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Legal Update
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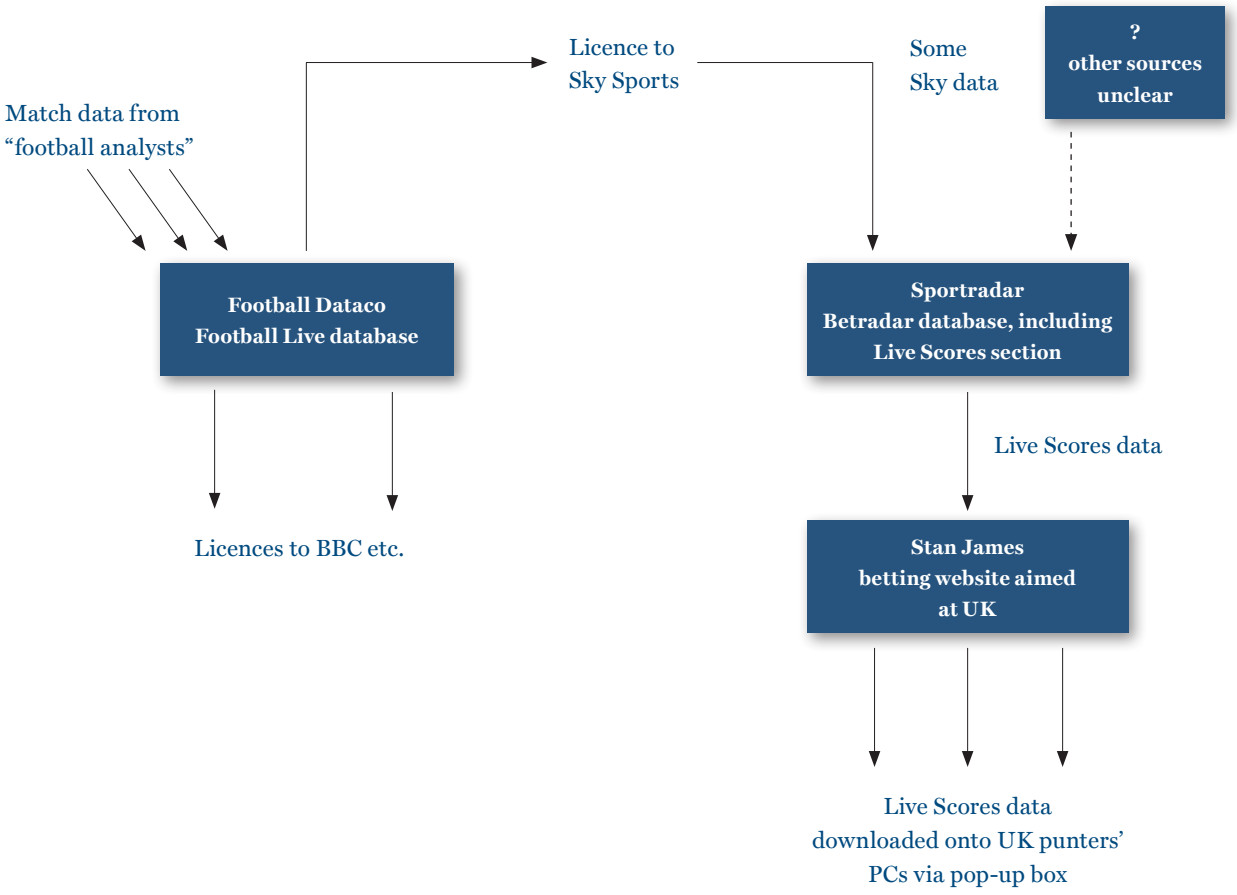
Rights in data – Football Dataco case goes to UK Court of Appeal

The long-running Football Dataco case, relating to rights in data and infringement on the internet, has now reached the UK Court of Appeal. The judgment is good news, not just for those exploiting information about sports matches (which has given rise to several cases already) but also those with valuable scientific and other databases. It also sheds light on when and where web-based infringements take place.

Background

The diagram below summarises the facts. In brief, Football Dataco spent some £600,000 a year collecting in UK Premier League football match data, using a network of retired football players phoning in information from football grounds. It exploited this by licensing to the BBC and others. Data which seemed to come from its Football Live database appeared on a betting website operated by Stan James, which in turn sourced that data from the defendants, Sportradar. While some of that data was licensed from Football Dataco's owners, Sportradar could not satisfactorily explain where it had got the rest from.



This latest development in the case – the Court of Appeal judgment – follows a decision by the European Court on the question of where Football Dataco had to sue (see our alert here).

Sportradar's servers were in Germany and Austria, but the European Court said that Football Dataco could bring the case in England because that was where the punters who used the betting website were based and it was clear that the website targeted those in the UK.

The Court of Appeal gave short shrift to Sportradar's arguments that Football Dataco's database did not qualify for EU database rights. The criteria for this right are summarised in the table.

Recap: When does EU database right exist and when is it infringed?

There is a "database"	A collection of independent works, data or other materials, arranged in a systematic or methodical way and individually accessible by electronic or other means.
There is the right kind of "investment"	A substantial investment (of financial, human or technical resources) in obtaining, verifying or presenting the contents of the database. But investment in creating data – e.g. fixture lists – does not count.
There is an infringing act	Extraction (i.e. the permanent or temporary transfer of database contents to another medium) or re-utilisation (making database contents available to the public) of all or a substantial part of those contents.
In an EU country	Where infringement takes place via a website, you can sue in the country which the website targets and to which it provides the database contents (regardless of where the services are located).

An earlier case relating to horse racing data had established that the only "investment" which counts for the purposes of working out whether there is legal protection is investment in obtaining, verifying or presenting database contents - rather than creating them in the first place. Sportradar tried to argue that Football Dataco was just "creating" match data, which would have meant that this was a wrong kind of investment. That argument failed. As the judge put it, "*only a metaphysicist would say a goal is not scored until the [football analyst says] that it has been scored. The same metaphysicist might also deny a temperature exists unless and until it is recorded, but he would feel hot in a Turkish bath even without a thermometer.*"

Scientific and other databases

This point is relevant to all kinds of databases. Scientific databases which record pre-existing data (such as temperatures or other measurements) can still be protected by database right, since that data exists even before it has been recorded. In the horse racing case (*William Hill v BHB*) the primary investment was in actually creating fixture lists, rather than obtaining or verifying them. So there is a fine line between activities which count and those which do not. In the financial sector, this raises interesting issues about rights in databases of prices and other valuable data.

The case goes on to say that it does not matter if the same person is creating the data (investment which does not count) and then obtaining, verifying or presenting it (which does). Finally, it does not matter whether some of the database contents are subjective (e.g. identifying a goal as being worthy of "goal of the year"): database right does not just project objective data.

When are website operators liable for infringement?

The next interesting aspect of this decision relates to infringement by uploading data which is not then read. Here, punters using the Stan James website clicked on a pop-up box which automatically uploaded all of the Sportradar "Live Scores" data onto their PCs. That data was encrypted and so could not be seen until the punter chose to see any part of it using a de-encryption key like a magnifying glass. The Court of Appeal said it was "hopeless" to argue that there was no infringement just because the punter could not see all of the data. As shown in the table, database right is infringed, amongst other things, by the "temporary transfer of the contents" to another medium – i.e. from the Sportradar database to the punter's computer. It did not matter that the punter would normally only be interested in just part of the data, just as someone using a dictionary will only ever consult a small proportion of the entire contents.

The appeal against a decision that Sportradar had taken a "substantial part" of Football Dataco's database also failed, even though Sportradar had reduced the amount taken during the course of the case. The

amount taken at that later stage (just goal data) still represented a substantial investment because it still involved having people sitting at every ground and reliably reporting what they had seen.

Last year's European Court ruling said that Sportradar was liable for infringing activity in its own right because it targeted punters in the UK. The same applied to Stan James, which the Court of Appeal said was plainly a joint tortfeasor (i.e. was jointly infringing database right) with Sportradar and with UK punters. The key issue was that "if A has a website containing infringing material which will inevitably be copied onto the computer of B if he enters that website" then A is a joint tortfeasor with B. The website provider does not just facilitate infringement, it causes every UK user who accesses the website to infringe.

This part of the decision holds out the possibility that website operators whose sites point to others, from which data is downloaded, will be liable if that data turns out to be infringing. They could protect themselves to some extent by obtaining indemnities from their data suppliers. Here, it seems that Stan James had not obtained an indemnity from Sportradar, so it too was financially at risk.

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