

Originality and Databases

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Football listings have hit the UK again, this time with an "original" twist. Disputes surrounding football lists never seem to go out of fashion. On 9 December 2010, the High Court yet again was faced with issues of IP protection of football listings and other related statistical football information, subject matter somewhere on the borderline between copyright and the database sui generis right. A UK provider of football listings and live football scores took various defendants to court for allegedly infringing copyright and database rights.

The decision by the High Court of Justice considers, in particular, the availability of copyright law to databases but decided to leave that question to the European Court of Justice for a preliminary ruling. Importantly, and perhaps stunningly for continental copyright lawyers, Justice Jacobs asserted that the football listings may be protectable by UK copyright law following Article 3 of the Database Directive – the creation of listings exceeding the traditional "sweat of the brow" threshold and falling comfortably in the remit of an own creation as required under the Directive, thus reflecting sufficient originality.

The answer to be given by the ECJ may well have a dramatic impact above and beyond the "acquis" as set forth under the Database Directive. The ECJ must, first, clarify the extent to which the Directive aims to harmonise copyright protection for compilations, a question that arose given the uncertainty over whether traditional UK law in relation to database contents is affected by the new criterion of an "own intellectual creation". But more significant is a further reference to be placed before the ECJ following arguments contended by the claimant, that is, whether there can be copyright in individual football lists as such. Hence, what exactly is meant by Article 3 of the Database Directive? Is it sufficient to show that value had been added to individual data so as to constitute an own intellectual creation? Finally, can traditional copyright in compilations and tables be relied upon atop the protection scheme provided for by the Directive?

These are, indeed, important questions, specifically so from a UK perspective, since here traditional "skill and labour" copyright in compilations had to be sacrificed to make way for a harmonised standard of database protection with its two tier system of a higher originality threshold under copyright and a bespoke sui generis right vesting in the investment. Despite the implementation of the Directive, UK law still provides for traditional copyright protection for "tables and compilations", and the harmonised originality level would, at first glance, only apply to databases as defined. Clearly, permitting the traditional protection regime to survive would undermine the existing regime. Concerning the issue as to what is meant by an "own intellectual creation", the claimant apparently seems to rely on the fact that the ECJ in the Infopaq decision already noted that eleven words might constitute an own intellectual creation as a literary work, though in that case the issue was not decisive as it related to subject matter not yet harmonised. What will the effect be if the ECJ cements such low threshold as a general element of an emerging European acquis on originality? For rights subsisting in databases, the effect would be drastic, creating two parallel rights owned by different persons or entities, but the consequences will be much more dramatic: copyright protection based on "selection or arrangement" concerns types of works that are necessarily on the brink of protectability, because here protection of "pure" information and structural protection conflict immediately. Permitting a low threshold in such cases would invariably mean that copyright protection must increase across the entire range of subject matter. The ECJ now faces an agonizingly convoluted mission – which will certainly require a close analysis of the denotation of the continental terminology in all its complex variations. The case may well bring about the most important response on the European copyright acquis so far.