

Discover business databases

Brent Babcock and **Jeff Johnson** urge you to discover the potential benefits of conducting business database discovery

The problems of trying to locate specific information from collections of text documents are well known. The main discovery problem is that the information of interest can be conveyed in many different ways with a myriad of terms used by multiple individuals or groups of individuals. For example, the meaning of a date can only be properly understood from the context of the document containing that date (for example, in a patent infringement case, was the date mentioned in a document the date the design was created? Approved? Changed? Or was this the date the allegedly infringing product was sold to a customer?). Furthermore, mathematical operations, like totalling specific amounts or graphing results, are virtually impossible to perform when the data reside in unstructured text.

Control the chaos

Many of the difficulties associated with obtaining useful information from unstructured data are eliminated, or at least greatly reduced, by obtaining discovery of structured business databases. Unlike unstructured content, in which the authors are free to choose or create their own terms and format them as they see fit, structured database information is stored in carefully defined tables and columns. Only certain types of data elements are placed in specific fields, oftentimes with a controlled set of choices or vocabulary for each field.

Unstructured content can typically be characterised as including anything anywhere, whereas with well-designed databases, there is a place for everything and everything in its place. For example, in a structured database, the dates that a product was manufactured, shipped, and received will reside in three separate and readily identifiable locations. Comparable information in word processing files may appear almost anywhere and be stored in a variety of date formats.

Further, while there may be many different terms that employees use to refer to a particular product in e-mails or other documents, the so-called product ID in an inventory control database will be a unique and unambiguous term permitting precise and complete retrieval.

Many of an organisation's core commercial operations are initiated, tracked, and recorded almost exclusively in its databases, including purchasing, sales, billing, inventory, customer contacts, resource scheduling, claims call centres and human resources systems. While most databases are customised for individual organisations, the underlying software of these databases is usually widely recognised (for instance, SAP, Salesforce, Oracle, Sybase and DB2).

Not only can structured databases provide for more precise, targeted searching, but the search results can also be far more useful because they can be sorted, summarised, and presented in an unlimited number of ways. For example, even if thousands of sales were documented in thousands of customer order confirmation e-mails, it could be difficult to provide total sales by product, by region, or by sales agent, without re-inputting that data into a re-created database. Not so if queries could be run on the underlying database that generated and sent those e-mails.

Craft your case carefully

When developing a litigation strategy, careful consideration should be given to the nature of the information sought through discovery. Obtaining e-discovery of structured databases can greatly facilitate the review and analysis of large volumes of information, potentially saving counsel and expert witnesses significant time (and money). Indeed, as discussed above, relevant discoverable information may only reside in computer databases.

Be prepared, however, to encounter resistance from your adversary when seeking

One-minute read



The traditional focus of e-discovery has been to manage unstructured data, such as electronic documents, e-mails, presentations, and spreadsheets.

Today, courts and attorneys increasingly recognise that business databases - the informational heart of many organisations - represent a valuable but often untapped discovery resource. In fact, business databases may be the only place where certain information may exist. Obtaining the most meaningful data from databases requires specialised knowledge and tools. However, early assessment of the data potentially contained in such databases can help focus discovery efforts and thereby reduce litigation costs. IP owners should be aware of the advantages of obtaining discovery of business databases compared to conducting traditional e-discovery of unstructured records.

Database discovery in *Microsoft v i4i*

The recent high profile decision in *Microsoft v i4i* (Supreme Court, June 2011) provides an example of when database-type discovery could be crucial. In that case, Microsoft sought to demonstrate that i4i's earlier software product (called S4) was prior art and anticipated i4i's asserted patent. However, when the development of S4 ceased many years before the litigation, i4i destroyed the source code and "no copies were available", according to case documents. As explained by the Federal Circuit: "In evaluating the evidence, the jury was free to disbelieve Microsoft's expert, who relied on the

S4 user manual, and credit i4i's expert, who opined that it was impossible to know whether the [patent] claim limitation was met without looking at S4's source code. Although the absence of the source code is not Microsoft's fault, the burden was still on Microsoft to show by clear and convincing evidence that S4 embodied all of the [patent] claim limitations."

Source code itself is not in a database form, but it is usually stored and maintained in a versioning system that acts as a database. While current databases may no longer contain relevant information about the prior art, most com-

panies routinely back up all electronic data on a regular basis. It is not uncommon for a party to simply state (almost reflexively) that the data no longer exists. But with detailed and particularised requests for information, effective cross-examination of key witnesses, collaboration between counsel and an e-discovery expert, and effective communication with the other party's IT person most knowledgeable, it may be possible to locate archived databases and recover case-altering evidence. Unfortunately for Microsoft, such discovery, if attempted, was not sufficient to locate the missing information.

panying, and recompiling the electronic data into a readily understandable format can also be time consuming. Further, the e-discovery expert must be educated sufficiently about the case to understand what information is being sought and why. Accordingly, coordination with an e-discovery expert early in the case will help to ensure that critical discovery is not overlooked and obtained in a timely fashion.

A more focused fight

Database discovery can be a powerful tool for quickly assessing the facts of a case and can help minimise or focus more traditional e-discovery of unstructured data. While discovery directed to business databases does

not always receive as much attention as traditional e-discovery of unstructured data, databases can be equally valuable, and are sometimes of even greater value. An early focus on obtaining database discovery, including discovery of the database schema needed for reasonable interpretation of the data contained therein, can yield large dividends.

On managingip.com
 Busting US trade mark litigation myths, June 2011
 E-discovery rules released in Australia, March 2009
 Plan early to avoid e-discovery risks, September 2007



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