

Database rights and the place of re-utilisation

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By Gaetano Dimita

The football data clashes continue. This time, the Court of Appeals decided to bring an important aspect of the Dataco case (as mentioned here) to the attention of the Court of Justice:

Hearing the appeal and cross appeal on Football Dataco Ltd, The Scottish Premier League Limited, The Scottish Football League Limited and PA Sport UK Limited v Sportradar GmbH & Sportradar AG [2010] EWHC 2911 (Ch), the Court of Appeals (Lords Justices Laws, Jacob and Wilson) decided to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

'Where a party uploads data from a database protected by sui generis right under Directive 96/9/EC onto that party's webserver located in member state A and in response to requests from a user in another member state B the webserver sends such data to the user's computer so that the data is stored in the memory of that computer and displayed on its screen

(a) is the act of sending the data an act of "extraction" or "re-utilisation" by that party?

(b) does any act of extraction and/or re-utilisation by that party occur: (i) in A only; (ii) in B only; or (iii) in both A and B?'

The case involves the alleged infringement of Football Dataco Ltd's copyright and sui generis right on a database of football matches' goals scored, goal-scorers, penalties, yellow and red cards, etc. Sportradar provides a similar database collecting data on English and Scottish matches from public sources, and it stores its data on servers based in Germany and Austria. Nevertheless this data may be accessed from everywhere (including UK) through linking. Sportradar denied liability, and also argued that since they were neither based in the UK, nor conducting activities in the UK, the court had no jurisdiction.

In the precedent Chancery Division decision, *Floyd J*, on the basis of the evidence established that Sportradar had not reproduced Football Dataco's database or extracted data from it in the UK. In order to answer the question whether and (perhaps even more grippingly) where re-utilisation of the database contents had taken place (Article 7(2)(b) Database Directive), the Judge, notwithstanding the point was not *acte clair*, deemed unnecessary to refer the question to the Court of Justice of the European Union, and concluded that 'the act of making available to the public by online transmission is committed and committed only where the transmission takes place'.

The Court of Appeals, in contrast, decided to refer the questions above to the Court of Justice of the European Union. In making the reference, the court summarised the arguments at para [42] to [45] and decided it was not appropriate for the judges to form their own view about this very important and difficult questions.