Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

18 October 2012*

(Directive 96/9/EC — Legal protection of databases — Article 7 — Sui generis right — Database relating to football league matches in progress — Concept of re-utilisation — Localisation of the act of re-utilisation)

In Case C-173/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Court of Appeal of England and Wales (Civil Division) (United Kingdom), made by decision of 5 April 2011, received at the Court on 8 April 2011, in the proceedings

Football Dataco Ltd,

Scottish Premier League Ltd,

Scottish Football League,

PA Sport UK Ltd

v

Sportradar GmbH,

Sportradar AG,

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta, acting as President of the Third Chamber, K. Lenaerts (Rapporteur), G. Arestis, J. Malenovský and D. Šváby, Judges,

Advocate General: P. Cruz Villalón,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 8 March 2012,

after considering the observations submitted on behalf of:

— Football Dataco Ltd, Scottish Premier League Ltd, Scottish Football League and PA Sport UK Ltd, by J. Mellor and L. Lane, barristers, instructed by S. Levine and R. Hoy, solicitors,

— Sportradar GmbH and Sportradar AG, by H. Carr QC, instructed by P. Brownlow, solicitor,

* Language of the case: English.

— the Belgian Government, by T. Materne, acting as Agent, and R. Verbeke, advocaat,

— the Spanish Government, by N. Díaz Abad, acting as Agent,

— the Portuguese Government, by L. Inez Fernandes, A. Barros and A. Silva Coelho, acting as Agents,

— the European Commission, by M. Wilderspin and J. Samnadda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 June 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 7 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20).

2 The reference has been made in proceedings between Football Dataco Ltd, Scottish Premier League Ltd, Scottish Football League and PA Sport UK Ltd (referred to collectively as 'Football Dataco and Others') and Sportradar GmbH and Sportradar AG (referred to collectively as 'Sportradar') concerning inter alia an alleged infringement by Sportradar of the *sui generis* right which Football Dataco and Others claim to have in a database relating to football league matches in progress ('Football Live').

Legal context

3 In accordance with Article 1(2) of Directive 96/9:

'For the purposes of this Directive, "database" shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.'

4 In Chapter III of that directive, '*Sui generis* right', Article 7, which concerns the object of protection, provides:

'1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

2. For the purposes of this Chapter:

(a) "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;

(b) "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. …

…

5. The repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.'

5 Directive 96/9 was transposed in the United Kingdom by the enactment of the Copyright and Rights in Database Regulations 1997, which amended the Copyright Designs and Patents Act 1988. The provisions of those regulations that are material for the dispute in the main proceedings are in the same terms as the relevant provisions of the directive.

6 Under Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), a person domiciled in a Member State may, in another Member State, be sued 'in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur'.

7 In accordance with Article 8(1) and (2) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40):

'1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.

2. In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.'

The dispute in the main proceedings and the question referred for a preliminary ruling

8 Football Dataco and Others are responsible for organising football competitions in England and Scotland. Football Dataco Ltd manages the creation and exploitation of the data and intellectual property rights relating to those competitions. Football Dataco and Others claim to have, under United Kingdom law, a *sui generis* right in the 'Football Live' database.

9 Football Live is a compilation of data about football matches in progress (goals and goalscorers, yellow and red cards and which players were given them and when, penalties and substitutions). The data is said to be collected mainly by ex-professional footballers who work on a freelance basis for Football Dataco and Others and attend the matches for this purpose. Football Dataco and Others submit that the obtaining and/or verification of the data requires substantial investment and that the compilation of the database involves considerable skill, effort, discretion and/or intellectual input.

10 Sportradar GmbH is a German company which provides results and other statistics relating inter alia to English league matches live via the internet. The service is called 'Sport Live Data'. The company has a website, betradar.com. Betting companies which are customers of Sportradar GmbH enter into contracts with the Swiss holding company Sportradar AG, which is the parent company of Sportradar GmbH. Those customers include bet365, a company incorporated under the law of the United Kingdom of Great Britain and Northern Ireland, and Stan James, a company established in Gibraltar, which provide betting services aimed at the United Kingdom market. The websites of both those companies contain a link to betradar.com. When an internet user clicks on the 'Live Score' option, the data appears under a reference to 'bet365' or 'Stan James' as the case may be. The referring court concludes that members of the public in the United Kingdom clearly form an important target for Sportradar.

11 On 23 April 2010 Football Dataco and Others brought proceedings against Sportradar in the High Court of Justice of England and Wales, Chancery Division, seeking inter alia compensation for damage linked to an infringement by Sportradar of their *sui generis* right. On 9 July 2010 Sportradar challenged the jurisdiction of the High Court to hear the case.

12 On 14 July 2010 Sportradar GmbH brought proceedings against Football Dataco and Others in the Landgericht Gera (Regional Court, Gera) (Germany), seeking a negative declaration that its activities do not infringe any intellectual property right held by Football Dataco and Others.

13 By judgment of 17 November 2010, the High Court of Justice declared that it had jurisdiction to hear the action brought by Football Dataco and Others in so far as it concerned the joint liability of Sportradar and its customers using its website in the United Kingdom for infringement of their *sui generis* right by acts of extraction and/or re-utilisation. By contrast, it declined jurisdiction over the action brought by Football Dataco and Others in so far as it concerned the primary liability of Sportradar for such an infringement.

14 Both Football Dataco and Others and Sportradar appealed against that judgment to the Court of Appeal of England and Wales (Civil Division).

15 Football Dataco and Others submit that Sportradar obtains its data by copying it onto its server from Football Live and then transmits the copied data to the members of the public in the United Kingdom who click on Live Score. In their view, in accordance with the 'transmission' or 'communication' theory, the acts at issue in the main proceedings must be regarded as taking place not only in the Member State from which the data has been sent by Sportradar but also in the Member State in which the persons receiving those sendings are located, in this case the United Kingdom.

16 Sportradar submits that the data on the betradar.com website is generated independently. It adds that, in accordance with the 'emission' theory, an act of transmission occurs only in the place from which the data is sent, so that the acts which it is said to have committed are not within the jurisdiction of the courts of the United Kingdom.

17 In those circumstances the Court of Appeal of England and Wales, Civil Division, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'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:

(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?'

Consideration of the question referred

18 By part (a) of its question, the referring court essentially asks whether Article 7 of Directive 96/9 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 'extraction' or 're-utilisation' of the data by the person sending it. If so, it asks, by part (b) of its question, whether that act must be regarded as taking place in Member State A, in Member State B, or in both those States.

19 The referring court bases its question on a number of premisses, the correctness of which is exclusively for it to assess, namely:

— Football Live is a 'database' within the meaning of Article 1(2) of Directive 96/9 which satisfies the material conditions which, under Article 7(1) of that directive, must be satisfied for protection by the *sui generis* right to apply;

— Football Dataco and Others are entitled to protection by the *sui generis* right of the Football Live database; and

— the data which was the subject of the sendings at issue in the main proceedings was previously uploaded by Sportradar from that database.

20 As regards part (a) of the question, the Court has previously held that, having regard to the terms used in Article 7(2)(b) of Directive 96/9 to define the concept of 're-utilisation', and to the objective of the *sui generis* right established by the European Union legislature, that concept must, in the general context of Article 7, 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 (see Case C-203/02 *The British Horseracing Board and Others* [2004] ECR I-10415, paragraphs 45, 46, 51 and 67). The nature and form of the process used are of no relevance in this respect.

21 That concept covers an act, such as those at issue in the main proceedings, in which a person sends, by means of his web server, to another person's computer, at that person's request, data previously extracted from the content of a database protected by the *sui generis* right. By such a sending, that data is made available to a member of the public.

22 The circumstance that the acts of sending at issue in the main proceedings involve companies providing betting services which are contractually authorised to have access to Sportradar's web server, and in turn, in the context of their activities, make that server accessible to their own customers, cannot invalidate the legal classification as 're-utilisation' within the meaning of Article 7 of Directive 96/9 of the acts by which Sportradar sends from that server data originating from a protected database to those customers' computers.

23 As regards part (b) of the question, the European Commission, in its written observations, doubts the purpose of answering this question at this stage of the main proceedings.

24 While it is correct, as the Commission submits, that whether the acts at issue in the main proceedings are covered by the concept of 're-utilisation' within the meaning of Directive 96/9 is independent of the location in the European Union in which they are carried out, it should none the less be pointed out, first, that that directive does not aim to introduce protection by the *sui generis* right governed by a uniform law at European Union level.

25 The objective of Directive 96/9 is, by approximating national laws, to remove the differences which existed between them in relation to the legal protection of databases, and which adversely affected the functioning of the internal market, the free movement of goods and services within the European Union and the development of an information market within the European Union (see Case C-604/10 *Football Dataco and Others* [2012] ECR, paragraph 48).

26 To that end, the directive requires all the Member States to make provision in their national law for the protection of databases by a *sui generis* right.

27 In that context, the protection by the *sui generis* right provided for in the legislation of a Member State is limited in principle to the territory of that Member State, so that the person enjoying that protection can rely on it only against unauthorised acts of re-utilisation which take place in that territory (see, by analogy, Case C-523/10 *Wintersteiger* [2012] ECR, paragraph 25).

28 According to the order for reference, the referring court, in the main proceedings, has to assess the validity of the claims of Football Dataco and Others alleging infringement of the *sui generis* right they claim to hold, under United Kingdom law, in the Football Live database. For that assessment, it is thus necessary to know whether the acts of sending data at issue in the main proceedings fall, as acts taking place within the United Kingdom, within the territorial scope of the protection by the *sui generis* right afforded by the law of that Member State.

29 Secondly, Article 5(3) of Regulation No 44/2001 establishes, in cases which, like that at issue in the main proceedings, concern tortious liability, special jurisdiction on the part of 'the courts for the place where the harmful event occurred or may occur'.

30 It follows that the question of the localisation of the acts of sending at issue in the main proceedings, which Football Dataco and Others claim have caused damage to the substantial investment involved in creating the Football Live database, is liable to have an influence on the question of the jurisdiction of the referring court, with respect in particular to the action seeking to establish the principal liability of Sportradar in the dispute before that court.

31 Thirdly, in accordance with Article 8 of Regulation No 864/2007, in the case of an infringement of an intellectual property right which, like the *sui generis* right established by Directive 96/9, is not a 'unitary Community' right within the meaning of Article 8(2) of that regulation (see paragraphs 24 to 26 above), the law applicable to a non-contractual obligation arising from such an infringement is, under Article 8(1), 'the law of the country for which protection is claimed'.

32 That conflict-of-laws rule confirms that it is relevant to know whether, regardless of the possible localisation of the acts of sending at issue in the main proceedings in the Member State in which the web server of the person doing those acts is situated, the acts took place in the United Kingdom, the Member State in which Football Dataco and Others claim protection of the Football Live database by the *sui generis* right.

33 In this respect, the localisation of an act of 're-utilisation' within the meaning of Article 7 of Directive 96/9 must, like the definition of that concept, correspond to independent criteria of European Union law (see, by analogy, Case C-5/11 *Donner* [2012] ECR, paragraph 25).

34 In the case of re-utilisation carried out, as in the main proceedings, by means of a web server, it must be observed, as the Advocate General does in points 58 and 59 of his Opinion, that this is characterised by a series of successive operations, ranging at least from the placing online of the data concerned on that website for it to be consulted by the public to the transmission of that data to the interested members of the public, which may take place in the territory of different Member States (see, by analogy, *Donner*, paragraph 26).

35 Account must also be taken, however, of the fact that such a method of making available to the public is to be distinguished, in principle, from traditional modes of distribution by the ubiquitous nature of the content of a website, which can be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the operator of the website in regard to its consultation beyond that person's Member State of establishment and outside of that person's control (see, to that effect, Joined Cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof* [2010] ECR I-12527, paragraph 68, and Joined Cases C-509/09 and C-161/10 *eDate Advertising and Others* [2011] ECR I-10269, paragraph 45).

36 Consequently, the mere fact that the website containing the data in question is accessible in a particular national territory is not a sufficient basis for concluding that the operator of the website is performing an act of re-utilisation caught by the national law applicable in that territory concerning protection by the *sui generis* right (see, by analogy, *Pammer and Hotel Alpenhof*, paragraph 69, and Case C-324/09 *L'Oréal and Others* [2011] ECR I-6011, paragraph 64).

37 If the mere fact of being accessible were sufficient for it to be concluded that there was an act of re-utilisation, websites and data which, although obviously targeted at persons outside the territory of the Member State concerned, were nevertheless technically accessible in that State would wrongly be subject to the application of the relevant law of that State (see, by analogy, *L'Oréal and Others*, paragraph 64).

38 Accordingly, in the dispute in the main proceedings, the fact that, at the request of an internet user in the United Kingdom, data on Sportradar's web server is sent to that internet user's computer for technical purposes of storage and visualisation on screen is not in itself a sufficient basis for concluding that the act of re-utilisation performed by Sportradar on that occasion takes place in the territory of the United Kingdom.

39 The localisation of an act of re-utilisation in the territory of the Member State to which the data in question is sent depends on there being evidence from which it may be concluded that the act discloses an intention on the part of its performer to target persons in that territory (see, by analogy, *Pammer and Hotel Alpenhof*, paragraphs 75, 76, 80 and 92; *L'Oréal and Others*, paragraph 65; and *Donner*, paragraphs 27 to 29).

40 In the dispute in the main proceedings, the circumstance that the data on Sportradar's server includes data relating to English football league matches, which is such as to show that the acts of sending at issue in the main proceedings proceed from an intention on the part of Sportradar to attract the interest of the public in the United Kingdom, may constitute such evidence.

41 The fact that Sportradar granted, by contract, the right of access to its server to companies offering betting services to that public may also be evidence of its intention to target them, if – which will be for the referring court to ascertain – Sportradar was aware, or must have been aware, of that specific destination (see, by analogy, *Pammer and Hotel Alpenhof*, paragraph 89, and *Donner*, paragraphs 27 and 28). It could be relevant in this respect if it were the case that the remuneration fixed by Sportradar as consideration for the grant of that right of access took account of the extent of the activities of those companies in the United Kingdom market and the prospects of its website betradar.com subsequently being consulted by internet users in the United Kingdom.

42 Finally, the circumstance that the data placed online by Sportradar is accessible to the United Kingdom internet users who are customers of those companies in their own language, which is not the same as those commonly used in the Member States from which Sportradar pursues its activities, might, if that were the case, be supporting evidence for the existence of an approach targeting in particular the public in the United Kingdom (see, by analogy, *Pammer and Hotel Alpenhof*, paragraph 84, and *Donner*, paragraph 29).

43 Where such evidence is present, the referring court will be entitled to consider that an act of re-utilisation such as those at issue in the main proceedings is located in the territory of the Member State of location of the user to whose computer the data in question is transmitted, at his request, for purposes of storage and display on screen (Member State B).

44 The argument put forward by Sportradar that an act of re-utilisation within the meaning of Article 7 of Directive 96/9 must in all circumstances be regarded as located exclusively in the territory of the Member State in which the web server from which the data in question is sent is situated cannot be accepted.

45 Besides the fact that, as Football Dataco and Others observe, it is sometimes difficult to localise such a server with certainty (see *Wintersteiger*, paragraph 36), such an interpretation would mean that an operator who, without the consent of the maker of the database protected by the *sui generis* right under the law of a particular Member State, proceeds to re-utilise online the content of that database, targeting the public in that Member State, would escape the application of that national law solely because his server is located outside the territory of that State. That would have an impact on the effectiveness of the protection under the national law concerned conferred on the database by that law (see, by analogy, *L'Oréal and Others*, paragraph 62).

46 Moreover, as Football Dataco and Others submit, the objective of protection of databases by the *sui generis* right pursued by Directive 96/9 would, in general, be compromised if acts of re-utilisation aimed at the public in all or part of the territory of the European Union were outside the scope of that directive and the national legislation transposing it, merely because the server of the website used by the person doing that act was located in a non-member country (see, by analogy, *L'Oréal and Others*, paragraph 63).

47 In the light of the above considerations, the answer to the question is that Article 7 of Directive 96/9 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. That act takes place, at least, in Member State B, where there is evidence from which it may be concluded that the act discloses an intention on the part of the person performing the act to target members of the public in Member State B, which is for the national court to assess.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 7 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases 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. That act takes place, at least, in Member

State B, where there is evidence from which it may be concluded that the act discloses an intention on the part of the person performing the act to target members of the public in Member State B, which is for the national court to assess.

[Signatures]