

Court of Justice EU, 18 October 2012, Football DataCo v Sportradar



v



DATABASE RIGHTS

'Re-utilisation' in Member State

- the sending by one person of data by means of a web server located in Member State A to the computer of another person in Member State B, at that person's request constitutes an act of 're-utilisation' of data by the sender, when there is evidence from which 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

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.

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Court of Justice EU, 18 October 2012

(R. Silva de Lapuerta, K. Lenaerts (Rapporteur), G. Arestis, J. Malenovský and D. Šváby)

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,
- 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 I-0000, 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 I-0000, 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 I-0000, 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-0000, paragraph 68, and Joined Cases C-509/09 and C-161/10 eDate Advertising and Martínez \[2011\] ECR I-0000, 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-0000, 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.

* Language of the case: English.

**OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN**

delivered on 21 June 2012 (1)

Case C-173/11

Football Dataco Ltd

The Scottish Premier League Ltd

The Scottish Football League

PA Sport UK Ltd

v

Sportradar GmbH (company registered in Germany)

and

Sportradar AG (company registered in Switzerland)

(Reference for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division))

(Directive 96/9/EC – Legal protection of databases – Concepts of extraction and re-utilisation – Location of the act of re-utilisation)

1. In the course of legal proceedings concerning the sui generis right established by 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, (2) the Court of Appeal has 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.

2. The purpose of this reference for a preliminary ruling is to enable the Court to give a ruling on the issue of the location of acts of infringement of what is known as the sui generis right. In keeping with the Court’s case-law relating to communication via the internet, I shall confine myself to proposing a solution tailored to the specific features of that medium and, in particular, to the conceptual categories employed in Directive 96/9 itself, thus refraining from addressing other issues such as, among others, jurisdiction, with which, in my view, the referring court’s question is not concerned.

I – Legislative context

A – European Union law

3. In Chapter II (‘Copyright’) of Directive 96/9, under the heading ‘Restricted acts’, Article 5 provides: *‘In respect of the expression of the database which is protectable by copyright, the author of a database shall have the exclusive right to carry out or to authorise:*

...

(d) any communication, display or performance to the public;

...’

4. In Chapter III (‘Sui generis right’) of Directive 96/9, under the heading ‘Object of protection’, Article 7 establishes the following:

‘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. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;

Public lending is not an act of extraction or re-utilisation.

...’

B – National law

5. Directive 96/9 was transposed in the United Kingdom by the amendments made to the Copyright Design and Patents Act 1988 by the Copyright and Rights in Database Regulations 1997 (SI 1997/3032). The content of the UK legislation is the same as that of the directive.

II – Facts

6. Football Dataco Ltd, The Scottish Premier League Ltd, The Scottish Football League and PA Sport UK Ltd (‘Football Dataco and Others’), the companies which brought the original proceedings, are responsible for organising football leagues and competitions in England and Scotland. Football Dataco manages the creation and exploitation of the data and intellectual property rights relating to those competitions and claims to have, under UK law, the sui generis right in the ‘Football Live’ database.

7. The database at issue (‘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). The data is collected mainly by ex-professional footballers who are engaged on a freelance basis by Football Dataco and Others and who attend the football matches for this purpose. Football Dataco and Others submit that not only is there considerable investment in the obtaining and/or verification of the information collected but the compilation of Football Live requires skill, effort, discretion and considerable intellectual input by experienced personnel.

8. On the other hand, the German company Sportradar GmbH provides live results and other statistics relating to fixtures in the English league to the public via the internet. That service is called ‘Sport Live Data’.

9. In particular, Sportradar GmbH has a website called betradar.com. The betting companies which are customers of Sportradar GmbH allegedly have contracts with the Swiss company Sportradar AG, which is the parent company of Sportradar GmbH. Those betting companies include bet365, a UK company, and Stan James, based in Gibraltar. Both of these provide betting services aimed at the UK market. Their respective web pages have links to betradar.com. The Live Score option provides access to information

that appears in a banner running across the screen carrying the names of bet365 or Stan James, from which the Court of Appeal infers that the UK public forms an important target for the defendant companies.

10. On 23 April 2010, Football Dataco and Others, alleging that the information provided on Sport Live Data was extracted from Football Live, brought an action before the High Court of Justice of England and Wales seeking compensation for the damage arising from an infringement of its sui generis right in the Football Live database.

11. Sportradar challenged the jurisdiction of the UK court and sought from the Landgericht Gera (Regional Court, Gera) (Germany) a formal declaration that its activities do not infringe any intellectual property right held by Football Dataco and Others.

12. 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 has now made the present reference for a preliminary ruling.

III – The question referred

13. The question referred for a preliminary ruling by the Court of Appeal is 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?'*

14. The Court of Appeal states that it does not consider it appropriate to form its own view in this regard and so confines itself to setting out the arguments of the parties (paragraph 45 of the reference).

IV – The procedure before the Court of Justice

15. The reference for a preliminary ruling was received at the Court Registry on 8 April 2011.

16. Written observations have been submitted by the Spanish and Portuguese Governments, the parties to the original proceedings and the Commission.

17. Once the date for the hearing had been set, the Court asked the parties to focus their observations on two issues:

– What is the relationship between the issue of the location of the acts of sending data mentioned by the referring court, on the one hand, and the issues of the

law applicable to the main proceedings and the court having territorial jurisdiction under the Rome II Regulation and the Brussels I Regulation respectively, on the other?

– What bearing, if any, do the developments in the case-law found at paragraphs 61 to 67 of L'Oréal, (3) paragraphs 61 to 94 of Pammer and Alpenhof (4) and paragraphs 45 to 52 of eDate Advertising and Others (5) have on the present case?

18. The hearing, held on 8 March 2012, was attended by the Belgian and Portuguese Governments, the parties to the original proceedings and the Commission.

V – Observations

19. Football Dataco and Others submit, with respect to the first of the questions referred by the Court of Appeal, that the sending of data to a user's computer constitutes both an act of extraction – as a transfer from one medium to another of data originating from a protected database – and an act of re-utilisation – as the transmission of that data to the public.

20. As regards the second question raised by the referring court, Football Dataco and Others argue that the acts performed by Sportradar must be regarded as having taken place in the United Kingdom, since that is the Member State at which those acts were directed. In their submission, it is therefore appropriate to apply the 'communication theory' adopted by Directive 2001/29, (6) the WIPO Treaty (7) and the Court of Justice in L'Oréal.

21. The Spanish Government's position is largely the same as that of Football Dataco and Others, inasmuch as it states that, in its view, the activity under examination entails an extraction, which took place in State A, the location of the database onto which data from a protected database is loaded, and a re-utilisation, which occurred in State B, the location of the user to whom that data is sent upon his request.

22. The Portuguese Government points out that, in the situation at issue, the data could have been obtained without using the protected database. Consequently, since it is impossible to be certain whether or not this is the case, it can only be said that the acts in question are acts of re-utilisation, which, moreover, took place in both Member States.

23. For its part, the Commission submits that the question should be extended to the act of uploading the data before sending it, on the ground that the former constitutes an extraction while the latter is a re-utilisation. As regards the place where those acts took place, the Commission contends that that question is immaterial to their legal classification and may be of relevance only at a later stage in the national proceedings when the law applicable to the case falls to be determined.

24. Finally, Sportradar confines its observations to the question of the place where the acts under examination took place and submits that, in order to determine that place, regard must be had to the 'emission theory'. In its view, that is the theory applied by Directive 96/9, the Berne Convention, (8) Directive

89/552, (9) Directive 93/83 (10) and Directive 2001/29. The consequence of that approach is that 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.

25. As regards the two issues on which the Court asked the parties to focus their observations at the hearing, they all agree that the question of the location of the acts of sending data is decisive for the purposes of identifying both the competent national court and the substantive law applicable. Accordingly, the exchange of argument between the parties centred from the outset on identifying the place where the infringement of the sui generis rights at issue took place. In this regard, they all maintained the positions they had taken in their written observations, with the exception of the Commission, which, at the hearing, submitted that in the present case there has been both an extraction and a re-utilisation and that both of these took place in State A as well as in State B, the decisive factor, in its view, being the distinction between the harmful act, on the one hand, and the harm itself, on the other.

26. Finally, at the hearing, both the Belgian Government and the Portuguese Government argued that Football Live should not be regarded as a 'database' within the meaning of Article 1(2) of Directive 96/9, since, in terms of both its content and its configuration, it fails to satisfy the conditions necessary for it to be the object of the protection guaranteed by the directive.

VI – Assessment

A – Preliminary considerations

27. With a view to gaining a proper understanding of the meaning and scope of the questions raised by the Court of Appeal, I consider the content of the declarations contained in the order of the Court of Appeal that precedes and accompanies the reference for a preliminary ruling of the same date to be very enlightening.

28. The aforementioned order concludes with the declaration (a) that the Court of Appeal has no jurisdiction to hear claims for infringement of copyright (which issue is dealt with in paragraphs 14 to 18 of the reference for a preliminary ruling); (b) that it has jurisdiction to hear claims concerning the joint liability of Sportradar (which issue is dealt with in paragraphs 19 to 39 of the reference for a preliminary ruling); and (c) that it has made no final determination on the jurisdiction of the High Court to try the claims brought against the defendants individually.

29. There is nothing in the reference for a preliminary ruling which clearly corresponds to the final declaration. Instead, from paragraph 40, the reference sets out what may be regarded as the grounds in support of the questions as they will ultimately be formulated, that is to say, issues relating to the categories of 'extraction' and 're-utilisation' (paragraphs 40 to 41), but is above all given over to an extensive description of the positions of the parties in relation to the 'transmission' and 'communication'

theories (paragraphs 42 to 46), and concludes with the direct statement of the questions as reproduced above.

30. The first of those questions concerns the legal classification which, in accordance with Directive 96/9, is warranted by an act which the Court of Appeal describes in detail as follows: the '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.

31. Thus no question is raised in connection with the Football Live database – which we must regard as a 'database' within the meaning of Article 1(2) of Directive 96/9 – or in connection with the rights which Football Dataco and Others claim to have in that database. The attempts of the Belgian and Portuguese Governments to re-open that issue by challenging the proposition that Football Live is a database protected by Directive 96/9 are therefore, to my mind, misplaced.

32. Neither that issue nor the issue as to whether Football Dataco and Others hold a sui generis right in the Football Live database was in dispute in the original proceedings.

33. On the contrary, it should be recalled that, as paragraph 19 of the reference states, what Sportradar specifically disputes in those proceedings is the jurisdiction of the UK courts to hear and determine the infringement of the sui generis right complained of by Football Dataco and Others in the claim brought against Sportradar individually.

34. Nor is there any question that the data 'sent' originates from Football Live and that the 'sending' was done from a Sportradar server located in a Member State other than the United Kingdom. Consequently, in so far as the foregoing is taken as read, I, unlike the Commission, do not think it necessary to consider what legal classification is to be given to the act of uploading the data obtained from Football Live onto Sportradar's server. The answer to that question would have no bearing on the question which the Court of Appeal is now putting to the Court of Justice, which is concerned only with the sending to the computers of users situated in the United Kingdom of data about the nature, obtaining and origin of which no doubts have been raised.

35. The second question referred concerns where the act of 'sending' occurs, once that act has been classified. The Commission takes the view that determining the place where the act of sending took place is immaterial for the purpose of classifying that act. And so it is, without any doubt. That in itself is not conclusive, however. It is reasonable to surmise that the reason why the Court of Appeal asks about the place of 'sending' may be that it is only on the basis of that information that it would be able to determine the court competent to try the matter raised in the original proceedings, that being one of the factors at issue in the dispute in those proceedings (paragraphs 19 and 20 of the reference), as became apparent at the hearing.

36. None the less, we must not lose sight of the fact that the Court of Appeal is very precise in its wording

of the two questions which it puts to the Court of Justice. It is at all times careful to relate its doubts to the act of sending performed by Sportradar, asking, first, whether that act is to be classified as ‘extraction’ or ‘re-utilisation’ and, next, where that particular act is to be regarded as having taken place. As I see it, by avoiding any reference to the harm caused by that act, the referring court would like to leave outside the ambit of consideration by the Court of Justice any deliberation on the inferences that are to be drawn from the identification of the place where the ‘sending’ takes place. I shall therefore confine my comments to the question of the location of the actual act of ‘sending’, without extending my analysis to the question of any inferences that may be drawn from the answer to the first question, a matter which will have to be resolved by the referring court.

37. Furthermore, in my view, it cannot be inferred from the information drawn from the documents in the original proceedings that the Court of Appeal expects to be in any doubt when it comes to identifying the law applicable to the case once the court with jurisdiction to try the main dispute has been determined. Nor was that issue discussed at the hearing. In my view, therefore, it would not be appropriate for the Court of Justice to give a ruling in this regard.

B – The legal classification of the act by which a party which operates a server located in one Member State sends to the computer of a user situated in another Member State, at the request of that user, information obtained from a database protected by the sui generis right. Objective and subjective aspects

38. In my view, the answer to this first question follows readily from the rule established by the Court in various relatively recent decisions. (11)

39. In accordance with that rule, the terms ‘extraction’ and ‘re-utilisation’, when considered objectively, ‘must ... be interpreted as referring to any act of appropriating and making available to the public, without the consent of the maker of the database, the results of his investment, thus depriving him of revenue which should have enabled him to redeem the cost of the investment’ (The British Horseracing Board and Others, paragraph 51).

40. These are, moreover, terms which ‘cannot be exhaustively defined as instances of extraction and re-utilisation directly from the original database at the risk of leaving the maker of the database without protection from unauthorised copying from a copy of the database’ (The British Horseracing Board, paragraph 52). Consequently, ‘the concepts of extraction and re-utilisation do not imply direct access to the database concerned’ (The British Horseracing Board, paragraph 53).

41. In the situation under consideration here, which concerns exclusively the act of ‘sending’ to a user’s computer, upon his request, information obtained from a database protected by the sui generis right, we are clearly dealing with an act forming a necessary constituent part of a process of making available to the

public which, in accordance with the rule established in *The British Horseracing Board*, constitutes a re-utilisation within the meaning of Article 7(2) of Directive 96/9.

42. Indeed, in the context of communication via the internet, ‘re-utilisation’ as referred to in Directive 96/9 can only be understood as a generally complex act made up of the actions needed to produce the effect of ‘making available’ which, in the language of the directive itself, comprises ‘re-utilisation’. The act of sending by Sportradar to which the Court of Appeal refers is one of the necessary component parts of that complex act and, in conclusion, must therefore be regarded, for the purposes of these proceedings, as being in the nature of ‘re-utilisation’.

43. It seems appropriate at this point to revisit the circumstances in which the present reference for a preliminary ruling was made. This will shed light on the relevance of the fact that the referring court has doubts as to its jurisdiction in relation to a very specific act: the ‘sending’ performed by Sportradar.

44. It is important to bear in mind first and foremost that the Court of Appeal is in no doubt about its jurisdiction to hear claims brought by Football Dataco and Others against, jointly, Sportradar and its customers situated in the United Kingdom. It does have doubts, however, about its jurisdiction to try claims brought by Football Dataco and Others against Sportradar individually.

45. It is clear, in my view, that the chain of actions which starts with Sportradar and culminates in the Football Live data being made available to individuals through the betting companies which have entered into contracts with Sportradar constitutes a typical instance of ‘re-utilisation’.

46. None the less, inasmuch as the claim in the main proceedings is directed solely against Sportradar, the referring court raises the question whether the action of Sportradar alone, which forms part of the abovementioned chain of actions and, within that frame of reference, shares the legal classification attributed to those actions as a whole, is, on its own, outside that frame of reference, sufficiently significant and autonomous to warrant a separate classification.

47. In my opinion, that question clearly has to be answered in the negative. The fact that, in circumstances such as those which have given rise to the main proceedings, ‘re-utilisation’ is the result of a series of actions coming together that are attributable to different parties does not mean that each of those actions does not in and of itself warrant classification as an act of ‘re-utilisation’ within the meaning of Directive 96/9 entailing the consequences provided for therein. It is clear that each of those actions is meaningful only as a constituent part of that complex act and, therefore, necessarily shares the classification of the act in question.

48. Consequently, as a first conclusion, I propose that the Court’s answer to the first question should be that the act of ‘sending’ specifically performed by

Sportradar constitutes a 're-utilisation' within the meaning of Article 7(2)(b) of Directive 96/9.

C – Location of the act of 're-utilising' the information obtained from a database protected by the sui generis right

49. The answer to the second question raised by the referring court has prompted the parties to opt for one of the two traditional communication theories. On the one hand, the 'emission theory' would say that the act of re-utilisation was performed at the location of the Sportradar server from which the information requested by the customers of the betting companies providing services on the UK market was 'sent'. On the other hand, the 'transmission or reception theory' would say that the re-utilisation took place in the United Kingdom, where the UK customers of the betting companies linked to Sportradar received on their computers, in response to their request, the information transmitted by Sportradar from outside the United Kingdom.

50. This description of the issue highlights the fact that, in the context of the internet, the usefulness of employing conceptual constructions formulated in the context of broadcasting is highly questionable. The latter context is one in which the European Union legislation on which the parties rely either does not clearly adopt one of the two possible alternatives (12) or, if it does, does so only because its very purpose is to guarantee an activity identified with one of those alternatives. (13)

51. What is required in the present case, in keeping with the Court's recent practice in this regard, is, rather, a specific construction tailored to the particular characteristics of communication via the internet and, in particular, to the European Union legislation which is applicable to the case and in respect of which an authoritative interpretation has been sought by the referring court.

52. The first aspect takes us into the area of internet communication, on the specific features of which, in the context of the dissemination of information, I have had occasion to comment in connection with another reference for a preliminary ruling. (14)

53. The second leads us to a piece of legislation, Directive 96/9, the very *raison d'être* of which is to respond to the finding that rights in databases are not sufficiently protected in the Member States, as recital 1 in its preamble expressly states, so that the objective pursued by the European Union legislature is specifically to provide that protection by recognising and guaranteeing the 'sui generis rights' which the maker of a database enjoys as against actions defined in the directive itself as instances of 'extraction' and 're-utilisation', the very acts with which we are concerned here.

54. Directive 96/9, as I have already said, uses the term 're-utilisation' as an independent category that is defined in language which I consider to be perfectly suited to the needs of the theoretical construction required by the unique nature of sending data over the internet.

55. In the context of the internet, the categories of 'emission' and 'reception' become highly relative as criteria for determining the 'location' of the points between which there is an act of communication. Categories based on concepts, such as time and space, the meaning of which becomes highly ambiguous in the world of virtual reality, are rendered ineffective by the networked configuration of a global communication medium, the content of which is constantly being renewed and which even today remains highly resistant to the discipline of a legislative framework that can be effective and efficient only if it is set up with the support of the international community of States as a whole.

56. The Court has found a suitable criterion in the idea of the intended target of information on the internet. It applied that criterion in both *L'Oréal* (15) and *Pammer and Hotel Alpenhof*. (16)

57. Consistent with this criterion, in my opinion, is that adopted 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.

58. To my mind, that phrase, 'making available to the public', has 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 this 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.

59. Finally, in so far as, in an internet context, 're-utilisation' is not usually a single act but the sequential succession of a number of acts which, having as their purpose the 'making available' of certain data via a networked and multi-polar communication medium, occur in that medium as a result of the actions of individuals located in different territories, the conclusion must be that the 'place' of the 're-utilisation' is that of each of the acts needed to produce the result comprising the 're-utilisation', that is to say, the 'making available' of the protected data.

60. Consequently, as a second conclusion, I propose that the Court's answer to the second question should be that the act of re-utilisation under examination occurred 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 every one of them.

VII – Conclusion

61. Consequently, I propose 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.

1 – Original language: Spanish.

2– OJ 1996 L 77, p. 20. ‘Directive 96/9’.

3– Case C-324/09 [2011] ECR I-0000.

4– Joined Cases C-585/08 and C-144/09 [2010] ECR I-0000.

5– Joined Cases C-509/09 and C-161/10 [2011] ECR I-0000.

6– Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

7– World Intellectual Property Organisation Copyright Treaty, adopted in Geneva on 20 December 1996.

8– Berne Convention for the Protection of Literary and Artistic Works (Act of Paris of 24 July 1971).

9– Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23).

10– Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15).

11– Case C-203/02 The British Horseracing Board and Others [2004] ECR I-10415, Case C-304/07 Directmedia Publishing [2008] ECR I-7565 and Case C-545/07 Apis-Hristovich EOOD [2009] ECR I-1627.

12– This is the case with Directive 2001/29, in which both Football Dataco and Others and Sportradar believe that they have found support for their respective positions.

13– This is true of Directive 89/552, which, although it adopts the emission theory, does so only because its objective is to lay down ‘the minimum rules needed to guarantee freedom of transmission in broadcasting’ (13th recital in the preamble).

14– Opinion in eDate Advertising, points 42 to 48.

15– Paragraphs 61 and 62.

16– Paragraphs 75 to 93.