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Protection of Intellectual Property in Big Data

By Janet Toh Yoong San & Elyse Diong Tze Mei

Major amounts of information or data have been collected, stored and used in respect of everyday business dealings and activities. This includes use of big data for analysing, predicting and managing of businesses. With the rise of the usage of big data, one of the major challenges in this digital world is that vast amount of information are easily dissipated in public domains. To what extent can intellectual property rights in big data be protected?

Most traditional methods may still be applicable as a form of protection of big data. This is inclusive of patent protection. In most jurisdictions, patent laws have restrictions on inventions that may be patentable. This would include schemes, rules or methods for

doing business, performing purely mental acts or playing games, discoveries, scientific theories and mathematical methods.¹ Therefore, information or data may not be patentable. However, where the use of data or information has been used to create an invention that would satisfy the requirements of novelty, contains an inventive step, and has industrial applicability,² protection of the data or information in the form of an invention may be accorded.

Big data may also fall under the purview of copyright protection. Copyright laws generally do not protect formation of ideas such as sketches or business ideas. Copyright subsists only in works that are original and have been reduced into material form.³ Although

protection under copyright covers a variety of works inclusive of artistic, literary, musical works and sound recordings, the work must originate from an author and sufficient effort has been expended in the creation of the work.⁴

Copyright protection may subsist if sufficient efforts have been taken to create or present a single piece of data or information, or a collection of the same in an original manner or form. For example, if data sets (structured or unstructured) have been used to generate a unique software or program, this may be copyrighted.

In addition to the above, it is perhaps beneficial for companies or businesses to fall back on the traditional doctrine of confidential information as a form of intellectual property protection. The laws on confidential information are established on the basis that a person is prevented from divulging confidential information without the consent or approval of the other party. Confidential information covers a variety

of data inclusive of trade secrets, literary or artistic secrets, plans, sketches, customer lists or databases, business know-hows, and secret recipes.

Confidential information can generally be protected through execution of agreements inclusive of confidentiality clauses and non-disclosure agreements. Where there are no contractual relationships or agreements are silent on the obligation of confidentiality, case laws steps in. In the case of *Electro Cad Australia Pty Ltd & Ors v. Mejati RCS Sdn. Bhd. & Ors* [1998] 3 MLJ 422, the High Court held that a plaintiff must establish three elements to prove a breach of confidence, namely:

- the information is of confidential nature;
- the information in question was communicated in circumstances importing an obligation of confidence; and
- there must be an unauthorised use of that information to the detriment of the party who communicated it.

“
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One of the advantages that most companies or businesses could leverage on is that protection of confidential information may extend perpetually. In the recent Malaysian Federal Court case of *Dynacast (Melaka) Sdn Bhd & Ors V. Vision Cast Sdn Bhd & Anor* [2016] 6 CLJ 176, the Federal Court held that if it was necessary to answer, protection of confidential information 'does not have any time limits'.

The key is proper management of the data or information at hand and identifying the best protection strategy available for intellectual property rights subsisting in big data.

1. Section 13 of the Patents Act 1983
2. Section 11 of the Patents Act 1983
3. Section 7(3)(b) of the Copyright Act 1987
4. *Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm Performance Audio & Car Accessories Enterprise)* [2009] 3 MLJ 525

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