

Data Rights: ECJ Delivers Blow to UK Racing and Football Authorities

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Introduction

In recent years, the governing bodies of UK football and horseracing have become increasingly convinced that very significant revenues can be attained from licensing intellectual property rights in fixture lists (in the case of football) and lists of runners and riders (in the case of horseracing) to bookmakers and the media. Such a conviction was bolstered by the issuing of Directive 96/9/EC on the legal protection of databases¹. Following the European Court of Justice's highly restrictive interpretation of the directive in four recent cases arising from the football and horseracing industries, such revenues look like they might be much harder to attain than previously anticipated by those governing bodies and their advisors.

On 9 November 2004 the European Court of Justice gave four rulings that will have a profound impact on the ability of sports governing bodies and event owners to sell so-called "data rights". Each of the rulings arose from references made by English, Swedish, Finnish and Greek national courts for preliminary rulings pursuant to Article 234 EC and each reference concerned the proper interpretation of certain provisions of the directive. The four cases concerned were:

- The British Horseracing Board Ltd and Others v William Hill Organization Ltd²
- Fixtures Marketing Ltd v Organismos Prognostikon Agonon Podosfairou AE³
- Fixtures Marketing Ltd v Oy Veikkaus Ab⁴
- Fixtures Marketing Ltd v Svenska Spel AB,⁵

Sports governing bodies and those advising them need to take stock of these rulings, their potential implications and keep a close eye on how they will be applied by the national courts which referred the initial questions to the ECJ.

¹ OJ 1996 L 77, p. 20

² Case C-203/02

³ Case C-444/02

⁴ Case C-46/02,

⁵ Case C-338/02,

Legal Background to the Cases

It has long been established in English law that databases enjoy legal protection under the law of copyright. Likewise fixture lists⁶ and lists of runners and riders in horse races⁷ have also been protected as copyright works by the courts. Both have been commercially licensed in the UK and overseas for a number of years.

However the legal position under copyright is different in various European jurisdictions, where databases and compilations of information were not afforded copyright protection by certain national courts and under certain copyright statutes. This, to a large extent, reflects a basic yet fundamental difference in the development of copyright law between common law systems (which have found no problem in applying economic criteria for qualification for copyright protection (i.e. the questions asked related to simple originality and the level of effort employed in the creation of the work)) and civil law systems where qualification for copyright protection is based more upon the search for an intellectual or emotional investment in the creation of an original literary work on the part of author.

Recognising both this distinction and the policy need to ensure that the European database industry could flourish in a legal environment that afforded sufficient legal protection for databases, the EU issued the directive.

The key points to note relating the directive in the context of the cases under discussion are as follows:

A database is defined in Article 1(2) as *“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 3 provides for copyright protection for databases which, *“by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation”*.

Article 7(1) provides for a *sui generis* right (this is the right that most lawyers and sports administrators understand as “Database Right”) to protect certain types of databases. To qualify for the *sui generis* rights, a maker of a database must show that he has made *“qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents”*. If he can do so, the nature of the *sui generis* rights he is granted is *“to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.”*

Article 7(2) further defines the meaning of extraction and re-utilisation as follows:

“(a) “extraction” shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

⁶ Football League Limited v Littlewoods Pools Ltd [1959] Chancery 637

⁷ Winterbottom v Wintle [1947] 50 WALR 58

(b) *“re-utilisation” shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community”.*

Article 7(5) further defines the scope of the *sui generis* right:

“The repeated and systematic extraction and/or re-utilisation 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.”

Article 10 provides:

“1. The right provided for in Article 7 shall run from the date of completion of the making of the database. It shall expire 15 years from the first of January of the year following the date of completion.”

The directive has been implemented in United Kingdom law by the Copyright and Rights in Databases Regulations 1997 which entered into force on 1 January 1998. The terms of those regulations are identical to those of the directive.

The Horseracing case

The British Horseracing Board Ltd, the Jockey Club and Weatherbys Group Ltd (“the BHB and Others”) administer aspects of the horseracing industry in the UK and in various capacities compile and maintain the BHB database. The database contains a large amount of information relating to horses, races, jockeys, etc, supplied by owners, trainers, racecourses and others involved in horseracing.

The BHB and its contractor, Weatherbys Group Ltd, developed a highly complex system for the compilation, management and delivery of the pre-race data for each race. The database produced thereby contains essential information for those directly involved in horseracing as well as broadcasters, bookmakers and their clients. The costs of running the database are approximately £4 million per annum.

The database is distributed in a number of ways: On a joint website of BHB and Weatherbys; in the BHB’s official journal; via Racing Pages Ltd, a joint venture between Weatherbys and the Press Association, which forwards data to subscribers including bookmakers in a “Declarations Feed” the day before a race; via Satellite Information Services Limited (“SIS”) which is authorised by Racing Pages to transmit data to subscribers in a “raw data feed” (“RDF”); in newspapers; and on the Ceefax and Teletext services, where the list of runners and riders is published on the afternoon before the race.

William Hill, the well-known bookmaker, is a subscriber to both the Declarations Feed and the RDF, and launched its online betting service on two internet sites. These sites published lists of runners and races together with William Hill's odds, the information being sourced from newspapers published the day before the race and from the RDF supplied by SIS on the morning of the race.

The information displayed on William Hill's Internet sites comprised a very small proportion of the total data in the BHB database and was limited to a few facts, such as names of horses and races. Also the races and lists of runners on William Hill's sites were not formatted in the same way as the BHB database.

In March 2000 the BHB and Others issued proceedings against William Hill in the High Court, Chancery Division, alleging infringement of their *sui generis* database right. The basic claims were that:

1. William Hill's daily use of data sourced from newspapers or the RDF is an extraction or re-utilisation of a substantial part of the BHB database, prohibited by Article 7(1); and
2. even if the individual extracts made by William Hill are not substantial they should be contrary to Article 7(5).

The High Court ruled in favour of BHB and Others. William Hill subsequently appealed to the Court of Appeal, which referred eleven questions to the ECJ.

To answer these questions the ECJ combined them into 4 groups which essentially broke down as follows:

- 1. What is the correct interpretation of the concept of "investment" in the obtaining and verification of the contents of a database within the meaning of Article 7(1)?**

In answering this question the ECJ surprised many commentators by stating that the expression "*investment in ... the obtaining ... of the contents*" of a database must be understood to refer to the resources used to seek out and/or verify existing independent materials and collect them in the database, as opposed to the resources used for the creation or verification of independent materials. The purpose of the protection provided by the *sui generis* right is to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database. It followed from this that resources used to prepare a list of horses in a race and to carry out checks in that regard do not represent investment in the obtaining and verification of the contents of the database in which that list appears.

Thus the ECJ appears to be saying that the investment made by the BHB and Others relates to the creation and verification of the raw materials for the database rather the creation and verification of the database itself. Although the Court of Appeal must apply this ruling to the facts, it appears therefore that the ECJ is of the view that, in the absence of significant investment in the creation and verification of the database containing the data – as opposed to the data itself – the BHB database

would not qualify for *sui generis* protection under Article 7(1). However there is potentially some limited “wriggle room” and the interpretation of the ruling must be watched carefully.

- 2. Is “extraction” or “re-utilisation” in Article 7 of the directive limited to the transfer or making available to the public of the contents of the database directly from the database, or does it also include the making available to the public of works, data or other materials which are derived indirectly from the database, without having direct access to the database?**

In response the court ruled:

“The terms ‘extraction’ and ‘re-utilisation’ in Article 7 of the directive must be interpreted as referring to any unauthorised act of appropriation and distribution to the public of the whole or a part of the contents of a database. Those terms do not imply direct access to the database concerned. The fact that the contents of a database were made accessible to the public by its maker or with his consent does not affect the right of the maker to prevent acts of extraction and/or re-utilisation of the whole or a substantial part of the contents of a database.”

Thus, although William Hill used source material from newspapers and data feeds which it was authorised to receive, William Hill was not entitled to extract and re-utilise the data in the manner it did in relation to its online betting service and the fact that it sourced such data from “indirect” sources is no defence. However, if the ECJ’s ruling leads the Court of Appeal to find that *sui generis* right does not subsist in the BHB’s database then such a ruling, though informative, is academic from the BHB and Others’ perspective.

- 3. What is the correct interpretation of the concepts in Article 7(1) of “substantial part” and “insubstantial part” of the contents of a database when assessed qualitatively or quantitatively?**

Here the ECJ noted that the materials displayed on William Hill’s website represented only a very small proportion of the whole of the BHB database and therefore held that those materials do not constitute a substantial part, evaluated *quantitatively*, of the contents of that database.

However could the data be said to be a substantial part when assessed *qualitatively*? The ECJ noted that the information on William Hill’s website concerns only limited data fields of the BHB database: the names of horses running; the date, time and name of the race; and the name of the racecourse. The court went on to state that, in order to assess whether those materials represent a substantial part, evaluated *qualitatively*, it must be considered whether the human, technical and financial efforts put in by the maker of the database in obtaining, verifying and presenting those data constituted a substantial investment. The BHB and Others argued that data extracted and re-utilised by William Hill was of crucial importance because, without lists of runners, the horse races could not take place and that such data was the product of significant effort and financial investment. However, the ECJ ruled that the intrinsic value of the data affected by the act of extraction and/or re-utilisation does not constitute a relevant criterion for assessing whether the part in question is substantial, evaluated *qualitatively*. The fact that the data extracted and re-utilised by William Hill are vital to the organisation of the horse races which BHB and Others are responsible for organising was thus

irrelevant to the assessment whether the acts of William Hill concern a substantial part of the contents of the BHB database.

The court then reiterated that the resources deployed by BHB to establish, for the purposes of organising horse races, the date, the time, the place and/or name of the race, and the horses running in it, represented an investment in the creation of materials contained in the BHB database, not the database itself. Consequently, if the materials extracted and re-utilised by William Hill did not require BHB and Others to put in investment independent of the resources required for their creation, it must be held that those materials do not represent a substantial part, in qualitative terms, of the BHB database.

Thus if applied strictly by the Court of Appeal the ECJ's ruling appears to state that William Hill's extraction and/or re-utilisation of data from the BHB database is not extraction and/or re-utilisation of a substantial part of that database. Again, however, if *sui generis* protection does not exist in the database per se then the answer to this question is somewhat academic.

4. In Article 7(5) of the directive what is meant by “acts which conflict with a normal exploitation of that database or unreasonably prejudice the legitimate interests of the maker of the database”? In particular, are the facts and matters in [the BHB case] capable of amounting to such acts?

The ECJ noted that the objective of Article 7(5) is to prevent repeated and systematic extractions and/or re-utilisations of insubstantial parts of the contents of a database, the cumulative effect of which would be to seriously prejudice the investment made by the maker of the database. In this case however the court ruled that although it was clear that William Hill's extraction and re-utilisation concerned insubstantial parts of the BHB database and were of a repeated and systematic nature there is no possibility that, through the cumulative effect of its acts, William Hill might reconstitute and make available to the public the whole or a substantial part of the contents of the BHB database and thereby seriously prejudice the investment made by BHB in the creation of that database. It was therefore held that the prohibition in Article 7(5) of the directive does not cover acts such as those of William Hill.

The Football Cases

These cases arose following the use, separately, by Veikkaus, OPAP and Svenska Spel, (together the “Defendants”) for the purpose of organising betting games in Finland, Greece and Sweden respectively, of information taken from the fixture lists for English and Scottish professional football leagues.

In English and Scottish professional club football, fixture lists are drawn up for the matches to be played during the season (around 2,000 matches during each season over a period of 41 weeks in England and over 700 matches in Scotland). The preparation of fixture lists is a complex process requiring consideration of a number of factors: ensuring alternation of home and away matches; ensuring that several clubs from the same town are not at home on the same day; clashes with international fixtures; clashes with other public events; and policing considerations. A significant investment is made in the drawing up of these fixture lists. Work begins a year in advance of each

season and is carried out by working group consisting of representatives of the professional leagues and football clubs and necessitates meetings between those representatives, representatives of supporters' associations and the police. A computer programme is also used for the work. During the season, the fixture lists may be altered due to the requirements of broadcasters, postponements because of the weather, etc. The professional leagues also verify that matches are held, check the players' licences and monitor and announce the scores. The activities involved in preparing and administering the fixture lists cost around £2.3 million per year.

The organisers of English and Scottish football retained Football Fixtures Ltd to handle exploitation of the fixture lists through commercial licensing. Fixtures Marketing Ltd was assigned the right to represent the holders of the intellectual property rights in those fixture lists.

Each of the Defendants was involved in using the fixture lists as the basis for betting products. Some of them enjoyed state-granted monopolies to run betting services. Each was generating significant sums of money from exploitation of these betting products.

Fixtures Marketing, having tried in at least one case unsuccessfully to sell a commercial licence for use of the fixture lists, issued proceedings independently against each of the Defendants for infringement of the *sui generis* database rights set out in Article 7(1).

In the process of each litigation, each national court referred a set of questions relating to the directive to the ECJ. Although the questions were each subtly different, at the heart of each reference was the following basic issue, which was were dealt with in the same way by the ECJ in returning its rulings:

In assessing whether a database is the result of a "substantial investment" within the meaning of Article 7(1) of the directive can the maker of a database be credited with an investment primarily intended to create something which is independent of the database and which thus does not merely concern the "obtaining, verification or presentation" of the contents of the database?

The court ruled, as it did in BHB and Others v William Hill, that the significant investment in preparing the fixture lists represents merely an investment in the production of the data itself as opposed to the database which contained the data. Finding and collecting the data which made up the fixture lists did not require any particular effort on the part of the leagues. Obtaining the contents of a football fixture list thus did not require any investment other than that required for the creation of the data contained in that list. The leagues did not need to put any particular effort into monitoring the accuracy of the data on league matches when the list is made up because those leagues are directly involved in the creation of the data. The verification of the accuracy of the contents of fixture lists during the season simply involved adapting certain data in those lists to take account of any postponement of a match or fixture date. Such verification did not, the court ruled, require substantial investment. The presentation of a football fixture list, too, was also found to be closely linked to the creation of the data and could again not be considered to require investment independent of the investment in the creation of its constituent data.

It followed, the court ruled, that neither the obtaining, nor the verification nor the presentation of the contents of a football fixture list constituted a substantial investment which could justify protection by the *sui generis* right provided for by Article 7 of the directive.

Comments on the Cases

These rulings will come as a major blow to the governing bodies of horseracing and football in the United Kingdom. Both sports are very popular for betting purposes and both sports wished to capitalise on this popularity in the light of their perceived enhanced position following the issuing of the directive. Both had invested in gearing up to greatly increase domestic and international revenues from the licensing of their fixture lists and pre-race data. The ECJ has taken the view, however, that *sui generis* protection should not be available. There appears to be little “wriggle-room” for the Court of Appeal and the national courts which referred the questions to take a view that differs from the ECJ. In such circumstances, we would be in a position where it is an indisputable legal fact that football fixture lists and pre-race data are not protected by *sui generis* database rights, a position that will come as a great surprise to many common law practitioners and sports administrators. For racing this will come as a particular blow as the sport had set its stall in the hope that commercial data licensing revenues will replace those lost through the disappearance of the Levy. Although, in the UK at least, the authorities may be able to rely on copyright to support a licensing programme, in many civil law jurisdictions this may be difficult to achieve given that copyright does not always subsist in lists of facts in civil law copyright regimes. In any event it is harder to prove infringement of copyright than of database right where a substantial part must be appropriated before liability arises as opposed to the “little and often” provisions that apply in the case of Article 7(5) of the directive.

Suddenly it seems, horseracing and football appear not to have as many robustly enforceable data rights to sell than they otherwise might have believed. And the media, bookmakers and other users of limited amounts of sports data may have less that they need to pay for than they had previously feared. Whether this is true now depends on how the national courts interpret these four crucially important rulings.

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