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Football Dataco keeps the Court of Justice busy, this time with jurisdictional issues

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On 21 June 2012, Advocate General Cruz Villalón delivered his opinion in Case C-173/11: Football Dataco Ltd and Ors v. Sportradar GmbH and Ors regarding a question where the use of the content of a database protected by sui generis database right takes place.

It has been four months since the Court of Justice delivered its judgment in Case C-604/10 Football Dataco Ltd, and Ors. v Yahoo! And Ors. (see E.Derclaye's comment here) holding that inter alia that "significant labour and skill of the author of the database cannot as such justify the protection of it by copyright under Directive 96/9, if that labour and that skill do not express any originality in the selection or arrangement of that data", and thus clarifying the circumstances under which a database may be protected by copyright.

The present case, brought by almost the same claimants (and lodged with the CJEU barely 4 months after the first case) deals with sui generis database right established by Article 7 of Directive 96/9, and in particular with the question where the acts of "extraction" and "re-utilisation" take place. The Question was referred by the Court of Appeal (England and Wales)(Civil Division), that asked the Court of Justice whether a given use of the content of a database protected by that right is to be classified as a case of 'extraction' or as a case of 're-utilisation' and, once classified, where that use is to be regarded as having taken place. This should enable the Court to give a ruling on the issue of the location of acts of infringement on the sui generis right.

Football Dataco Ltd, The Scottish Premier League Ltd, The Scottish Football League and PA Sport UK Ltd (Football Dataco and Others) are responsible for organising football leagues and competitions in England and Scotland. Football Dataco creates and exploits (among other databases) 'Football Live' in which they claim to have the sui generis right under UK law.

'Football Live' is a compilation of data about football matches in progress (goals and goal-scorers, the names of the players, yellow and red cards, fouls and substitutions) which is collected mainly by ex-professional footballers who attend the football matches for this purpose.

Football Dataco claimed that there is a considerable investment in the obtaining and/or verification of the information collected and also that the compilation of Football Live requires skill, effort, discretion and considerable intellectual input by experienced personnel. (Following the first 'Football Dataco' case, they must now carefully consider whether the intellectual input in such a compilation meets the originality criteria, i.e. whether it is its author's "own", "intellectual", and "creation"? One can doubt whether recording the fact that a goal was scored or a player got a yellow card leaves any space for creativity whatsoever. And, what exactly is the discretion exercised by the 'experienced personnel'? Nevertheless, this is not the issue in the present reference even though the Belgian and Portuguese Governments, which submitted their observations, tried to re-open the question whether Football live in fact is a database protected by the Directive 96/9.)

The defendant, German company Sportradar GmbH, provides live results and other statistics relating to fixtures in the English league to the public via the internet through a service called 'Sport Live Data' and through a website called betradar.com. Betting companies which are customers of Sportradar GmbH provide betting services aimed at the UK market. Their respective web pages have links to betradar.com. The Court of Appeal infers that the UK public forms an important target for the defendant companies.

On 23 April 2010, Football Dataco and Others brought an action before the High Court alleging that the information provided on Sport Live Data was extracted from Football Live and seeking compensation for the damage arising from an infringement of its sui generis right in the Football Live database. Sportradar challenged the jurisdiction of the UK court and sought from the Landgericht Gera (German Regional Court in Gera) a formal declaration that its activities do not infringe any intellectual property right held by Football Dataco and Others.

The High Court declared that it had jurisdiction to hear the claim brought by Football Dataco and Others in so far as it sought to establish joint liability on the part of Sportradar and those of its customers which use its website in the United Kingdom, but that it did not have jurisdiction to hear the claim in so far as it sought to establish primary liability on the part of Sportradar. Both parties appealed against the High Court's decision to the Court of Appeal, which eventually made the reference for a preliminary ruling.

The question referred was worded as follows:

'Where a party uploads data from a database protected by sui generis right under Directive 96/9/EC ("the Database Directive") onto that party's web server located in Member State A and in response to requests from a user in another Member State B the web server 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?'

It is interesting to read parties' observations on the two issues, invited by the Court of Appeal and accompanying the reference for preliminary ruling, and to see the divergence. While the claimants

support the “communication theory” and find the act of sending the data to a user’s computer constituting both ‘extraction’ and ‘re-utilisation’, the Portuguese government (attending the hearing) only finds the acts in question to be acts of ‘re-utilisation’, which, moreover, took place in both Member States. The defendants then claim that regard must be had to the “emission theory” and in such case both the sending of the data and its prior uploading constitute cases of ‘re-utilisation’ which take place only in the Member State in which the server onto which the protected data was uploaded is situated.

For an assessment of the first question, i.e. whether the act of “sending by a party which operates a server located in one Member State, to the computer of a user situated in another Member State, in response to the request of that user, of data obtained from a database protected by sui generis right” is an act of ‘extraction’ or an act of ‘re-utilisation’ one has to look at the definition provided by the Directive 96/9. According to Article 7 (2), the “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; and “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.

Having regard to the Court of Justice’s decisions in British Horseracing Board (C-203/02), Directmedia Publishing (C-304/07), and Apis-Hristovich (C-545/07) the Advocate General concluded that the act of sending by Sportradar is in the nature of ‘re-utilisation’ within the meaning of Article 7 (2) of the Directive 96/9.

When answering the question whether the ‘emission theory’ (the act of re-utilisation was performed at the location of the Sportradar server from which the information was ‘sent’) or ‘reception theory’ (‘re-utilisation’ takes place in the UK where the customers of betting companies linked to Sportradar received the information on their computer) should apply, the Advocate General questioned the use of the conceptual constructions used in the context of broadcasting when dealing with the use on the internet.

In particular, Mr. Villalón emphasized the definition of ‘re-utilisation’ introduced by Article 7(2)(b) of Directive 96/9 itself, which defines ‘re-utilisation’ as ‘any form of making available to the public’ the content of a protected database. He found that phrase ‘making available to the public’ to be the essential conceptual key to giving an answer to the question raised by the UK court. On that basis, the term ‘re-utilisation’ would include the collection of acts which, in the present case, starting with the ‘sending’ of data from Sportradar’s server and ending with the acts performed by the betting companies, culminates in the customers of those companies having access to the data sent.

As a result of these considerations the Advocate General proposes that the Court should answer the questions raised as follows:

(1) Where a party uploads data from a database protected by sui generis right under Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases onto that party’s web server located in Member State A and, in response to requests from a user in another Member State B, the web server 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, the act of sending the information constitutes an act of ‘re-utilisation’ by that party.

(2) The act of re-utilisation performed by that party takes place both in Member State A and in Member State B.

It looks like the Portuguese Government got it right from the start. Or, will the Court of Justice have an opinion different from that of Mr. Villalón? Also, once the jurisdictional questions are solved by the Court of Justice and subsequently dealt with by the referring court it will be interesting to see if Football Dataco Ltd. is able to push through their claim that Football Live attracts copyright protection and the sui generis right.

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