

Commentary on the Legal Practice of Database Protection

Protection of Allied Rights to Database: V Kontakte Ltd. v. Dabl Ltd.

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 **Abstract**

Analysis of causes and outcome of recent judicial conflict between solid database companies.

 **Keywords**

personal data, social network, exclusive, users, violation, expenditure, compensation, case, claimant, respondent, the Appeals Court, the Intellectual Property Court.

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Under Russian law, a database is deemed to be a collection of independent materials in objective form, systematized to enable such materials to be located and processed with the aid of computers (P.2 of Article 1260 of the Civil Code of the Russian Federation, hereinafter — CC RF).

Databases may be protected in two regimes — as an object of author's rights and/or as an object of allied rights.

For a database to receive protection by virtue of allied rights, the manufacturer of the database must bear substantial costs for its creation (P.1 of Art. 1334 of CC RF).

In the application of the given regulations of the law, practical questions have arisen whether a social network in which a user posts his personal data independently may be recognized as a database protected by allied rights, who holds rights to it, which investments are taken into consideration in assessing the database's protection feasibility, may it be an auxiliary product of the company's activity ("spin off"), and also within which parameters may third parties make use of the data of social network users.

The aforesaid questions were examined by courts in the matter of V Kontakte Ltd. v. Dabl Ltd. (case № A40-18827/2017¹).

The "V Kontakte" company filed a claim against the "DABL" company and the joint-stock company "Natsionalnoye Byuro Kreditnykh Istoriy" [National Bureau of Credit Histories. — Trans.] for a ruling that the actions of the Respondents in extraction and subsequent use of information elements from the database of the "V Kontakte" social network's users constitute a violation of the Claimant's exclusive rights as the manufacturer of the database containing data of the users of the "V Kontakte" social network, and demanding a cease and desist order obligating the Respondents to terminate the breaching of the Claimant's exclusive rights and the payment of compensation for the said breach of exclusive rights to the amount of 1 rouble.

The "V Kontakte" company, considering itself to be the holder of exclusive allied rights to the database of users of the social network, elements (information units) that are cards of users, asserts that that the "DABL" company, acting for the purpose of manufacturing its own database, engages in automated extraction, copying and systematization of part of the information of the social network's database from all users' cards (*inter alia* from the following columns (fields): surname, given name, data on place of employment and education, place of birth and residence, profiles of the user's friends, photographic images of the user, data on frequency of visits to the network, the communication device through which the network is accessed) and uses this information in its commercial activity. *Inter alia*, the "V Kontakte" company has established that the companies "DABL" and "Natsionalnoye Byuro Kreditnykh Istoriy" have executed an agreement granting the latter the right to use the software support of the Respondent, which in the view of Claimant "V Kontakte" is engaging in extraction and use of a substantial part of its database.

¹ Available at: URL: <https://kad.arbitr.ru/Card?number=A40-18827/2017> (accessed: 20.01.2020)

The “V Kontakte” company bases its claim to its exclusive allied rights to the database of its users on the grounds that it produced and continues to produce substantial material and organizational costs for the manufacture and support of the social network’s infrastructure, with the exceptional application of which the users’ database exists and is expanded, moreover as the expansion and composition of the users’ database is the purpose of relevant investments. Furthermore, the “V Kontakte” company stresses that the manufacture of the database of social network users is a vital issue for the Claimant, as the existence of a social network without users (and a database of them) is impossible.

Assuming that the actions of the “DABL” company include the extraction and use of a substantial part of elements from the social database’s users, which runs counter to normal social database use and is an unjustifiable infringement of the holder’s rights, the “V Kontakte” took the matter to court.

Pursuant to an amicable resolution of the matter with “Narsionalnoye Byuro Kreditnykh Istoriy”, the claim against the latter was terminated.

The court examined the claim filed by the Claimant against the “DABL” company. It was established by courts that the “V Kontakte” company is the administrator of the “V Kontakte” social network, which forms a hardware-software complex comprising three parts (blocks): hardware, software and information. It ensues from the Claimant’s position in the matter, that the information part of the social network is formed of several automated databases, each of which consists of independent elements (materials), systematized by a specific means allowing the location and processing of elements with the aid of an electronic computer. One such base is the database of users of social networks that contains an aggregate of independent elements (users’ cards) with information concerning every user registered with the social network. The database is augmented by new independent elements with the aid of the given algorithm for collecting data upon the registration of a new user through the social network’s site.

The courts have also established that the “DABL” company is the developer and proprietor of computer programs which, on the basis of its own technological methods and algorithms of search, storage and analysis of data from social networks, including the “V Kontakte” social network, gathers and automatically processes data concerning users of social networks for the purpose of estimating the creditworthiness of potential and existing borrowers. Holding rights to the indicated program, “DABL” offers its own

program products to third parties, facilitating work with social network data for the indicated purposes.

The Court of First Instance ruled against satisfying the claims against the “DABL” company². The court act is motivated by the fact that the “V Kontakte” company was unable to prove that the creation of the database corresponding to the characteristics indicated in article 1260 of CC RF, or the fact of the arising of exclusive rights to the database in the sense of article 1334 of CC RF. *Inter alia*, the Court of First Instance considered unproven the circumstance that the “V Kontakte” company incurred substantial financial, material, organizational and other costs in the manufacture (including processing or presentation of relevant materials) of the database, directed specifically toward the creation of such a database. Clarifying its conclusion, the Court of First Instance cited the rules for use of the “V Kontakte” site, from the contents of which it emerges that the “V Kontakte” company, as the administrator of the social network, does not perform “filling” of the database, and all information entering the database is published by third parties (users of the social network).

The Court of First Instance established that the “V Kontakte” company provided no evidence confirming that the Respondent extracted any materials from the database of users of the social network. The actions of the Respondent were qualified by the Court of First Instance as search and processing of generally accessible information in the Internet, rights to which are the property of users of the social network, and not the “V Kontakte” company. Furthermore, the Court of First Instance indicated that the Claimant provided no evidence concerning the transfer of the entire contents of the database or a substantial portion of its stored materials on to another information medium with the use of any technical means and in any form.

The Court of First Instance also concluded, that as the “DABL” company is not the database administrator and received no special logins and passwords for access to the database, the said company has no technical means of accessing the database or extracting materials from it.

The Appeals Court revoked the decision of the Court of First Instance³, indicating that the conclusion of the court regarding the absence of a users’

² Decision of the Moscow Arbitration Court 12.10.2017. Case № A40-18827/2017. Available at: URL: <https://kad.arbitr.ru/Card?number=A40-18827/2017> (accessed: 20.01.2020)

³ Resolution of the Ninth Arbitration Appeals Court 06.02.2018. Case № A40-18827/2017. Available at: URL: <https://kad.arbitr.ru/Card?number=A40-18827/2017> (accessed: 10.12.2019)

database *per se* contradicts the evidence in the materials of the matter. The Appeals Court reached a conclusion regarding the existence of a database of users of the social network, with all the characteristics of a database in the sense of p. 2 of Article 1260 of the CC RF.

Furthermore, the Appeals Court disagreed with the conclusion of the Court of First Instance regarding the absence of substantial costs in the creation of the disputed database. Allowing for the circumstance that the formation of a social network (providing for the existence and filling of the users' database) by the "V Kontakte" company involved considerable financial, organizational and other costs, including costs for the creation and support of its infrastructure (technical equipment ensuring the functioning of servers), purchase of necessary equipment and servers, as well as expenditure on human resources, and the number of user's database elements (over 400 thousand users' profiles) greatly exceeds ten thousand independent information elements, the Appeals Court concluded that the "V Kontakte" company proved its exclusive allied rights to the database.

The Appeals Court indicated further that the materials of the matter overturn the decision of the Court of First Instance that the "DABL" company does not extract and use materials from the database.

The Appeals Court also established that the extraction and use of even a negligible part of the database in the present case is deemed to be a violation of an exclusive right by virtue of p. 3 article 1335 CC RF, as the actions of the "DABL" company contravene normal use of the database and constitute an unjustifiable infringement of the database manufacturer's lawful interests. The Appeals Court based this conclusion on the grounds that the "V Kontakte" company has obligations to all the users of its social network to provide protection for the users' personal data from illegal or accidental access, copying, dissemination, reproduction, collection, systematization, storage and transfer of information from the social network for commercial or non-commercial purposes, or its use wholly or in any part by any means without the user's consent.

Having established the fact of the Claimant's exclusive allied rights to the database and the fact of the Respondent's violation of the said rights, the Appeals Court satisfied the Claimant's demands in part, obligating the Respondent to cease violation of the Claimant's exclusive rights.

The Intellectual Property Court revoked the abovementioned court acts and directed the case for a new examination⁴, noting the following.

1. The database of users of a social network may be recognized as a database protected by an allied right.

The circle of circumstances to be proven upon the examination of a claim for protection of an exclusive right to a database, including responsibility for its breach, includes: the fact of the existence of an object of allied rights (database), the fact of the Claimant's possession of an exclusive right to the indicated object of allied right, and also the fact of the violation of the indicated right by the Respondent.

Establishment of the exclusive right of the manufacturer of the database requires the existence of the putative object of an exclusive right — a database answering to the characteristics contained in p. 2 of Article 1260 and p. 1 of Article 1334 of CC RF.

Acting on the basis of the aggregate evidence in the materials of the case, the Appeals Court established that the database of users of the “V Kontakte” company is a database in the sense of p. 2 of Article 1260 of CC RF, as it is presented in an objective form, contains an aggregate of independent materials concerning users of the social network and is systematized in a manner enabling their location and computer processing.

2. Recognition of an entity as manufacturer of a database does not necessarily require its independent filling of the database, the manufacturer may create conditions for the filling of the database by users.

The court dismissed the Respondent's argument that the Claimant has no exclusive right to the database as filling of the database is performed directly by users and that the “V Kontakte” company does not incur expenses in collection of database elements.

The court noted that it ensues from the provisions of articles 1333 and 1334 CC RF that the manufacturer of a database is an entity that organized the creation of the database and work on the collection, processing and presentation of its component materials. Moreover, the indicated norms do not set a mandatory condition requiring the independent filling of the database by its manufacturer: the creation by third parties of relevant conditions for

⁴ Decision of the Intellectual Property Court 24.07.2018. Case № A40-18827/2017. Available at: URL: <https://kad.arbitr.ru/Card?number=A40-18827/2017> (accessed: 20.01.2020)

filling the database and performance of subsequent processing and presentation of materials received from such parties also qualify by acting law as actions establishing the legal status of the manufacturer of the database.

3. Assessment of the materiality of expenditure on the manufacture of the database pursuant to article 1334 CC RF requires examination of not an entity's subjective intentions regarding direct investment into the database, but the objective need for substantial expenditure for its manufacture. It is essential to establish the materiality of expenditure for the manufacture of the database, and not the data *per se*.

The "DABL" company denied the existence of an exclusive right to the database, as in its opinion the database of users of the social network is a "subsidiary product" ("spin off") from the activity of the "V Kontakte" company in its administration of the social network.

The court rejected this argument, indicating the following.

P.1 of Article 1334 of CC RF contains a refutable presumption of the materiality of financial, material, organizational or other costs incurred for the purpose of manufacturing a database if such a database consists of at least ten thousand independent information elements (materials) making up the database's content.

Consequently if the manufacturer of the base proves that the database contains more than ten thousand independent elements, proving the immateriality of expenditure for the manufacture of that database, and also organization of work on the collection, processing and presentation of its component materials devolves on the Respondent as a party to the dispute that challenges the presumption established by law.

Russian legislation, specifically, the provision containing in Article 1334 of CC RF, indicates that the manufacturer of a database, the creation of which (including processing or presentation of the relevant materials) requires substantial financial, material, organizational or other costs, holds exclusive rights to extract materials from the database and realize their further use in any form and by any means (exclusive right of the manufacturer of the database). In the absence of evidence to the contrary by the database, the manufacture of which requires substantial costs, is deemed to be a database composed of at least ten thousand independent information elements (materials), comprising the content of the database (second paragraph of p.2 of Article 1260 of CC RF).

Thus, pursuant to the indicated norm, it is essential to examine not the subjective intention of an entity regarding direct investment into the database, but the objective necessity of substantial expenditure for the manufacture of the database. It is also essential to establish the materiality of expenses for manufacture of the database, and not the data *per se*. The assessment of the materiality of such expenditure is an object for examination by courts considering the matter in substance.

In the present case, the Respondent has not denied that the manufacture of the database of users of the social network (including, *inter alia*, the processing and presentation of the relevant materials justifying its existence) calls objectively for substantial expenditure as such a base, the volume of its elements determined by the Appeals Court as substantially exceeding ten thousand independent elements, serves as a fundamental information resource and a key instrument in the functioning of a social network — a site created and supported by the Claimant.

4. The law establishes two different components of violations of exclusive (allied) rights to a database in application of the substantial and insignificant component parts of the database, therefore the court must establish one of the indicated components in every instance.

Pursuant to the second paragraph of p.1 of Article 1334 of CC RF, the component part of the violation of the exclusive right of the manufacturer of a database includes the extraction of materials from the database and conducting their further use without the consent of the holder of rights, with the exception of cases envisaged by the CC RF.

At the same time, extraction of materials is deemed to be the transfer of the entire content of the database or a significant part of the materials contained therein on to another information medium with the use of any technical means and in any form.

P. 3 of Article 1335.1 of CC RF establishes the unacceptability of repeated extraction or use of materials comprising an insignificant part of a database if such actions contravene normal use of the database and prejudice the lawful interests of the manufacturer of the database.

Thus, in the first instance the violation lies in the aggregate of the following actions: extraction (transfer of the entire content of the database or a substantial part of the materials therein to another information medium

employing any technical means and in any form) and the subsequent use of the entire database or the substantial part of its component materials, committed without the consent of the holder of rights (p.1 of Article 1334 of CC RF).

In the second instance the violation lies in the repeated performance of one of the actions (extraction or use) in relation to the insignificant part of the database if it conflicts with normal use of the database and unjustifiably infringes the lawful interests of the manufacturer of the database (p. 3 of Article 1335.1 of CC RF).

The Appeals Court qualifies the actions of the Respondent as a violation of the exclusive right of the manufacturer of the database pursuant to p.1 of Article 1334 of CC RF, and p.3 of Article 1335.1 of CC RF, in view of which the court act on the appealed decision of the Appeals Court contains an internal contradiction.

In connection with this circumstance, the court directed the matter for a review, so that the Court of First Level considered which actions the Respondent actually performed.

5. The Claimant's determination of the amount of compensation sought below the limits envisaged by law does not impede the court from granting the amount demanded in the event of proof of the fact of violation.

The amount of compensation is determined by the court within the limits established by the CC RF, depending on the nature of the violation and other circumstances of the matter, allowing for the reasonableness and fairness of the demand.

P.1 of Article 1311 of CC RF establishes the following limits for compensation in the event of violation of an exclusive right to an object of allied rights: 1) in the amount of ten thousand roubles to five million roubles, determined at the discretion of the court on the basis of the nature of the violation; 2) twice the cost of counterfeit phonogram copies; 3) double the amount of the cost of the right to use the object of allied rights, determined on the basis of the price which, under comparable circumstances, is usually charged for the lawful use of such an object in the way used by the violator.

As noted in p. 43.3 of the Resolution of the Plenum of the Supreme Court of the Russian Federation and of the Plenum of the Higher Arbitration Court of the Russian Federation dated 26.03.2009 № 5/29 "On questions arising in connection with the entry into force of the fourth part of the Civil Code of

the Russian Federation”⁵, in considering matters regarding requests for compensation in the amount from ten thousand to five million roubles, the court determines the amount of compensation within the limits envisaged by law at its own discretion, but not in excess of the demand requested by the Claimant.

P. 43.2 of the same Resolution indicates that compensation may be demanded upon proof of the fact of violation.

Therefore, the Claimant’s determination of the amount of compensation *per se* being lower than the limits envisaged by law does not impede the court’s satisfaction of the compensation demanded in the event that the fact of violation has been proven.

6. A claim for termination of a violation may be made against not only an entity making unlawful use of another party’s database, but also against the software developer, facilitating performance of the said activities.

The “DABL” company has asserted that it does not itself extract or use materials from the database, insofar as interaction with sites in the Internet (including, *inter alia*, the “V Kontakte” company) is performed by users of software, the developer of which is the company.

In this connection the Intellectual Property Court instructed lower courts that should it be established that materials from the database are actually being extracted and used, not by the “DABL” company but through its software support, the demands of the “V Kontakte” company are subject to examination with allowance for the circumstance that by virtue of Article 1252 of CC RF, a demand for termination of actions violating a right or threatening its violation, may be filed not only against the entity committing such actions or performing necessary preparations for it, but also against other entities that could terminate such actions.

Conclusion

Thus, the Intellectual Property Court has pronounced the following significant legal positions pertaining to protection of databases.

A social network may be acknowledged to be a database protected by allied rights despite the circumstance that the database is filled by its users

⁵ Available at: URL: <https://www.wipo.int/edocs/lexdocs/laws/ru/ru/ru112ru.pdf> (accessed: 20.01.2020)

themselves, it is unimportant for the acknowledgement of rights to the database as to who placed data directly, the importance lies in who organized the collection of data. Such an organizer holds exclusive rights to the database — the social network.

As Russian law acknowledges the presumption of the existence of substantial investments into the manufacture of a database if it contains at least 10 thousand independent elements, the recognition of an exclusive right to the database requires the Claimant to prove the existence of the indicated number of elements. In the present case the Respondent, disputing the existence of an allied right to the database must present refuting evidence. At the same time the court does not examine the subjective intentions of an entity regarding direct investment into the database, but the objective necessity of substantial expenditure for its manufacture, i.e. it may be a subsidiary product (“spin off”) from the company’s activity.

If the Respondent has developed a program facilitating the illicit extraction and use of materials from another entity’s database, it may face a demand for termination of the violation. In order to establish the existence of the violation, it is necessary to examine the algorithms of the working of the said program for the purpose of determining whether there is an extraction and use of materials from the database, and in what volume.