wanted a seamless transition. Bluecrest provided Cardio Analytics with what it got from Technomed and asked Cardio Analytics to replicate it. Cardio Analytics charged £4 per ECG. Technomed brought proceedings for infringement claiming that its database right had been infringed, that copyright in both its database and its materials had been infringed and that these infringements had been flagrant. The judge ruled that there was database right in Technomed's database and that this had been infringed. He also ruled that Technomed had a free standing copyright in its database that too had been infringed. The judge ruled that there was a low level of originality required to have either copyright or database right in the materials. The judge declined to rule as to whether the database was additionally protected as a '*literary work*'. In relation to a diagram of 2 hearts and a wave diagram, the judge rejected a submission that these were '*generic*' and ruled that Technomed held copyright in these diagrams which had been infringed. In the summer of 2016, Cardio Analytics re-wrote its patient definitions and the judge ruled that version 3 did not infringe Technomed's rights. Bluecrest had a counterclaim for breach of contract against Technomed which was stayed pending the ruling on IP rights. The judge found that one expert witness (Professor Mond) had an undeclared conflict of interest and attached no weight to his evidence. Bluecrest claimed that Technomed's losses were not caused by any infringement of its IP rights but rather because it got a better deal from Cardio Analytics. The judge declined to deal with this ruling it would have to be decided when Technomed had elected to either seek damages or an account of profits. The judge ruled that the infringements in relation to the 2 diagrams and the Technomed's explanatory materials were '*flagrant*'. Finally the judge refused to grant Technomed an injunction because he did not consider there to be a realistic threat that infringement will be recommenced.

Technomed Limited and Technomed Telemedicine Limited v. Bluecrest Health Screening Limited and Express Diagnostics Limited trading as 'Cardio Analytics'
[2017] EWHC 2142 (Ch) 24 August 2017
High Court, Chancery Division, Intellectual Property (Deputy Judge David Stone)

What are the facts?

Technomed provided a cloud based system for electro cardiogram ('ECG') readings to be taken called ECG Cloud. It would analyse the readings and provide a report back to users. Technomed's system had been written and developed by its founding director. Technomed had a number of cardiologists advising it and its database of readings had been refined over the years. Bluecrest signed up with Technomed for its services for an initial period of 2 years starting in January 2013. Bluecrest agreed to pay £5.25 per patient for each ECG from Technomed.

In January 2014 Bluecrest switched over and started to take its ECG analysis from Cardio Analytics using its EAnalyse system. Bluecrest wanted a seamless transition. Bluecrest provided Cardio Analytics with what it got from Technomed and asked Cardio Analytics to replicate it. At the beginning, what Cardio Analytics created was a blatant copy of everything that Technomed had created. After Technomed established what had happened and following initial letters before action, Cardio Analytics re-wrote some of the materials so there were significant divergences. Cardio Analytics charged £4 per ECG.

Technomed brought these proceedings for infringement of its intellectual property rights. It claimed that its database right had been infringed, that copyright in both its database and its materials had been infringed and that these infringements had been flagrant.

What were the issues the judge had to resolve at trial?

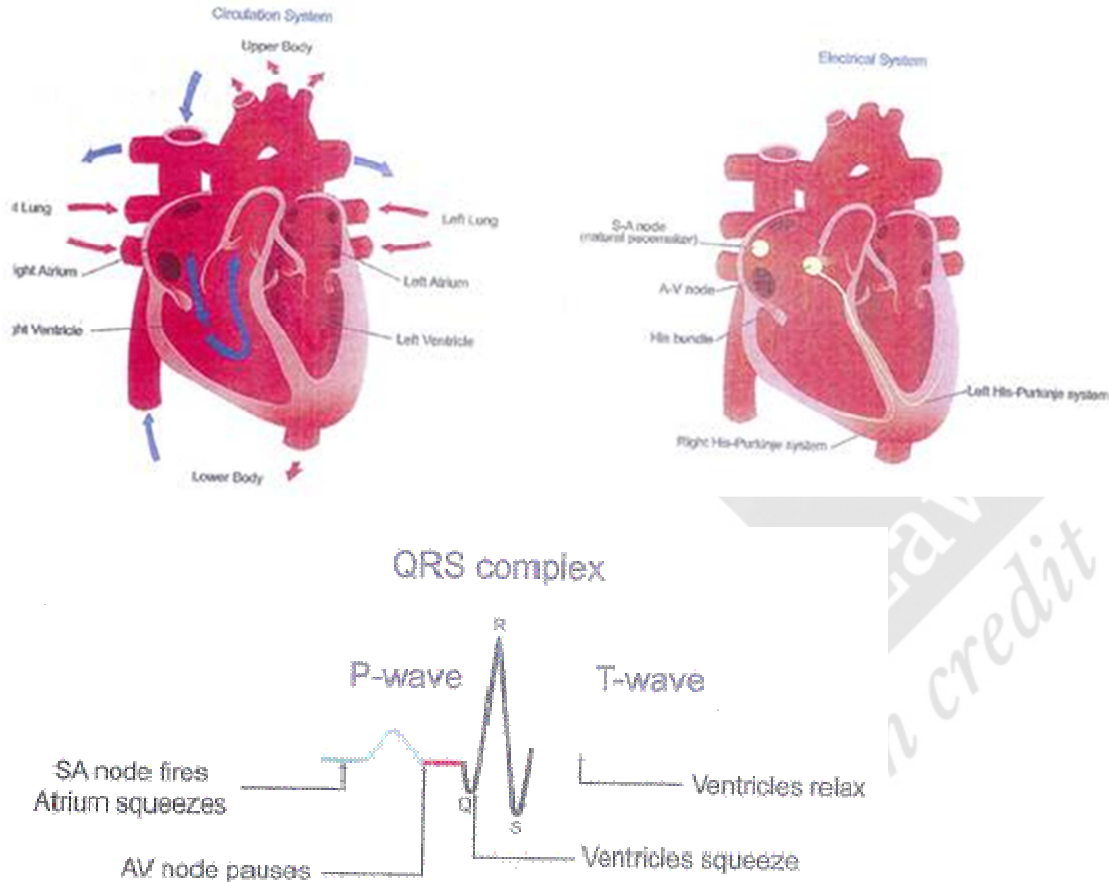
The 5 issues for the judge were:

- Did a database right subsist in Technomed's database? If so, had it been infringed by Bluecrest?
- Did copyright subsist in Technomed's database as a '*literary work*'? If so, had it been infringed by Bluecrest?
- Did copyright subsist in these proprietary materials of Technomed:
 - its XML format as a '*literary work*' and/or as '*preparatory design material*',
 - its explanatory materials,

- its patient definitions?
- Did copyright subsist in Technomed's 2 hearts diagram and wave diagram as an 'artistic work'?
- Were Bluecrest's copyright infringements of the explanatory materials, the 2 hearts diagram and the wave diagram flagrant?

What does the 2 hearts and wave diagrams look like?

Below are the 2 pictures which are reproduced from the judgement.



What did the judge make of the witnesses?

Technomed called 3 lay witnesses and 1 expert witness to give evidence. Bluecrest called 1 lay witness and 2 expert witnesses. Cardio Analytics called 1 lay witness to give evidence. One final witness of Bluecrest was not in the end called upon to give evidence.

Technomed

- **Mark Hasehemi.** He is the founder and managing director of Technomed and its parent company. Mr Hashemi has worked in the cardiac rhythm diagnosis and management industry since 1988 in sales, clinical support and senior management roles. He is not medically trained but has through practice acquired a good working knowledge of ECGs in a clinical setting. Mr Hashemi was 'occasionally combative' in his responses but the judge accepted that he gave a 'truthful account of both the development of ECG Cloud and Technomed's relationship with Bluecrest'.
- **Robin Fuller.** Since 2010 he has been employed by Technomed as its web-systems developer. He gave evidence as to the development of ECG Cloud and was a 'clear and careful' witness.
- **Dr Mark Sopher.** Since 2005 he has been a consultant cardiologist at the Royal Bournemouth Hospital. He acts as a freelance consultant to Technomed. He gave evidence of his work with Technomed and the development of ECG Cloud. The judge found him to be a 'cogent and helpful' witness.

Bluecrest

- **Peter Blencowe.** He is Bluecrest's managing director and his background is in marketing. He is not medically trained. In the witness box he often gave 'long speeches about irrelevant matters'.

The judge found his evidence to be '*made up of repetitive restatements of Bluecrest's case*' rather than answers to the questions put to him.

- **Dr Nick Summerton.** He was not called to give oral evidence. He was commissioned by Bluecrest to assist with a rewrite of its documents in 2016. The judge ruled that he did '*not consider that it is necessary or appropriate to draw any adverse inferences*' from failing to call him.

Cardio Analytics

- **Ian Jarvis.** He had been its director for 20 years. His background is in accounting not medicine. He gave a presentation by PowerPoint and video of Express's EAnalyse system. Whilst he '*occasionally strayed from matters that were within his knowledge*', he accepted this when it was put to him. However the judge did not accept that the gloss Mr Jarvis attempted to put onto documents was accurate and preferred instead to '*accept that the documents mean what they say*'.

What expert evidence was before the court?

The judge reserved his more trenchant appraisals for his assessment of the experts singling one out in particular for some stinging criticism.

Technomed

- **Christopher Dickson.** He is the principal of a software engineering practice called Framley Limited. He has over 25 years' experience of designing and writing software. He gave expert evidence in relation to Technomed's ECG Cloud software, Cardio Analytics' EAnalyse software and his opinion on the comparison of the two. The judge found him to be a '*careful and frank witness*'.

Bluecrest

- **Nigel Young.** He is a computer consultant and gave evidence of his technical investigation of ECG Cloud and his comparison with EAnalyse. Although the judge found that his evidence did '*not adequately follow the rules and guidance applicable to expert witnesses*' he ruled that this was not '*something for which he can be criticised*' and said he found his answers to questions to be '*clear and cogent*'
- **Professor Harry Mond.** He is a specialist physician in the Department of Cardiology at the Royal Melbourne Hospital, Australia and medical director of Cardioscan Pty Limited, a company which also provides ECG monitoring services. He gave his opinion on Technomed's materials in a brief 6 paragraph witness statement. He did not attend court for cross-examination but rather this took place over an ordinary mobile phone on speaker placed in the middle of the courtroom. However his company was in commercial discussions with the Cardio Analytics. Although his written expert report stated that he was instructed by the defendants' solicitors and sets out a CPR part 35 declaration stating '*I know of no conflict of interest of any kind*' this turned out not to be true. Further Professor Mond had also been in commercial discussions with Technomed at some point. For these reasons the judge concluded that he attached '*no weight to Professor Mond's evidence*'.

What does the EU Directive say about database rights?

These are the relevant provisions from Directive **96/9/EC** of 11 March 1996 on the legal protection of databases:

- **Article 1 - Scope.** 1. This Directive concerns the legal protection of databases in any form.
2. For the purposes of this Directive, '*database*' shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.
- **Article 2 - Limitations on the scope.** This Directive shall apply without prejudice to Community provisions relating to: (a) the legal protection of computer programs; (b) rental right, lending right and certain rights related to copyright in the field of intellectual property, (c) the term of protection of copyright and certain related rights.
- **Article 7 - Object of protection (Sui Generis Right).** 1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.....5. The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.

This Directive has been implemented in the UK in the Copyright and Rights in Databases Regulations 1997 **SI 1997/3032**.

What did the Court of Appeal rule on database rights in *Football Dataco*?

In *Football Dataco Limited v. Sportradar GmbH* [2013] EWCA Civ 27, the Court of Appeal considered whether the rights in a sports database had been infringed where substantial parts of it were extracted by someone else without permission and placed onto a bookmaker's website. Sir Robin Jacob gave the unanimous judgement where he started by noting that there is no protection or copyright for any underlying data - what is protected is the database itself. There is nothing in the Database Directive which says that if a collection of data otherwise qualifying for a database right is contained within a copyright work, that collection could not also be the subject of a *sui generis* right.

A scientist who takes a measurement would be astonished to be told that he is creating data. He would say instead that he is creating a record of a pre-existing fact and recording data - not creating it. The factual data provided by football analyst here and recorded in Football Dataco's database is pre-existing data. The policy of the Database Directive is that databases which cost a lot in terms of investment, and can readily be copied, should be protected or there would be no incentive to create databases of that sort. Where a database includes subjective elements, such as an assessment of the '*man of the match*', did not mean that the database was no longer protected. It would be absurd if the database lost protection because some subjective elements were also included.

The test for whether a substantial part of a database, on a qualitative basis, had been extracted is set out in *British Horseracing Board* and it depends on the scale of investment in obtaining verification or presentation of what had been extracted. Even if only a small part was taken, it could be qualitatively a '*substantial*' part if it represented a significant investment.

Are there any other prior authorities of relevance?

These authorities (listed in chronological order) are relevant in this case:

Fixtures Marketing Ltd v. Organismos Prognostikon Agonon Podosfairou [2004] EUECJ **C-444/02**, (Court of Justice of the EU, Grand Chamber – Judges Skouris, Jann, Timmermans, Rosas, Lenaerts, Puissechot, Schintgen, Colneric and Cunha Rodrigues. Advocate General Stix-Hackl. 9 November 2004)

The term '*database*' refers to any collection of works, data or other materials, separable from one another without the value of the contents being affected, including a method or system of some sort for the retrieval of each of its constituent materials. A fixture list is a database within the meaning of Article 1(2) of the Database Directive. The words '*investment in...the obtaining...of the contents*' of a database referred to the resources used to seek out existing independent materials and collect them in the database. Those words did not cover the resources used to establish the dates, times and team pairings for the league matches

London General Holdings Ltd v. USP PLC [2005] EWCA Civ 931 (Court of Appeal – Waller, Laws and Jacob LJ. 22 July 2005)

The argument concerning double recovery was misconceived. An infringing copy could be put to several uses - each of which could give rise to a damages claim. The claimed loss was not attributable to any breach of copyright because it lay beyond the scope of protection that the law of copyright afforded. Where a copyright work was a written document, a breach consisted of the unauthorised use of the actual text of the document. It did not consist in pirating the ideas to be found in the text. Here the defendant had suffered no damage arising from the unauthorised deployment of the actual text of the template as opposed to the idea it contained. The loss of profit element of the award is set aside.

Baigent v. Random House Group Ltd [2007] EWCA Civ 247 (Court of Appeal – Mummery, Rix and Lloyd LJ. 28 March 2007)

What the defendant had taken amounted to generalised propositions at too high a level of abstraction to qualify for copyright protection because it was not the product of the application of skill and labour by authors in the creation of their literary work. It lay on the wrong side of the line between ideas and their expression. Although relevant central theme elements were to be found in both books, the claim depended on showing that the central theme propounded was a central theme of the other work sufficient to qualify as a substantial part of the work - albeit as a combination of features obtained by abstraction. However the central theme here was no more than a selection of features that had been collated for forensic purposes rather than having emerged from a fair reading of the book as a whole.

Infopaq International AS v. Danske Dagblades Forening **C-5/08**, [2010] FSR 20 [2012] EUECJ **C-302/10** (CJEU, 4th Chamber – Judges Lenaerts, von Danwitz, Silva de Lapuerta, Arestis and Malenovský. 16 July 2009)

Database rights and copyright infringed by Cloud-based medical screening system
Technomed Ltd/Technomed Telemedicine v. Bluecrest Health Screening/Cardio Analytics [2017] EWHC 2142 (Ch)

The reproduction of an extract of a protected work which comprised 11 consecutive words was such as to constitute reproduction in part within the meaning of article 2 of the Copyright and related rights in the information society Directive **2001/29/EC** if that extract contained an element of the work which expressed the author's own intellectual creation. The data capture process used here allowed for the reproduction of multiple extracts of protected works and there was a risk that the cumulative effect of those extracts would lead to the reconstitution of lengthy fragments which were liable to reflect the originality of the work, containing elements of the author's intellectual creation. It followed that an infringement of copyright would occur unless consent was given by the relevant right holders. A temporary and transient act of reproduction was intended to enable the completion of a technological process of which it formed an integral and essential part and must not exceed what was necessary for the proper completion of that process - the process had to be automated so that it deleted that act automatically without human intervention once its function of enabling the completion of the process had come to an end.

Football Dataco v. Britten Pools Ltd [2010] EWHC 841 (Ch) (High Court, Chancery – Floyd J. 23 April 2010)

Football fixture lists are not protected by the *sui generis* right under the Database Directive. The article 7 right is intended to give legal protection to those who put substantial financial and professional investment into obtaining, verifying and presenting the contents of a database. That protection excluded the creation of the materials contained in the database. The claimant was involved primarily in creating the data and the extra effort in obtaining, verifying or presenting the data in the fixture lists was not sufficient to attract the *sui generis* right. However the fixtures lists were protected by database copyright under section 3 of the CDPA 1988 Act as they fulfilled the 'database' criteria under section 3A. The data collected and arranged included at least the dates on which matches in general would be played, the matches which were to be played and the dates of specific matches. It was not correct to give the term '*selection or arrangement*' a limited meaning and confine it to that selection or arrangement performed after the data was finally created. The process of selection and arrangement of the contents of a database could and often would commence before all the data was created. The purpose of article 3 copyright was to provide encouragement for creative endeavour and that differed from the *sui generis* right which was designed to encourage investment in particular types of data gathering. Nevertheless it was necessary to focus on the skill and labour which was actually concerned with selection and arrangement and to exclude that which was not. Although the overall list of matches in any league was ultimately a given, there was undoubted selection and arrangement in the fixture lists as to the choice of dates and the decisions as to which match was played on which date. The fixture lists constituted the authors' own intellectual creation under CDPA section 3A(2). The only way the fixture lists could conceivably attract copyright was as a database. There was no scope for the subsistence of copyright by any other route.

Meakin v. BBC & Celador Productions Ltd [2010] EWHC 2065 (Ch) (High Court, Chancery, Arnold J. 27 July 2010)

The features said to be common to his proposals and to the BBC show were really in the nature of very general abstract similarities. The BBC was correct to say that such similarities as existed between the proposals for a new show and the existing BBC show were no more than very general similarities at a high level of abstraction. They were similarities in respect of matters which were entirely commonplace, such as the use of premium rate phone lines and a split between an initial programme and a results programme. In considering whether there were similarities which supported the inference of copying, the fact that the similarities not only existed only at a high level of generality, but also were shared by works which preceded the copyright works relied upon, was a material factor to take into account. It is not necessary for text to be copied in order for a claim for infringement of literary copyright to succeed.

Forensic Telecommunications Services Ltd v. West Yorkshire Police [2011] EWHC 2892 (Ch) (High Court, Chancery, Arnold J. 9 November 2011)

Section 3A of the CDPA 1988 provides that a database is only '*original*' if, by reason of the selection and arrangement of its contents, the database is its author's own intellectual creation. Section 3 contains no corresponding provision in relation to a table or compilation other than a database. No copyright subsists in individual addresses because although some skill, judgement and labour was expended in ascertaining them, it was not of the right kind to attract copyright protection - it was not skill in devising the form of expression of the addresses. The List here as a whole was a database albeit a very simple one. The addresses in it were both systematically arranged and individually accessible, because the list was arranged into columns and rows. Since the list is a database, it is not protected by copyright because it is not the author's own intellectual creation by virtue of the selection and arrangement of contents, and had no structure meriting copyright protection. The database owner had made a substantial investment in obtaining and verifying the data on the list and cumulatively much skill and effort was expended so that a database right subsisted in the list.

SAS Institute Inc. v. World Programming Ltd [2013] EWHC 69 (Ch) (High Court, Chancery, Arnold J. 25 January 2013)

Copyright in a computer program did not protect its programming language, its interfaces or its functionality from being copied. If the claimant wished to plead that its language was a distinct copyright work, it would

have to apply to amend its case. There had been no suggestion in its pleaded case that the SAS language was a copyright work in its own right. The court's provisional view was that a programming language was not capable of being a literary work. A dictionary and a grammar were works which described a language. Such works recorded and thereby fixed the elements of the language they described - namely the meanings of its words and its syntax. It did not follow that the language was a work. Rather, the language was the material from which works could be created. Even when a language was generated from scratch, what it amounted to was a system of rules for the generation and recognition of meaningful statements. The test for whether there had been reproduction of a substantial part of a protected work is set out in *Infopaq*. The functionality, programming language and data file formats of a computer program did not constitute a form of expression of that program and were not protected by copyright in the program. Accordingly, in applying the *Infopaq* test those elements had to be disregarded. There could only be a reproduction of a substantial part of the program if a defendant had reproduced something that represented the expression of the intellectual creation of the author of the program.

What did the judge conclude on subsistence of database rights?

The judge ruled that database right subsisted in Technomed's ECG Cloud system.

The judge agreed with Technomed's counsel that a *'database need not have a complex structure or be large or have a sophisticated method of indexing'*. As to the pdf format of the database, the judge agreed that it was *'not separable from one another without their informative values being affected'* and that Technomed's database was *'no different to a telephone book'* or a *'list of football features'* and ruled that he did *'not accept that a pdf document cannot be a database for these purposes'*. He ruled that Technomed's database is a *'collection of independent works, data or other materials arranged in a systematic or methodical way'* and that it is a *'database within the meaning of the Database Directive'*.

However the judge went on to rule that *'the investment cannot lie in the creation of the contents of the database, but has to relate to the gathering, verification or presentation of pre-existing information'* and that *'database right could still arise even if some of the parts of the contents of the database were created in the process of compiling the database, so long as other parts were not'*. The judge ruled that Technomed had to *'establish that the obtaining, verification and presentation of the contents of the qualifying database required substantial investment which was independent of the resources used to create the materials contained within the database'*.

On this the judge observed that it had taken Mr Hashemi *'many hours'* to create the system and that Technomed had also *'invested substantially in verifying the information through a process of audit and review'* noting that Technomed's feedback tool *'enables reviewing cardiologists to edit various aspects of the reporting data'* which amendments are reviewed by Technomed and then *'alterations made to the Database'*. The judge accepted that *'184 modifications'* had been made to Technomed's database in this manner. For this reason the judge found that *'Technomed's investment in compiling the database was substantial'*.

Finally the judge ruled that Technomed had *'sought to prevent extraction and/or re-utilisation of the whole or a substantial part of the contents of'* its database and that in his judgment *'sui generis database right subsists'* in Technomed's database.

Had the database rights been infringed?

Yes.

The judge referred to Articles 7(2) and (5) of the Database Directive and found that *'the whole of'* Technomed's database had been copied by Bluecrest. He presciently noted that *'no evidence was given by Bluecrest'* or Cardio Analytics as to how Bluecrest's ECG reports were the same. Further the judge found there to have been *'repeated and systematic'* extraction by Bluecrest and that this *'unreasonably prejudices Technomed's legitimate interests'*.

As to *Football Dataco*, the judge had to consider the observation of Sir Robin Jacob where he said a *'database right would not prevent extraction from the database of any of the information he himself had created'*. On this the judge ruled that Technomed *'is not entitled... to double recovery in relation to both copyright infringement and database right infringement in relation to the Patient Definitions'* but that Technomed was entitled to *'recover in relation to the extraction of each Classification, Option and Traffic light until November 2016'* with the qualification that this was a *'matter for any damages enquiry'*.

What do the text books say about the level of originality required for copyright to subsist?

The 2016 edition of *Copinger and Skone James on Copyright* states that 'a work need only be "original" in the limited sense that the author originated it by his efforts rather than slavishly copying it from the work produced by the efforts of another person' and that this had 2 elements. Firstly that 'the work must originate from the author' and secondly that 'whether or not the author had drawn on other material, what was required was the expenditure of more than negligible or trivial effort or relevant skill in the creation of the work.'

What did the judge conclude on subsistence of copyright in the database?

The judge ruled that copyright subsisted in Technomed's database in addition to Technomed having a free standing data base right over the same material.

The judge said the CJEU ruling in *Infopaq* meant that 'the originality threshold is a low hurdle, a requirement for the work to be the author's own intellectual creation' but applying *Football Dataco* that 'the test for originality for database copyright is higher'.

Bluecrest sought to argue that the terms used by Technomed in its ECG Cloud were 'ubiquitous', 'commonplace', 'very, very generic', 'not unique', 'bog-standard', and 'text book stuff'. However the judge brushed this aside ruling that it was 'insufficient in a copyright case to claim that the copyright work relied on is generic'. To prove slavish copying, the judge ruled that 'the usual course will be to adduce the text books that are alleged to have been copied, to show that they were both accessible and earlier, and then to point to identical or near identical images or passages from which the copyright work alleged has been slavishly copied'. He said that this had been done here. Where Bluecrest wanted to argue that there had 'been no more than negligible or trivial effort' then this would need to be 'proved by cogent evidence' but there was a 'low threshold' set by *Infopaq*.

To determine that copyright subsisted in Technomed's database, the judge said he had to apply this 4 step test laid down by Floyd J in *Football Dataco*

- identify the data which is collected and arranged in the database,
- analyse the work which goes into the creation of the database by collecting and arranging the data so identified, to isolate that work which is properly regarded as selection and arrangement,
- ask whether the work of selection and arrangement was the author's own intellectual creation and in particular whether it involved the author's judgment, taste or discretion, and
- ask whether the work is quantitatively sufficient to attract copyright protection.

When the judge applied the *Football Dataco* test to the facts here, he found that 'considerable intellectual effort and creativity were expended in choosing the contents of' Technomed's database with its director Mr Hashemi selecting known classifications and arranging them 'in a structured format to enable drop down menus'. The judge ruled that this selection and arrangement 'was the authors' own intellectual creation' and had involved Mr Hashemi and others in 'exercising their judgement'. Concluding on this issue the judge ruled that this 'selecting and arranging is qualitatively sufficient to attract copyright protection'.

Is the database a literary work?

The judge side-stepped this issue ruling that he did 'not therefore need to consider whether copyright subsists in the Database as a literary work' but that he was 'satisfied that copyright subsists in the pdf form of the Database as a literary work, and was infringed until November 2016'.

Had copyright in the database been infringed?

Yes - the judge found a clear infringement.

What did the judge conclude on whether copyright subsisted in Technomed's proprietary materials?

The judge then had to look at whether copyright subsisted in the following:

- XML computer language,
- Technomed's explanatory materials, and
- Technomed's patient definition document.

XML

On XML, the judge observed that Technomed's expert witness had undertaken a 'comparison of Technomed's XML Format with an XML file produced by' Cardio Analytics Express for Bluecrest and that

he had *'identified 16 characteristics shared by the two files'* with his conclusion being that it was *'inconceivable'* that these *'shared characteristics could have arisen by coincidence'*. However the judge ruled that *'the XML Format is not entitled to protection as a computer program'* but that *'the XML Format could be a literary work so long as it meets the intellectual creation test'*. The judge nevertheless ruled that *'the XML Format contains content – not just structure, and hence is entitled to copyright protection'* because it *'is the product of Mr Fuller's intellectual creation'*.

Explanatory materials

On the explanatory materials the judge accepted that Technomed's Mr Hashemi had written these in February 2013. He also accepted that Mr Hashemi had not simply copied what was in Boston Scientific but had *'produced new patient friendly text to explain the ECG screening results in lay person's terms'*. Concluding on this issue the judge ruled that *'what matters is that the words used are a product of the author's intellectual effort'* and that this *'undoubtedly involved non-negligible intellectual expression by Mr Hashemi'* and so he found that *'copyright subsists in the Explanatory Materials'*.

Patient definitions

The judge accepted these were written by Technomed's Mr Hashemi and then reviewed by 2 doctors. The judge said that Technomed's witness Dr Sopher *'did not agree that these were standard definitions for the conditions listed'* because they were *'not definitions at all'* but rather *'language specifically created to try to explain to patients, remote patients, patients one was not having face-to-face contact with, patients who one knew nothing about who were having health screening for example'*. The judge rejected Bluecrest's submission that Technomed had *'not been creative enough in their drafting'* ruling that *'the test for subsistence of copyright in literary works is a low hurdle'* and that *'there was sufficient intellectual creation in each Patient Definition to clear that hurdle'* and that *'what matters is that sufficient, non-negligible intellectual effort was expended'*. The judge's conclusion was accordingly that copyright subsisted in each patient definition.

Did the judge rule that copyright had been infringed in Technomed's proprietary materials?

XML

On XML the judge found clear infringement, noting that Cardio Analytics had *'not put forward any evidence to establish independent creation'* so that the judge found Cardio Analytics *'copied Technomed's XML Format, infringing its copyright'* and this *'was ongoing until at least 11 December 2015'*.

Explanatory materials

The judge dealt with this quite shortly ruling that neither Bluecrest nor Cardio Analytics had *'put forward any explanation for the near identity of this aspect of their own reports'* and so the judge found that *'the Explanatory Materials were copied and that copyright in the Explanatory Materials was infringed'* and observing too that this was not a case of copyright being used to protect ideas which are *'banal or commonplace in the field'*.

Patient definitions

There had been 3 versions of this used by Bluecrest

- version 1 in use from March to June 2014,
- version 2 in use from July 2014 to November 2016, and
- version 3 in use from November 2016 onwards.

The judge ruled that versions 1 and 2 infringed Technomed's copyright.

However for version 3 the judge ruled that this *'was not a slavish reproduction of any earlier documents'*. Although the judge found that Bluecrest's Dr Summerton *'did not prepare his document from scratch'* nevertheless he said version 3 did not infringe because Dr Summerton had *'rewritten the concepts he saw there, based on his own skill and judgment'* and accordingly version 03 did not *'substantially reproduce any of the earlier versions or Technomed's 2013 pdf'* and so did not infringe.

What did the judge conclude on whether Technomed's 2 hearts diagram and wave diagram were 'artistic works'?

The judge dealt with this quite shortly ruling that *'both diagrams are clearly artistic works within the meaning of section 4 of the CPDA 1988'*. Bluecrest however submitted that the diagrams failed the test of originality because the changes made to the stock image to create the 2 hearts diagram were *'insufficient'* and that the wave diagram was *'utterly standard'*. This was rejected by the judge with him

again ruling that *'the test of originality is a low hurdle'* and that this hurdle had been *'met in this case'* with the changes made by Mr Hashemi to the stock image being *'sufficient to create a new, original work'*.

Did the judge rule that the infringements were flagrant or not?

Section 97(2)(a) of the CPDA 1988 deals with *'Provisions as to damages in infringement action'* and provides that *'the court may in an action for infringement of copyright having regard to all the circumstances, and in particular to (a) the flagrancy of the infringement, and (b) any benefit accruing to the defendant by reason of the infringement, award such additional damages as the justice of the case may require.'* Copinger and Skone Jones expands on this saying *'flagrancy implies scandalous conduct or deceit, including deliberate and calculated infringement where a defendant reaps a pecuniary advantage in excess of the damages he would otherwise have to pay.'*

The judge ruled that *'not having the time is neither a defence to copyright infringement, nor to a finding of flagrancy'*. He ruled that the infringements of the 2 hearts diagram, wave diagram and explanatory materials was indeed *'flagrant'* but he declined to make a similar ruling in relation to the infringements of any of Technomed's other copyright works.

What ruling did the judge make on the defendant's causation argument?

In a nutshell both Defendants submitted that any losses claimed by Technomed were not caused (in the legal sense) by any copyright or database right infringements but rather were caused because Bluecrest got a cheaper deal on ECG scans from Cardio Analytics than that offered by Technomed.

On this cute point, the judge ruled that he considered the arguments to be *'unmeritorious at this time'* but that he accepted that *'there is a sufficient causative link between the defendants' infringement and at least some damage in relation to each and every infringement'* that he had have found. However the judge ruled that Technomed was now entitled to elect either damages or an account of profits and that *'if it elects for a damages enquiry, it may in due course need to deal with the issue of causation'* but that *'time is not now'*.

What remedies were sought? What remedy was ordered?

Technomed claimed the following remedies

- an injunction,
- damages or an account of profits,
- an order for delivery up or destruction of infringing materials,
- an order for publication of the judgment, and
- costs.

The judgement deals only with subsistence and infringement. Technomed will now need to elect whether to pursue damages or seek an account of profits instead. The judge refused to grant an injunction because none of these infringements were *'on-going'* and that he did *'not consider that there is a realistic threat that infringement will be recommenced'*.

What about the counterclaim?

Bluecrest had also made a counterclaim against Technomed for breach of contract. However this had been split from the intellectual property claim and stayed pending the resolution of the subsistence and infringement issues. Technomed submits that this counterclaim *'has been manufactured as a tool to resist the claim'* but the judge ducked this ruling that it was *'not necessary or appropriate for me to comment on that contention'*.

What points did the defendants succeed on?

After a spirited resistance by the defendants to all claims made against them, although they lost on the subsistence and infringement issues, they managed to succeed on these 8 points:

- Technomed is not entitled to double recovery for both copyright and database right infringement,
- Technomed failed to obtain a ruling in its favour that copyright subsisted in its database as a *'literary work'*,
- The judge rejected Technomed's submission that its spreadsheet copy of its database was protected as *'preliminary design material'*,
- The judge accepted that Technomed had copied material from Boston Scientific in producing its materials,
- Version 3 of Cardio Analytic's classifications document did not infringe Technomed's rights,

Database rights and copyright infringed by Cloud-based medical screening system

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- The issue of causation will remain to be decided when Technomed elects either damages or an account of profits,
- The infringements in relation to XML language and patient definitions was not '*flagrant*', and
- Technomed's claim for an injunction was refused.

Will there be an appeal?

This is a multitrack case with the judgement handed down on 24 August 2017. Any appeal would have to be made to the Court of Appeal. To be in time, any application for permission would need to be lodged on or before 14 September 2017.

4 September 2017

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