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Football Dataco II: 'Re-utilisation' must be interpreted broadly

Brad Spitz (REALEX) · Tuesday, October 30th, 2012

"The ECJ does not go as far as the Advocate General, and observes that given the ubiquitous nature of the content of a website, the mere fact that the website is accessible in a national territory is not sufficient to consider that the operator of that site is performing an act of re-utilisation caught by the national law."

On 18 October 2012, the European Court of Justice (ECJ) rendered its judgment in Football Dataco II (C-173/11), in which it ruled that data is re-utilised in a Member State, the meaning of Article 7 of the Directive 96/9, if there is evidence that the alleged infringer intended to target members of the public in that territory.

The Court of Appeal of England and Wales made a reference for a preliminary ruling concerning the interpretation of Article 7 of the Directive 96/9/EC on the legal protection of databases, in the proceedings opposing Football Dataco Ltd, Scottish Football League and PA Sport UK Ltd (hereafter 'Football Dataco') and Sportradar (Sportradar GmbH and Sportradar AG).

Football Dataco organises football competitions in England and Scotland, and manages the creation and exploitation of the data and intellectual property relating to these competitions. Football Dataco claims to have, under UK law, a sui generis right in its database, which is a compilation of data about football matches in progress (goals, yellow and red cards, etc.).

Sportradar provides results and statistics relating to English league matches live on the Internet. It enters into agreements with betting companies that provide betting services aimed at the UK market. The websites of these betting companies contain a link to Sportrador's website (betradar.com), which allows the internet users to access the data.

Football Dataco brought a case against Sportrador before the High Court of Justice of England and Wales, on the grounds of the infringement of its sui generis right, arguing that the defendants had copied data from its database in order to compile data for its own services. Sportrador challenged the High Court's jurisdiction, which nevertheless declared that it had jurisdiction in a judgment dated 17 November 2010.

The parties both appealed the decision in the Court of Appeal of England and Wales, which decided to refer the following question to the ECJ:

'Where a party uploads data from a database protected by the sui generis right under Directive 96/9/EC … 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:

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

does any act of extraction and/or re-utilisation by that party occur

in A only,
in B only; or
in both A and B?'

'Re-utilisation' must be interpreted broadly

Article 7(1) of the Directive provides that the sui generis right is the right for the maker of a database "to prevent extraction and/or re-utilisation of the whole or a substantive part" of the contents of that database. And Article 7(2)(b) provides that 're-utilisation' means "any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, renting, by online or other forms of transmission".

In its judgement, ECJ refers to The British Horseracing Board and Others (case C-203/02) to state that the concept of 're-utilisation' must "be understood broadly, as extending to any act, not authorised by the maker of the database protected by the sui generis right, of distribution to the public of the whole or a part of the contents of the database". The Court observes that the nature and form of the process are of no relevance in this respect.

The ECJ then rules that 're-utilisation' must "be interpreted as meaning that the sending by one person, by means of a web server located in Member State A, of data previously uploaded by that person from a database protected by the sui generis right under that directive to the computer of another person located in Member State B, at that person's request, for the purpose of storage in that computer's memory and display on its screen, constitutes an act of 're-utilisation' of the data by the person sending it."

In our case, the betting companies entered into agreements with Sportradar to have access to its web server, and in turn they made that server accessible to their own customers. This is an act of distribution under Article 7 of the Directive.

Location of the re-utilisation: ECJ refuses 'infringement forum shopping'

Sportradar argued that an act of re-utilisation within the meaning of Article 7 of Directive 96/9 must be regarded as located exclusively in the territory of the Member State in which the web server from which the data is sent is located (the 'emission theory'). Thus, Sportradar considers that the English courts do not have jurisdiction. The ECJ explains that if it were to follow such an interpretation, it would mean that an operator who proceeds to re-utilise online the data of a database, targeting the public of a Member State, would escape the application of the national law of that State because its server is located outside the territory of the State in question. And

infringers could even escape the application of the European sui generis right by simply locating their servers outside of the EU!

On the other hand, the Advocate General, in his opinion delivered on 21 June 2012, interpreted broadly Article 7(2)(b) of Directive 96/9 and concluded that the act of re-utilisation occurs “as a result of a sequence of actions in a number of Member States and must be regarded as having taken place in each and everyone of them”.

The ECJ does not go as far as the Advocate General, and observes that given the ubiquitous nature of the content of a website, the mere fact that the website is accessible in a national territory is not sufficient to consider that the operator of that site is performing an act of re-utilisation caught by the national law. If not, it would be possible to conclude that there is an act of re-utilisation in any Member State where an internet user can technically access the website containing the data, that is to say virtually any Member State.

The ECJ refers to the case law it developed in trade mark law (case C-324/09 L’Oréal and Others, para. 64, but also joined cases C-585/08 and C-144/09 Pammer and Hotel Alpenhof, para. 69) to rule that the localisation of an act of re-utilisation depends on there being evidence that the act of re-utilisation discloses an intention to target persons in that territory. The ECJ adds that such intention must be assessed by the national courts.

The ECJ gives a few examples of the type of evidence of such intention to target members of the public of a Member State:

– The fact that Sportradar entered into agreements with companies that offered betting services to UK clients. The fact that the agreements take into consideration the amount business in the UK to fix the remuneration would constitute additional evidence of Sportradar’s knowledge of the destination of the data.

– The fact that the data was accessible in English to UK Internet users (who were clients of the companies in question), whereas English is not commonly used in the Member States from which Sportradar pursues its activities.

By applying its trade mark case law relating to jurisdiction, the ECJ refuses two types ‘infringement forum shopping’:

– The companies that re-utilise data protected in a EU Member State by a sui generis right, without authorisation, cannot rely on the emission theory and locate the servers in another Member State or (even worse) outside of the EU, in order to escape infringement proceedings in that State.

– The makers of databases cannot rely on the mere accessibility of a website re-utilising data protected by a sui generis right to bring an infringement case before the courts of any State where the website can be accessed, without there being evidence that the alleged infringer targeted the public of that State.

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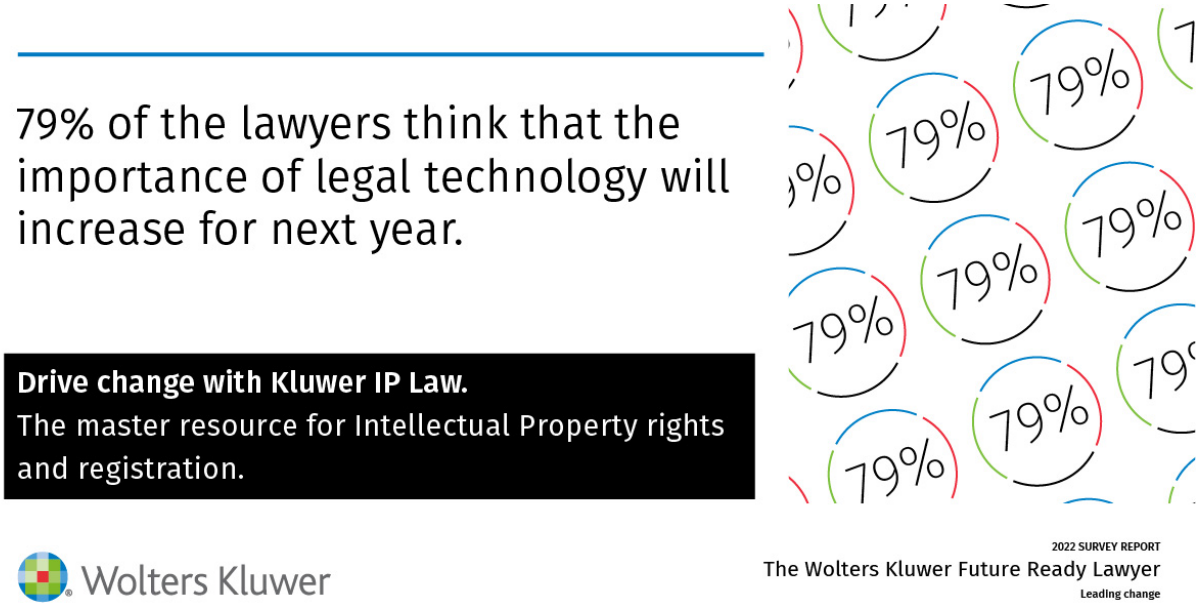

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