

Gowers Review of Intellectual Property

Views of The FA Premier League, The Football League, The Scottish Premier League and Scottish Football League, Football DataCo (together “the Football Authorities”) on issues relating to Sports Betting

(Submission 2)

Introduction

The Gowers Review has previously received a paper setting out the comments of the Sports Rights Owners Coalition (“SROC”). It sets out our experiences in relation to Sports Betting in the Case Study on betting and Football DataCo.

The Football Authorities fully support the SROC paper.

The purpose of this submission is to provide a detailed up to date view of the position of the Football Authorities in relation to sports betting and how it fits with current UK and EU IP law.

We are aware that you are most interested in real case studies of businesses operating in the new digital economy. Our case shows the very real difficulties for business in this fast evolving environment, and how IP law needs to be constantly refined, clarified and interpreted by policy makers to reflect the economic and technological reality.

We end by urging you to make specific recommendations in this area. We are ready and willing to meet with you and your team at any time to explore these issues with you.

Background

To summarise the key facts from the SROC Case Study, in 1959 the Football Authorities obtained a High Court judgment against Littlewoods confirming that the leagues owned a “table and compilation” copyright in their fixture lists. This case concerned football pools, which was, at that time - and for decades after - the most significant sports betting product outside horse and greyhound racing. This judgment formed the precedent for a very successful programme of licensing fixtures across the world, particularly in common law jurisdictions (which also had a culture of legitimate betting businesses in contrast to a major proportion of the world).

Through an agent (Fixtures Marketing Ltd), the leagues also sought to build a licensing business across Europe – where culturally betting is seen with greater suspicion and is often only operated by the state, and the law of copyright and unfair competition generally operated in a different way to the UK tradition. In the early 1990s, cases were brought in Sweden and Finland seeking to assert their version of “tables and compilations copyright”. These cases failed.

Development of Data Systems

Despite the setbacks in Sweden and Finland, the Football Authorities took a long range view of their product, and evaluated its potential for creating match data to be exploited by the growth in personal communication systems in the UK and across the world.

Football took the view that its content would be in demand, and wanted to invest in getting ready to provide official data and creating historical archives. The Football Authorities did not want to see many “unofficial” versions of their events, all claiming they were correct.

It became clear that :

- (a) Extensive investment was required in technology to develop a system for capturing, storing and delivering live data to customers.
- (b) By the time such a system had been devised and implemented it would be unlikely a company would be able to exploit the asset before having to enter a bidding contest to retain their position as official data gatherer for the football leagues.
- (c) Each time the business was won, a new company would have to “re-invent the wheel”, and start the technology process all over again, with the added disadvantage of migrating data from the previous system to the new supplier’s system: This migration becoming more difficult as the level of captured data multiplied.
- (d) Additionally, it was clear that data provision itself would be insufficient for potential customers and therefore end user applications that interpreted the data would be required for internet, mobile, interactive TV, PDAs, TV on-demand etc. Time and consistency would be needed to meet these requirements.

As a result of these considerations, the 134 professional football clubs in the UK, functioning inside the four professional football leagues, decided to invest and create a separate company to take on these challenges and carry out this business.

Events since 2000

DataCo officially came into being in 2001, and for season 2001-02 started providing live data feeds of information from all matches. In reality work had already started on the database and applications prior to DataCo being incorporated.

As DataCo was formed, the leagues’ agent in Europe, and the British Horse Racing Board in the UK, were in the final stages of taking the first Database Directive cases before the European Court of Justice. In the late 1990s the local agent had re-opened the fixtures cases in Sweden and Finland using the new 1996 European Database Directive and asserting sui generis rights. The local agent had also made a claim in the Greek courts against the government company that owned the betting monopoly.

In the UK courts (BHB v William Hill) it was held that Database Rights could apply to fixtures-style data while in Sweden and Finland (football’s cases) it was felt the opposite (the Greek case went straight to an ECJ reference without determining the issues under Greek law). In these four cases, the ECJ was asked to clarify questions relating to the operation/ application of the Database Directive.

Football's case was based around fixtures, whereas the Horse Racing case was based around more extensive data relating to runners and riders. Neither variant of applying the Database Directive escaped an adverse ruling. In football's cases the creation of material subsequently stored in a database failed the basic tests of obtaining and verification. With horse racing this was extended to include where the telephone call providing the data originated, with the clarification that if someone "volunteers" data then this fails the "obtaining" and "verification" tests as well.

Outcomes

Although the ECJ judgments damaged football's ability to generate royalties across continental Europe, no one envisaged the further complications that would arise in the UK.

By the time of the judgments in 2004, the Football Authorities had already invested £3m in its database and applications. Conversations with the Directorate for Internal Markets at the European Commission have confirmed that the original intention of the Database Directive had been to promote and stimulate database development throughout Europe by protecting company's financial investment in developing such systems.

Following the ECJ ruling, DG Internal Markets undertook a review to evaluate the effectiveness of the Database Directive. Despite expressing considerable reservations about the Directive, in the light of the ECJ rulings, and the very clear views expressed by officials that the fundamentals of the Directive have been undermined by the rulings, it looks as though the outcome of the review will be to maintain the Directive as it stands.

This seems wrong in principle to us, and is very frustrating. This is particularly so in the light of the fact that EU Member States had acted to protect their own state gambling monopolies in the ECJ cases, rather than operate on the basis of the legal principles that had been agreed at the time of the negotiation of the Database Directive. In essence, Member States with monopoly sports betting operations had not appreciated that the new Directive would mean that they would have to pay royalties to the UK football leagues on which they offer bets.

A further cause of frustration has been the lack of support from the DTI throughout the entire process. The UK Government has taken no policy position in the Database Directive review – or at least no public position. The UK Government made no intervention in the ECJ cases, despite the fact that the UK had negotiated the sui generis right into the Directive specifically to protect businesses such as ourselves, and despite the fact that Government had itself determined in the RIA for the abolition of the Horserace Betting Levy that there were commercial rights. We would ask that the Gowers Review looks into these matters.

We would also draw your attention to the views of the Adelphi Group in relation to the current analysis of the Database Directive.

Current position

The ECJ judgements led to football re-evaluating its legal position in the UK. The betting businesses resident in the UK who had been paying licence fees for years started to argue that the ECJ ruling reversed the effect of the 1959 judgment, and that football had no ownership of any of its data. These betting businesses, who were heavily involved in negotiating the new Gambling Act 2005, had never argued

this before. During the period of these negotiations with government the betting businesses stopped paying football.

And this is the current position, excluding any “locally” agreed arrangements with individual betting companies that wish to make a “voluntary” payment to football.

Football now finds itself in an invidious position. It has been investing in developing its data business, and it would now appear that the product(s) of this substantial investment may not be protected. By implication this means that all UK sports find themselves in the same position. Although this same position exists for Horse Racing it has the ability to enlist the Government’s support through a continuation of the Horserace Betting Levy legislation. Horse Racing is the only “sport” to have an enshrined right to revenues from betting that under current legislation would probably constitute Illegal State Aid were such a law to be created today.

Government Commitment to Address these Unintended Consequences

We have been told by Ministers in both the DCMS and the DTI that it was never the Government’s intention that our rights should be removed by the Database Directive. Both Departments have made a policy commitment to finding a long term rights based solution to this issue.

We would therefore urge the Gowers Review to consider these issues and to make specific recommendations as to how Government can deliver on this policy.

We would request a meeting in order to explore this further with you, including the ways in which the necessary clarification of the law can be achieved at UK level.

Gowers Review

We believe that our case is a typical example of a business attempting to grow and develop with the use of new technologies/ communications. Initially the support for our investment was underpinned by a European law that in practise did not provide the support originally intended by the law’s creators.

As a consequence, this leaves IP law within the UK lacking clarity . It is hoped the Gowers Review will provide this clarity for businesses such as ours attempting to develop in a rapidly changing technological world.

Independent European Sport Review

This report links to a development since the SROC submission to the review.

We want to highlight to you the findings on issues directly relevant to your review of IP rights, the recent Independent European Sports Review by Jose Luis Arnaut. The report was commissioned by EU Sports Ministers during the UK Presidency. We contributed to the review, as did many others in the sports and related industries.

As you will see, the Review makes very clear recommendations for action to protect and promote the position of organisations such as us. The full report is at www.independentfootballreview.com but pages 84 to 87 are of particular interest with regard to IP for sporting data rights.

The Review is due to be taken forward during the Finnish Presidency as part of a EC White Paper process. The DCMS is leading the consultation process on the Review.

The views of the Gowers Review will be very significant and we would urge you to support our call for action.

For more information and supporting documentation please contact in the first instance :-

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