

## News

### ECJ limits database protection

James Nurton, London - 14 November 2004

The European Court of Justice (ECJ) has dealt a blow to owners of database rights in four decisions published on November 10.

In a rare departure from its own Advocate General's opinion, the Court ruled that sporting data compiled by the British Horseracing Board (BHB) and Fixtures Marketing did not deserve protection under the EU database directive.

The decision is a victory for defendants – including bookmaker William Hill – who use data such as football and horse racing fixtures to provide betting information.

It is however a setback for the BHB, which had estimated that it could raise £100 million (\$186 million) a year from licensing its database, thereby securing its commercial future.

The EU database directive was introduced in 1996 to protect the investment made in electronic databases. But since its implementation many disputes have arisen over the scope of protection and the definition of terms such as obtaining, verifying and significant. These four cases are the first the ECJ has ruled on.

In response to questions on what was meant by investment in obtaining and verifying data, the Court said (in the *BHB case*) that investment must be shown in the creation of the database itself, as distinct from the pieces of data that make it up: "It does not cover the resources used for the creation of materials which make up the contents of a database."

The Court added: "The resources used to draw up a list of horses in a race and to carry out checks in that connection do not constitute investment in the obtaining and verification of the contents of the database in which that list appears."

The decision contradicts the Advocate General's opinion as well as the first instance and appeal decisions in the UK.

Theo Savvides, a partner of Osborne Clarke, said the Court had adopted a practical and commercial approach: "If the database is merely a side-effect of the business, a spin-off of the investment in the business, then that kind of investment isn't relevant."

It is likely, explained Savvides, that companies with databases such as telephone directories will be able to benefit from protection but traditional bricks-and-mortar companies, such as estate agents or recruitment agents, as well as sports organizers, will find it more difficult to do so.

Katharine Stephens, a partner of Bird & Bird, warned: "The real question will be, how do you prove investment in setting up the database as opposed to verifying the data?" She added: "One thing that immediately comes out of this case is that it will be hard to protect very large databases. Perhaps thought should be given to splitting them to prove more easily the investment put in."

One comfort for database owners is that the Court said that indirect copying of databases that had been put in the public domain is outlawed: "The fact that the contents of a database were made accessible to the public ... does not affect the right of the maker to prevent acts of extraction and/or re-utilization of the whole or a part of the contents of a database."

The Court also said that assessing whether someone had copied a "substantial part" of the database, evaluated qualitatively, involved taking into account the scale of investment made in the database.

David Harding, chief executive of William Hill, told *MIP Week* that he believed "common sense seems to have prevailed". He added: "We were not seeking to steal the BHB's data. And in any case we didn't take it from them as it was already in the public domain."

Said Harding: "The action came out of the blue three years ago. We knew nothing about the database directive and the ECJ. Commercially it is a very significant decision for us."

BHB indicated that it would challenge the ECJ's factual findings in the UK Court of Appeal. Chief executive Greg Nichols said in a statement: "The judgment provides protection for the investment made in the obtaining and verifying of data. That is what we do. We do not create lists of runners and riders, as the judgment appears to state – we obtain and verify them." He added that BHB would continue to act to enforce its copyright and database rights.

Harding responded: “If you look at the judgment, it seems to be pretty unequivocal. There’s no way we’re going to give up, whether it means going back to the ECJ or to the House of Lords.” He added that William Hill would seek to reclaim its estimated £2 million in legal costs.

Given these statements, it is likely that this particular database dispute will not be finished for some time. The Court of Appeal is likely to re-hear the case next year.

William Hill was represented by barristers Mark Platt-Mills QC and James Abrahams and law firm SJ Berwin. BHB was represented by barristers Peter Prescott QC and Lindsay Lane and solicitors Addleshaw Goddard.

Read the *BHB v William Hill* judgment on the [ECJ's website](#).

The three Fixtures Marketing rulings are also available [here](#), [here](#) and [here](#).

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