

Kluwer Copyright Blog

Football Dataco: skill and labour is dead!

Estelle Derclaye (The University of Nottingham) · Thursday, March 1st, 2012



Summary & comment by **Dr. Estelle Derclaye**, Associate Professor and Reader in Intellectual Property law, University of Nottingham, School of Law.

“The crux of the judgment comes at paragraph 42 when the court clearly states that skill and labour in the selection or arrangement of the data, even if significant, is not sufficient as such to trigger copyright protection.”

This morning, the Court of Justice delivered its judgement in [Case C-604/10](#), *Football Dataco & others v. Yahoo UK ! & others* and followed Advocate General Mengozzi’s opinion. The case concerned, yet again, football fixtures lists. The claimant (Football Dataco) argued that the lists were protected by copyright as databases because the person who makes (a certain Mr Thompson) them expands a lot of skill and labour and does not simply follows rigid rules leaving him no choice. The High Court and Court of Appeal of England and Wales accepted they were databases but rejected sui generis right in them as per the CJEU’s [Fixtures Marketing](#) (C-46/02; C-338/02 and C-444/02) and [British Horseracing Board](#) decisions in 2004. However, they both upheld the copyright claim. Nevertheless, the Court of Appeal had doubts about certain issues in this respect and asked four questions to the CJEU namely:

“1. In Article 3(1) of Directive 96/9 ... what is meant by “databases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation” and in particular:

- (a) should the intellectual effort and skill of creating data be excluded;
- (b) does “selection or arrangement” include adding important significance to a pre-existing item of data (as in fixing the date of a football match), and
- (c) does “author’s own intellectual creation” require more than significant labour and skill from the author, if so what?

2. Does the Directive preclude national rights in the nature of copyright in databases other than those provided for by [Directive 96/9]?”

In short, the CJEU replied positively to questions 1a), 1c) and 2) and negatively to 1b). What was its reasoning?

As to the first question, the Court rightly holds that the Database Directive’s concepts of “selection” and arrangement” refer to the “selection and arrangement of the data through which the author of the database gives the database its structure”. Selection and arrangement do not extend to the creation of the data contained in the database. Therefore, the intellectual effort and skill expended in creating data are not relevant in order to assess the eligibility of the database that contains them for copyright protection. The Court relies for this on the purpose of the directive and its recitals 9, 10 and 12. In short, the directive aims at stimulating the creation of databases. Its aim is not to protect the creation of data capable of being collected in a database.

The court then refers to its [Infopaq](#), [Bezpečnostní softwarová asociace](#), [Football Premier League](#) and [Painer](#) rulings to reiterate once more its interpretation of the originality requirement, namely the author’s own creation. Accordingly and applied to databases, the “criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices [...] and thus stamps his ‘personal touch’”. Therefore, the Court continues, the criterion is “not satisfied when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom”.

This leads the Court to answer the second sub-question, again rightly in my opinion, by saying that provided the selection and arrangement of the data in the case at hand is original, it is irrelevant whether or not this selection and arrangement includes ‘adding important significance’ to that data. Indeed, as article 3(1) of the Database Directive says no other criterion than that of originality is to be applied to determine whether the database is original. In my view, adding significance to the data has to do with the creation of the data. Therefore, adding significance to the data as such is not relevant anyway, because it is something done to the data, not the structure of the database. Hence, the Court already implicitly provided an answer to this sub-question in its answer to the previous sub-question.

The crux of the judgment comes at paragraph 42 when the court clearly states that skill and labour in the selection or arrangement of the data, even if significant, is not sufficient as such to trigger copyright protection. The labour and skill must express the originality in the sense defined by the court (i.e. creativity) for it to give copyright protection to the database. The court of Justice then leaves it to the national court to decide if this is the case. However, the Court of Justice then seems to retract from this leeway given to the national court in the next paragraph, probably leaving in effect no room for manoeuvre to the Court of Appeal on remand. Indeed, it states that the procedures for creating the fixtures lists, as described by the national court, are not original. Unless these procedures are supplemented by elements reflecting originality in selecting or arranging the data contained in the lists, the national court will then be forced to find that the database is not original and thus not protected by copyright law.

As the Court of Appeal of England and Wales surmised in its own judgment and like the Advocate General, the Court of Justice replies fairly quickly to the second question. It held that the Database Directive precludes national legislation which grants databases copyright under conditions which

are different than those set out in article 3(1) of the said directive, i.e. under conditions other than originality. The Court reasoned that the aim of the directive was to remove differences in national legislation particularly on the scope and conditions of copyright protection which adversely affected the functioning of the internal market, free movement of goods and services and the development of an information market in the EU. It also relies in recital 60 to say that article 3(1) carries out a “harmonisation of the criterion for determining whether a database is to be protected by copyright”. It reminds that of course, transitional provisions kept the status quo for databases created before 27 March 1996, which can remain protected under prior, different, if at all, eligibility criteria. However, for “new databases”, no other copyright protection can exist apart from that provided in the directive.

Comment

This decision is a clarifying one in many ways and also one that makes a lot of sense. If the Court had decided that copyright could subsist in the lists, it would have shot itself in the foot as it would, in effect, have rendered its BHB and Fixtures Marketing rulings ineffective. The major aspect of the decision is that skill and labour is not enough to qualify a work for copyright protection and that the judgement’s effect goes beyond databases as the criterion is the same for all works as per *Infopaq*. This is a welcome development as there is still misinterpretation and confusion in the English courts on this point even at the appellate level, as shown by the recent *NLA v. Meltwater* case.

Nonetheless, it is slightly unclear whether the Court of Appeal cannot find that the judgement and discretion exercised by Mr Thompson is enough to qualify under the “creativity/personal touch” originality rule. As the two English courts found, he does not rigidly follow rules. He thus has, and makes, some choices. One will have to re-read carefully the High Court judgment to see whether these choices are made at the stage of the creation of the data (and thus irrelevant as per the Court of Justice’s reasoning) rather than the selection and arrangement of it. But even if these choices are made later, at the stage of selection and arrangement, Mr Thompson does not have that much manoeuvre margin when making his decisions. It is therefore possible that there is only a handful fixtures lists possible. If so, then the Court of Appeal will be forced to find that copyright does not subsist in them because it must apply the merger doctrine. Indeed, in *Bezpečnostní softwarová asociace*, the Court held that when the different ways of expressing an idea are so limited, the idea and the expression merge.

Finally, the decision means that the English skill and labour copyright protection as well as the Dutch *geschriftenbescherming* and Nordic catalogue rule cannot subsist for “new databases”. But the answer to the second question is not totally clarifying. How about “copyright-like” protection such as protection against parasitism or slavish copying, which many national laws provide in their tort or special unfair competition statutes? The Court of Appeal of England and Wales had asked the Court more specifically “Does the Directive preclude national rights in the nature of copyright in databases other than those provided for by [Directive 96/9]?” Maybe the Court of Justice assumed that since the UK does not have unfair competition law (except passing off), it did not refer to that type of protection. Nevertheless, the Luxembourg court could have interpreted the question in a more extensive way since it was posed in such broad terms, i.e. capable of encompassing unfair competition-type legislation. The Court’s answer is not entirely clear on this point if at all, but on a logical construction of its paragraph 49, it is fair to assume that that sort of protection is also out of the window. Indeed, it would adversely affect the functioning of the internal market and free movement of goods and services if databases could obtain quasi-copyright

protection through unfair competition law provisions.

It will be very interesting to see what the Court of Appeal does of this ruling on remand. At least, I hope it now clearly overrules the Meltwater case and does away for good with the confusion it created on the criterion of originality. Whether it accepts or rejects the – admittedly ultra vires and this, since Infopaq – European diktat or not, and chooses to stick to its old originality criterion, is another thing... I, for one, will eagerly await the decision.

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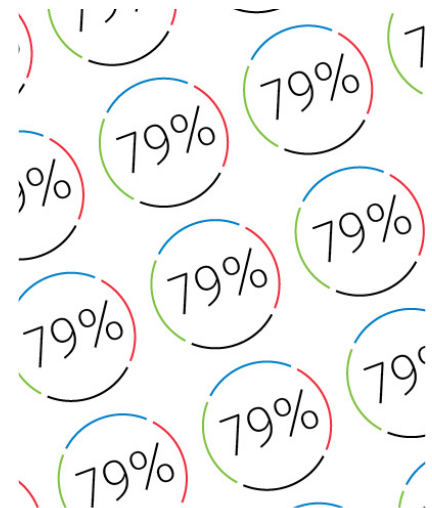
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