

Memorandum on Intellectual Property Issues

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MEMORANDUM ON INTELLECTUAL PROPERTY ISSUES
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This memorandum is structured around some of the questions that may arise within the context of the Action for Health project. It should be noted that this memorandum deals with legal issues at the level of legal principles and, as in many other fields, it is impossible to predict with any degree of certainty how principles will be applied in any particular situation. Many of the issues discussed below have not yet been litigated in Canada. **Nothing contained herein is intended to constitute legal advice and anyone who has specific questions should consult with a lawyer.**

ISSUES

1. What intellectual property issues could arise with health information websites and the maintenance of health databases?
 - a. Copyright protection for general health information websites.
 - b. Linking and framing.
 - c. Domain name registration
 - d. Issues of copyright ownership arising in public and private partnerships.

2. Issues relating to health information databases.
 - a. Who owns copyright in patient records?
 - b. Who owns copyright in patient information databases?
 - c. Issues of ensuring proper understanding of and documentation of copyright in all aspects of the database.

ANALYSIS

- 1. What intellectual property issues might arise with health information websites?**
 - a. Copyright protection for general health information websites.**

The Copyright Act

The *Copyright Act*¹ grants the creators of works the right to authorize the full or partial publication, performance or reproduction of their work (s. 3(1)). Specifically, the Act grants to the creator of the work:

¹ R.S., c. C-30. Available at <http://laws.justice.gc.ca/en/C-42/39253.html#rid-39323>.

3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied,

and to authorize any such acts.

As soon as the work is created it is protected by copyright; that is, the work does not have to be published or made available to the public before the protection adheres. Copyright applies to all original:

- literary or textual works: books, pamphlets, poems, computer programs
- dramatic works: films, videos, plays, screenplays and scripts
- musical works: compositions consisting of both words and music, or music only (lyrics without music are considered literary works)
- artistic works: paintings, drawings, maps, photographs, and sculptures
architectural works

As mentioned, the works must be original. Original for the purposes of copyrights does not mean novel but, rather, means that the work is not copied, and results from an exercise of skill and judgment.² For example, the contents of this memorandum are, for the most part, a statement of the law that would be familiar to those who had examined the questions. Nevertheless the authors of this memorandum have copyright over the

² *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339.

way the memorandum is written as the way the ideas expressed exhibit (hopefully) skill and judgment. As well, and importantly, copyright doesn't protect ideas but, rather, the way ideas are expressed. If I have in my mind a plot for novel, I do not have copyright over the idea. If I tell you my brilliant plot and you write the book, you get the copyright protection and I am left ruing the day I spoke to you.

To be protected by copyright, the work must be fixed; my speech is not protected by copyright unless it is written down, recorded, or in some other way rendered in a permanent form. As stated in *Canadian Admiral Corp. v. Rediffusion Inc.*, [1954] Ex. C.R. 382 at 394: "for copyright to subsist in a 'work' it must be expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance."

Infringement of a creator's copyright occurs when someone, without permission, treats the materials in ways that only the copyright holder is entitled to treat the work.³ Generally, the copyright is infringed when the original is reproduced in whole or in substantial part thus ignoring the rights of the copyright holder to control the reproduction of their work. For example, to cut and paste information from one site and place it on one's own site is to violate the author's rights because one has produced another copy of the work without the permission of the copyright holder. In addition, according to Vaver,⁴ computer files are reproduced when copied onto a computers permanent memory or on a storage medium. More worryingly, he notes that some American cases have found that downloading into temporary memory may violate copyright as, even if just for a short time, a further copy of the work is produced.⁵

Posting of health information in violation of copyright could also breach the right of communication to the public by telecommunication. According to the *Copyright Act*, copyright includes the right to "communicate the work to the public by telecommunication."⁶ It is now clear that information posted on the internet is considered to have been communicated to the public by telecommunication when it is accessed by a

³ *Copyright Act*, s. 27(1)(2) states:

27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

(2) It is an infringement of copyright for any person to

(a) sell or rent out,

(b) distribute to such an extent as to affect prejudicially the owner of the copyright,

(c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,

(d) possess for the purpose of doing anything referred to in paragraphs (a) to (c), or

(e) import into Canada for the purpose of doing anything referred to in paragraphs (a) to

(c),

a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

⁴ D. Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 126.

⁵ Vaver cites *MAI Systems Corp. v. Peak Computer Inc.*, 991 F.2d 511 (9th Cir. 1993).

⁶ *Copyright Act*, s. 3(1)(f).

member of the public.⁷ This is the case even if it is accessed only once, and even if the downloaded file is never opened or read. The person who posts the information is considered to be the party who communicates it to the public by telecommunication when it is accessed.⁸ Therefore, health information posted on the internet would be communicated to the public by telecommunication each time it is accessed by an end user. The person who posts the material may also be liable for authorizing the reproduction of the materials by the end user who downloads the materials.⁹

Obviously using the materials with permission and, if necessary, paying royalties is a legal way to use the materials in a way that does not violate the creator's rights. However, even if one has the right to reproduce a print copy of the work, one does not automatically get the right to reproduce it in digital form, to communicate it to the public by telecommunication, or to authorize further reproduction of the work.¹⁰

Users of information are allowed to use the creator's work if it meets the criteria for fair dealing. Fair dealing must be for a purpose expressly permitted in the legislation. These purposes include research or private study, criticism or review or news reporting only.¹¹ To be acceptable for these purposes, the dealing must also be "fair". The Supreme Court of Canada has recently articulated a set of criteria by which the fairness of a dealing may be assessed. Factors considered will include the amount and substantiality of the work taken, the impact on the market for the original work, the purpose of the dealing, alternatives to the dealing and so on. While the Supreme Court seems to be taking a more generous approach to fair dealing, it is important to note that case law has generally taken a very restrictive approach. Fair dealing is assessed on a case by case basis.

Consequently, if a person or an organization produced a website containing health information, the website would be protected by copyright. The website as a whole could be protected as a compilation (including text and graphic design). Individual works on the page (articles, logos, images, etc) might also each constitute works protected by copyright. It is possible that ownership of copyright in the component parts of the website would be different from the ownership of copyright in the website as a whole.¹² Copyright in the compilation exists independently if the compilation reflects an exercise in skill and judgment in the selection or arrangement of its elements. This means that it is possible that, even if the website consisted entirely of information that had been copied without the permission of the authors (ie., the website owners had infringed the authors

⁷ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427.

⁸ *Ibid.*

⁹ Teresa Scassa and Michael Deturbide, *Electronic Commerce and Internet Law in Canada* (Toronto: CCH Canadian, 2004) at 300.

¹⁰ See *Robertson v. Thompson Corp.* (2004), 243 D.L.R. (4th) 257 where freelance journalist Heather Robertson claimed the Globe and Mail's use of her work in electronic database and a CD-ROM violated her copyright even though the articles had previously been published in the Globe and Mail.

¹¹ *Copyright Act* ss. 29, 29.1 and 29.2.

¹² Teresa Scassa "Copyright in Collective Works" (2005) 84 Canadian Bar Review 347.

copyright), the offending website could still be protected by copyright if it meets the criteria for originality.¹³

Facts are not copyrightable but compilations of facts may be. That the selection and arrangement of materials must exhibit some degree of skill and judgment makes it unclear whether databases containing information on health-related issues would be protected by copyright if the data was merely compiled in a straightforward, unoriginal manner. In *Tele-Direct (Publications) v. American Business Information, Inc.*, the Federal Court of Appeal found that an alphabetical arrangement of yellow pages directory listings was not sufficiently original.¹⁴ The Supreme Court of Canada has ruled that a selection or arrangement of data must be the result of an exercise in skill and judgement to warrant copyright protection.¹⁵

The main issue for health information websites would be to ensure that there is clear ownership of the various components of the website, such as photographs, graphic designs, website design, written text, and audio or video components. In ensuring that the organization responsible for the website owns all necessary intellectual property issues so they are not later sued for copyright infringement. If any of the materials is from another source, the website creator should seek the permission of the person or organization which holds the copyright in the materials.

In general terms the author is first owner of copyright in a work.¹⁶ However, exceptions to the general rule exist. For example, copyright in works made by employees in the course of employment is generally owned by the employer.¹⁷ Thus if employees are hired to generate content for a website, the employer will be the owner of the copyright in the content. However, independent contractors retain copyright in their works. Thus whether someone is considered an employee or a contractor may be relevant to determining ownership of copyright. These matters are best resolved up front by contractual terms. For example, someone paying for content to be generated or for a website to be designed should have a clear clause in the contract indicating that they will be the owner of all copyright in the resultant works.

The author of a photograph is deemed to be the person who owns the negative or the medium on which the photograph is stored.¹⁸ Thus the person who takes a photograph is not necessarily the owner of the copyright in the work. These provisions are the subject of proposed amendments to the Copyright Act; however, the amendments are not yet law.

b. Linking and framing.

¹³ This does not mean that the copyright holders could not enforce their rights however.

¹⁴ [1997] F.C.J. 1430 (C.A.).

¹⁵ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339.

¹⁶ *Copyright Act*, s. 13(1).

¹⁷ *Copyright Act*, s. 13(2).

¹⁸ *Copyright Act*, s. 10.

Linking

A link connects the content between files or to different places within the same file. A link can lead to another file in the same website (eg. linking on “home” take the reader to the homepage) or to a file on some other site. When linking to another site, a webpage creator can either link to the home page of the linked site or to a page deeper in the site (called deep linking) that bypasses the home page. It is unlikely that any liability could arise from linking to another site’s home page.¹⁹ However deep linking has resulted in some litigation.²⁰ Most of the litigation arises where a site deep links into another site in a way that bypasses the sites homepage and, consequently, avoids that advertising and other content on the page. In *Ticketmaster v. Tickets.com*,²¹ the Tickets.com site linked into the Ticketmaster site. When someone searched the Tickets.com site and wanted to purchase a ticket to an event, they clicked on the link and were taken to the Ticketmaster page where the tickets could be purchased but which bypassed content Ticketmaster wanted purchasers to view. (Tickets.com gave notice to the purchaser that they were being transported to the page of another company and so they were not representing that they were selling the tickets.) The Court found that there had been no violation of the United States Copyright Act:

[H]yperlinking does not itself involve a violation of the Copyright Act (whatever it may do for other claims) since no copying is involved, the customer is automatically transferred to the particular genuine web page of the original author. There is no deception in what is happening. This is analogous to using a library’s card index to get reference to particular items, albeit faster and more efficiently.²²

Thus, it would appear that linking would not be a violation of copyright. Nevertheless, seeking permission of the copyright holder would be prudent.

Framing allows content from different sites to be displayed simultaneously. Thus, elements of one site can be displayed along with elements of another to the effect that one site’s advertising can surround another site’s content.²³ This occurred in *Imax Corp. v. Showmax Inc.*²⁴ Imax claimed that its trademark was infringed by the Showmax’s site which used framing to display a picture of one of the Imax’s theaters and its trademark alongside Showmax’s trademark. The Court concluded that the website would potentially cause consumers to believe that there was a relationship between the parties. The Court granted a preliminary injunction restraining Showmax’s uses of the trademark and to stop the unauthorized framing.

¹⁹ See *Shetland Times Co. Ltd. v. Willis*, [1997] FSR 604 (Scotland Court of Sessions) where an injunction was granted to stop the defendant linking to the plaintiff’s news stories. The parties settled before the matter got to court.

²⁰ For a discussion of case law in relation to linking, see Scassa & Deturbide, *Electronic Commerce and Internet Law in Canada*, (CCH Canadian, 2005), ch. 6.

²¹ *Ticketmaster Corp. v. Tickets.com, Inc.*, 54 USPQ 2d 1344 (C.D. Cal. 2000).

²² *Ibid.* at para. 7.

²³ For a discussion of the legal situation in relation to framing, see Scassa and Deturbide, ch. 6.

²⁴ [2000] F.C.J. No. 69.

Things like linking and framing could particularly be a concern where health related information is at issue. In addition to the concerns mentioned above where people are able to bypass advertising, if a link pops up for a “legitimate site” from a drug company site, people could be led to believe that the legitimate site is endorsing the product. In addition, if a legitimate health information site had two separate links, one of which was called “the pros of Prozac” and the other which was “the cons of Prozac” but the Prozac drug company linked directly to the first one, the user could be led to believe that the site containing the legitimate health information endorsed Prozac and that it only had positive things to say about its use.

The main issue for those operating health information websites would be to ensure that the design is such that there are no inappropriate linking and framing practices which infringe on the rights of other websites or mislead those accessing the health information.

c. Domain name registration

Each host computer is given an internet protocol (IP) address which consists of a series of numbers. In order to make it convenient for people to use the web, internet registration authorities assign a unique domain name to the IP address. In Canada the Canadian Internet Registration Authority (CIRA) is in charge of the dot.ca domain name and anyone who wants a dot.ca name must register with them.²⁵

MedicalInfo can be the registered trademark of a company marketing medical school materials, a company with online health information, or a company providing computer support to hospital information systems. They may all use this name as a registered trademark and may all be permitted to do so because they offer different products and services.²⁶ But there can only be one medicalinfo.ca though clearly all of the MedicalInfo companies may wish to register that as their domain name. (It is possible that one of the MedicalInfo companies can register their name with Network Solutions Inc. and receive the medicalinfo.com name.) Generally, the names are assigned on a first come–first served basis and so the first one to register for the dot.ca name gets it as their unique domain name irrespective of whether the name is a registered trademark for another entity.²⁷

²⁵ CIRA maintains a website providing full information about its policies and practices in relation to the .ca domain. See <http://www.cira.ca>.

²⁶ G.S. Takach,, *Computer Law*, 2nd ed (Toronto: Irwin, 2003) at 180.

²⁷ Some problems have occurred where companies or individuals register the name of a well known trademark in order to sell it back to the trademark holder. In the case of the .ca domain, this would violate CIRA dispute resolution policy; in the case of the .com domain, it would violate the Uniform Dispute Resolution Policy. Such activity may also be actionable as passing off or trademark infringement. See, for example *Law Society of British Columbia v. Canadian Domain Name Exchange Corp.*, [2002] B.C.J. No. 1909 (B.C.S.C) where the Law Society of British Columbia sought and was granted an injunction against a party who had registered lawsocietyofbc.ca for a porn site. For a full discussion of these issues, see Scassa and Deturbide, ch. 4.

Those who create sites should ensure they are properly registered and should turn their minds to whether they are choosing a name that is the trademark of another party.²⁸ While using another's trademark is often allowed, it is better to avoid becoming embroiled in a domain name dispute.

There are other important things to keep in mind when choosing a domain name. First, registration is on an annual basis: a fee must be paid each year to maintain the registration. Failure to pay the fee in a timely fashion can lead to the loss of the domain name. There are people who wait for domain name registrations to lapse; they then move in and register the lapsed domain name themselves.

It is also important to consider whether it is worth registering a range of similar domain names both in the .ca domain and in other major domains such as .com. These other domain names can be set up to resolve to your main web site. This can prevent others from acquiring and using domain names that might be used by people who are looking for your site, but who have an imperfect recollection of the domain name. Thus, if your site is at medicalinfo.ca, you might want to also register medicalinfo.com, medical-info.ca, medical-info.com, and so on.

d. Issues of copyright ownership arising in public and private partnerships.

Because the government may be commissioning private organizations to provide health information or contract web designers that are not government employees to work on their websites, the issue of governmental or institutional ownership of copyright may also arise. This is premised on the fact that when the work is created during the course of employment, the employer and not the employee own the copyright.²⁹ Therefore, if a government employee created the information, the government would be the copyright holder.³⁰

It can sometimes become a difficult question assessing whether an employee-employer relationship exists between parties. Work done under a contract with the government is not necessarily government work. According to the *Copyright Act*, copyright is vested in any work prepared or published "by or under the direction or control of Her Majesty or any government department."³¹ Vaver interprets this section:

The tendency is to interpret 'direction or control' narrowly. So a work is not made under the government's direction or control simply because the government can demand changes, veto publication, or refuse to accept the work for any reason. Extraordinarily, however, the government may own

²⁸ The Canadian Intellectual Property Office (CIPO) maintains an online searchable database of all trademarks in Canada. See: <http://strategis.ic.gc.ca/cipo/trademarks/search/tmSearch.do>.

²⁹ *Copyright Act* s. 13(3).

³⁰ In the case of the government, the rules of ownership are set out in s. 12 of the *Copyright Act*.

³¹ *Copyright Act*, s. 12.

copyright in a freelance work that is published, although not prepared, under its direction or control.³²

The best way to clarify issues regarding ownership of copyright is to establish who owns the intellectual property in a contract. Indeed, in the specific section of the *Act* which assigns the copyright of employees to their employers the ability to contract out of this situation is provided.

2. Issues relating to health information databases.

a. Who owns copyright in patient records?

The question of copyright in patient records is unclear and is likely to increase in importance as electronic health records become more commonplace.

As mentioned, facts are not subject to copyright and so the notation of what my blood pressure is on a particular day is not copyrightable. However, doctors' notes and diagnoses would appear to material suitable for be copyrightable as they would be expressions displaying the requisite skill and judgement.

Vaver explicitly states that "less obvious items have also been protected" and gives a list which includes medical records. However, none of the sources in the footnotes corresponding to this list specifically cite cases or articles addressing medical records. Instead, they cover things like copyright of legal documents, warranties and lottery tickets.³³ If the material is copyrightable, the question arises as to whether the patient, the physician, or a third party owns the information.

The Australian Court in *Breen v. Williams*³⁴ explicitly found that medical records were the property of the doctor who created them and that the doctor, as creator, held the copyright. In this case, Breen sought access to her medical records to take part in breast implant litigation. Williams's insurers would only allow access to the records if the Breen released any claims against Williams. One ground that Williams argued against producing the records for Breen was copyright. The court found that:

Dr Williams is the owner of the copyright in the records. By federal law, ownership of the copyright gives Dr Williams a number of exclusive proprietary rights including the right to reproduce the records in any material form. He is the beneficial owner of those rights. He does not hold them on trust for Ms Breen. In the absence of an undertaking, express or implied, on the part of Dr Williams to allow her to copy the records, it is difficult to see how Ms Breen could be allowed to copy the records even if she had a right of access to the records.

³² Vaver at 92.

³³ *Ibid.*

³⁴ [1996] 43 A.L.J. 481 (HC) online: QL.

The Australian court did not find that the records were held in trust for Breen. This is quite different from an important decision in Canada which also dealt with the right of patients to access their medical records. The Supreme Court of in *McInerney v. Macdonald*³⁵ found that, while the creator of the record was the owner, the records were held in trust for the patient.

The fiduciary duty to provide access to medical records is ultimately grounded in the nature of the patient's interest in his or her records. As discussed earlier, information about oneself revealed to a doctor acting in a professional capacity remains, in a fundamental sense, one's own. The doctor's position is one of trust and confidence. The information conveyed is held in a fashion somewhat akin to a trust. While the doctor is the owner of the actual record, the information is to be used by the physician for the benefit of the patient. The confiding of the information to the physician for medical purposes gives rise to an expectation that the patient's interest in and control of the information will continue. (at 150-51)

The Court did not specifically address the intellectual property rights that physicians had in their records. However, given that the Court admits that doctors own the records, and given the provisions of the *Copyright Act*, it is difficult see why physicians would not have copyright in those parts of the record that go beyond mere facts but demonstrate skill and judgment.³⁶ How doctor's copyright in the record coheres with the fiduciary duty to provide access to the records remains to be determined.³⁷

b. Who owns copyright in patient information databases?

As mentioned above, there is no copyright in facts. Does this mean that there is no protection for databases consisting of collections of facts?

The *Copyright Act* protects compilation (s. 5(1)) where compilation is defined (at s. 2) as:

- (a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or
- (b) a work resulting from the selection or arrangement of data;

It is clear from this that it is only the selection or arrangement of facts that can be protected by copyright; copyright does not subsist in the underlying factual material.

In the United States *Feist Publications Inc. v. Rural Telephone Services., Inc.*,³⁸ the Supreme Court held that the listings in a telephone directory were not protected by copyright. Neither the selection of the data (all telephone subscribers) nor its

³⁵ [1992] 2 S.C.R. 138.

³⁶ For a consideration of these issues, (including an argument as to why such material should not be covered by copyright) see: Teresa Scassa, "Original Facts: Skill, Judgment and the Public Domain", forthcoming, (2005) McGill Law Journal.

³⁷ It should be noted that the Australian Court in *Breen v. Williams* found that physicians were not in a fiduciary relationship with their patients.

³⁸ 499 U.S. 340 (1991).

arrangement (in alphabetical order) demonstrated the requisite originality. As Takach notes:

[I]n the United States copyright protection for factual compilations is quite thin, given that the second compiler can copy facts from even a compilation whose selection and arrangement is protected by copyright so long as the facts, as presented by the second comer, are selected and arranged differently. The *Feist* decision makes extremely problematic the protection of certain electronic databases through copyright.³⁹

The Federal Court of Appeal in *Tele-Direct (Publications) Inc., v. American Business Information, Inc.*⁴⁰ followed similar reasoning, and found that there was not sufficient originality in in-column yellow pages listings. In *CCH Canadian v. Law Society of Upper Canada*⁴¹ the Supreme Court of Canada set the standard for assessing originality in Canada. Essentially, to be original, a work must not be copied, and must demonstrate an exercise of skill and judgment. McLachlin C.J. for the Court noted: “This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.” (at para 16)

A database is only capable of protection under copyright law if the selection and arrangement of the data it contains is the product of an exercise of skill and judgment. This will be a difficult threshold for most electronic databases to meet, as the data will likely not be arranged in any particular fashion, but will depend on a search program to sort it according to the users’ needs. As for the selection of the data, it remains to be determined what amounts to an original selection. In cases where the database aims to be as comprehensive as possible, the level of originality in the selection is likely to be low. In any event, the protection for a database protected by copyright law will only be against reproduction of the original selection or arrangement.

c. Issues of ensuring proper understanding of and documentation of copyright in all aspects of the database.

As well as the copyright possibly existing in the database, it must also be remembered that others could have copyright in some of the information in the database. For example, in a database consisting of patient information some data will not be copyright protected (mere facts) but if, say, doctor’s notes and diagnoses were included in the database, the copyright in these expressions of fact will belong to the creator of the work.

The most important issue for those maintaining databases will be to ensure that they have clarified and documented all intellectual property rights, including all aspects of the

³⁹ G. Takach, *Computer Law* 2d (Toronto: Irwin Law, 2003) at 154.

⁴⁰ (1996), 27 B.L.R. (2d) 1 (F.C.T.C.).

⁴¹ [2004] 1 S.C.R. 339.

database. This might include some kinds of database content, as discussed above, in addition to any copyright they might have in the software being used.

Another relevant consideration is copyright or patent protection for computer programs, which could be used in a number of ways in the health information context. For example, there could be programs used by facilities such as hospitals to collect and manage patient data, or there could be programs used on the internet where patients enter their symptoms and the program generates potential conditions the symptoms correspond to. According to Vaver, copyright in computer programs includes both the source and object codes for any operating and application programs, and may also include the screen display generated by the program.⁴²

In addition to copyright protection for computer programs is the potential for there to be patent protection. Scassa and Deturbide note that software is patentable in Canada where the software is incorporated into an otherwise patentable machine or process.⁴³ Software and business methods are much more widely patentable in the United States.⁴⁴

These issues, however, go beyond the scope of this memorandum.

⁴² Vaver at 125-126.

⁴³ See Scassa and Deturbide, ch. 7.

⁴⁴ *Ibid.*