Case Nos: HC 08 CO3222
HC 08 CO3223
HC 08 CO0391

Neutral Citation Number: [2010] EWHC 841 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 23/04/2010

Before :

THE HON MR JUSTICE FLOYD

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Between :

(1) FOOTBALL DATACO LIMITED
(2) THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED
(3) THE FOOTBALL LEAGUE LIMITED
(4) THE SCOTTISH PREMIER LEAGUE LIMITED
(5) THE SCOTTISH FOOTBALL LEAGUE
(6) P A SPORT UK LIMITED **Claimants**

- and -

BRITTENS POOLS LIMITED (in action 3222)
YAHOO! UK LIMITED (in action 3223)

(1) STAN JAMES (ABINGDON) LIMITED
(2) STAN JAMES PLC
(3) ENETPULSE APS (in action 0391) **Defendants**

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James Mellor QC and Lindsay Lane (instructed by **DLA Piper UK LLP**) for the **Claimants**
Richard Meade QC and Philip Roberts (instructed by **Olswang**) for the **Defendants**

Hearing dates: March 23-25 2010

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Judgment

Mr Justice Floyd :

1. By orders made in these three copyright and database right infringement actions on 6th November 2009, Master Bragge ordered the joint trial of a preliminary issue called "the Fixture List Subsistence Issue". This is my judgment following the trial of those preliminary issues.

2. The preliminary issue is concerned with establishing whether any and if so what rights subsist in the annual fixture lists produced and published for the purposes of the English and Scottish (football) Premier Leagues and football leagues ("the Fixture Lists"). The main candidates are (i) copyright as a database under section 3 and 3A of the Copyright Designs and Patents Act 1988 ("CDPA 1988") and (ii) the *sui generis* database right pursuant to the Copyright and Rights in Databases Regulations 1997 (SI 1997/3032) ("the Database Regulations"), the domestic legislation enacted to give effect to European Parliament and Council Directive 96/9/EC on the Legal Protection of Databases ("the Database Directive"). The claimants also contend that the Fixture Lists are protected by copyright irrespective of whether they are a database.

3. The claimants are the same in each of the three actions. The second to fifth claimants organise professional football matches in England and Scotland. The first defendant and the sixth defendant are involved with the exploitation of data and rights in connection with those matches, including the Fixture Lists.

4. The defendants in all three cases are entities who are alleged to be using the Fixture Lists without a licence from the claimants. The defendant in Claim No. HC08C03222 ("the Brittens action") is a football pools company Brittens Pools Limited. The defendant in Claim No. HC08C03223 ("the Yahoo action") is the media company Yahoo! UK Ltd. The first and second defendants in Claim No. HC09C00391 ("the Stan James action") are two betting companies Stan James (Abingdon) Ltd and Stan James Plc. The third defendant in that action is Enetpulse ApS ("Enetpulse"), a Danish company who supplied data to Stan James. Mr James Mellor QC with Ms Lindsay Lane presented the case for all the claimants. Mr Richard Meade QC and Mr Philip Roberts appeared for all the defendants. I am very grateful to them all for the clarity of their arguments and the economical handling of the evidence.

The preliminary issue

5. The Fixture List Subsistence Issue is defined by reference to paragraphs 35 to 41 inclusive of the Particulars of Claim and paragraphs 10-15 inclusive of the Defence.

6. These allegations and responses in these paragraphs of the pleadings can be summarised as follows:

    i) each of the Fixture Lists is a collection of independent works, data and/or other materials which are arranged in a systematic or methodical way and are individually accessible by electronic or other means. This allegation is **admitted**.

    ii) copyright subsists in the Fixture Lists. This allegation is **denied** on the basis that the Fixture Lists do not satisfy the definition of originality in section 3A(2) of the Act.

iii) further or alternatively database right subsists in the Fixture Lists. This allegation is **denied** on the basis that there has been no substantial investment by the claimants in the obtaining, verification or presentation of the contents of the Fixture Lists as required by regulation 13 of the Databases Regulation.

iv) further or alternatively the Fixture Lists are tables or compilations other than databases. This allegation is **denied** on the basis that the Fixture Lists are admitted to be databases.

v) further or alternatively the contents of each of the Fixture Lists is a literary work irrespective of whether it is a database and so copyright subsists in the Fixture Lists as a literary work. This allegation is **denied**.

7. The issues which arise are therefore:

i) are the Fixture Lists **original** literary works within section 3A(2)?

ii) has there been investment in **obtaining, verification or presentation** within Regulation 12?

iii) does copyright subsist in the Fixture Lists irrespective of whether it is a database?

8. I should also record that it is admitted that, insofar as any of the alleged rights subsist, they belong to the claimants.

The preparation of the English Leagues Fixture List

9. The English football leagues are organised as follows. The Premier League has 20 teams and the football leagues each have 24 teams. In each season every team will play the others twice: once at home and once away. So a Premier League club has 38 matches, and there are 380 matches in all in that league. At the end of every season the bottom three teams in each league are relegated to the next league down and the top three teams (other than in the Premier League) are promoted. The first two teams are automatically promoted. Promotion of the third team is decided in the Play-Offs at the end of the season. The season runs from August until May, allowing respite from league football in June and July, when major international tournaments take place.

10. In organising the fixtures for the season those who settle the final list have to have regard to the English Leagues' Fixture Compilation Rules: the so called golden rules. The most important of these are:

i) No club shall have 3 consecutive home or away matches (i.e. no HHH or AAA);

ii) In any five consecutive matches no club shall have four home matches or four away matches (e.g. AAHAA) is not permissible;

iii) As far as possible, each club should have played an equal number of home and away matches at all times during the season;

iv) All clubs should have as near as possible an equal number of home and away matches for mid-week matches.

11. The annual production of the Fixture List for the English leagues takes place as follows.

The Fixture Schedule/Outline Fixture List

12. The first stage, which begins in the previous season, is the preparation of the Fixture Schedule for the Premier League and a corresponding Outline Fixture List for the other leagues. This is done by employees of the leagues. The Fixture Schedule and the Outline Fixture List do not include details of which clubs will be playing in any particular league, as this information is not known until the result of the play-offs in the current season. The Schedule and List simply list the dates on which each of the matches can take place. The lists work on the basis of "rounds" of dates, so a match scheduled to take place on a Saturday, may take place on the Saturday, Sunday or Monday, and a match scheduled to take place on a Wednesday, may take place on a Tuesday or Wednesday.

13. Three basic parameters determine the content of the Fixture Schedule/Outline Fixture List: first, the period from the start to the end of the season; secondly, the number of league matches which must be played and thirdly, the dates on which international matches and other club competitions (both English, e.g. the FA Cup, and European, e.g. the Champions League) are scheduled. Whilst it might appear superficially that there is not a lot of flexibility in choosing 38 dates for each club from the available dates between August and May, I was satisfied there was in fact a significant amount of effort in doing so.

Questionnaires

14. The second stage is the sending out of Fixtures Questionnaires and analysis of responses to those questionnaires. In their responses to the questionnaires, the clubs can make "specific date requests", "non-specific date requests" and "pairing requests". On average around 200 requests are made per season. A "specific date request" is a request by a club to play at home or away on a particular date on which a match has been scheduled (e.g. Chelsea asking to play away on the date of the Notting Hill Carnival). An example of a "non-specific date request" is a request by Newcastle United FC to play its matches against Sunderland FC on a Saturday or Sunday with a kick-off no later than 1.30 p.m. to reduce the risk of disorder amongst fans. A "pairing request" is a request that one club is "paired" with another, such that they cannot both play at home on the same day. This can be based on geographical proximity and/or particular sensitivities between the sets of supporters in question. An example of a paired set is Everton and Liverpool, based on their geographical proximity in the Liverpool area. The completed questionnaires are then reviewed by the leagues.

Sequencing and Pairing

15. The next stage in the process is undertaken by Mr Glenn Thompson of Atos Origin IT Services UK Limited which is a company engaged by the claimants to prepare the lists. He has been responsible for this work since 1992/3. He carries out two major tasks, which ultimately culminate in a first draft fixture list. These are called

16. For sequencing, Mr Thompson starts with the Fixture Schedule/Outline Fixture List which he typically receives in February each year. The objective of sequencing is to try to achieve the perfect home-away sequence (i.e. HAHAHAHA etc.) for every club (an aim which is in fact logically impossible to achieve in practice in an all-play-all league). In carrying out the work he has to have regard to the golden rules I have referred to above. Sequencing is carried out by choosing small groups of fixtures (or sets), which can be switched or moved about easily within the set without upsetting the overall sequencing (i.e. of all the other sets). The aim is to achieve a fixture list where the majority of specific date requests can be met and to help maintain pairings. There is no *a priori* reason to proceed by means of set: it is a device designed to make the exercise more easily manageable by human mind. The methodology is based on a theory advanced in a paper written in 1983 by E.N. Hawkins, which Mr Thompson had read but did not fully understand.

17. Mr Thompson first puts the Fixture Schedule/Outline Fixture List into a spreadsheet. He then decides on the "Christmas sequence", which must always balance, one match must be at home, the other away. He next identifies the midpoint of the season for the different leagues, the aim being for every club to play every other club once first before playing the return fixtures. He divides each half of the season into five sets (labelled X, Y, Z, V, W), where each set has a minimum of two and a maximum of nine rounds. Ideally set breaks are made on the same date across all leagues, but this is not always possible because of the different numbers of matches in the Premier and other leagues. Because pairing may occur across different leagues, if set breaks are not on the same date across the leagues, there will be an increased tendency for paired club clashes to occur.

18. Mr Thompson then inserts the home and away sequence. He allocates a separate letter of the alphabet to each of the match days/rounds for the first half of the season (from A to S, 19 letters). The same letters are allocated to the match days in the second half of the season. Those in the first half are marked positive, those in the second half, negative. The fixture represented by a negative letter will be the reverse of the fixture represented by the positive letter. He then manipulates the order of the letters in the sets to improve the balance of home and away matches across the season and to ensure that the Fixture Compilation Rules are met. The names of the clubs are still not involved in the process: they do not need to be and in any event are not yet all known.

19. As already indicated, a club is paired with another if the playing sequences of the two clubs are such that when one is at home, the other is away, and vice versa. Clubs can be paired with more than one other club. Mr Thompson is provided with a summary of the pairing requests which have been analysed by the leagues as a result of the Fixtures Questionnaires. Mr Thompson is also sent a summary of the specific date requests. In many cases it is necessary to make value judgments about which of two different clubs' specific date requests to grant, or to refuse a specific date request on the ground that it is unfair to another club. The pairing requests and specific date

20. To produce a pairing grid Mr Thompson looks at the different possible combinations of being "positive" and "negative" within each of the five sets and works out where there could be problems, i.e. two home or two away games, across a set break. He then works out how many problem set breaks there are against each pair of combinations and writes the number of breaks in the sequencing onto the grid. Next he marks potential clash dates (obtained from the sequencing sheet) and marks these on the pairing grid. Finally, he starts to add team names into a colour coded/marked pairing grid by reference to the specific date requests made by a club, trying to avoid the lines which are the most problematic (i.e. the highest number of breaks). He inserts more names and amends the pairing grid until he has a draft he is happy with. For some clubs there may be only one place in which they can go on the grid, but for many there are a number of places. The date requests have to be accommodated, so far as possible, and the sequence may be sacrificed in some circumstances.

21. In order to prepare a first draft fixture list, Mr Thompson then uses the Fixtures Compilation program. He transfers the information from the sequencing sheet and the pairing grid into a computer program to produce a readable version of the fixture list.

Review

22. The final stage of the process of creation of the English Leagues Fixture List involves Mr Thompson working directly with the various employees of the leagues to review the lists. The review is manual, but the computer software is used as a tool to assist in finding a solution to problematic fixtures. Following the review there are two further meetings to consider the fixtures – a Fixtures Working Party meeting and a meeting with police representatives. In the 2008-9 season, 56 changes were made during this stage.

The preparation of the Scottish Fixture Lists

Scottish Football League Fixture Lists

23. The Scottish Football League Fixture Lists are prepared by Glenn Thompson and Anton Fagan. I have mentioned Mr Thompson above. Mr Fagan is Operations and Events Manager at the Scottish Football league ("SFL").

24. As with the English Leagues, the first step is the preparation, through a number of drafts of the outline fixture list. There is a meeting of the Scottish Fixtures Working Group in February. Further changes are made after this meeting.

25. The second step is the sending out of Fixtures Questionnaires and analysis of responses to those questionnaires.

26. In the third step, certain fixtures are established before Mr Thompson starts his work. Derby Day is the first Saturday in January when traditionally two local teams play each other. Mr Fagan decides which fixtures should be played at which location to be fair to all clubs involved. The SFL decides a limited number of games to be played on the Opening Day.

27. In the fourth stage Mr Thompson follows a procedure which is largely similar to that for the English Leagues Fixture List, save for the following. Firstly, there is one compulsory pairing between the Scottish Premier League ("SPL") and the SFL, Dundee United and Dundee, so Mr Thompson has to wait until the SPL has announced when Dundee United will be playing at home, before starting work. Secondly, there are a different number of clubs and match days, so there are different numbers of sets on the sequencing sheets. Thirdly, the Derby Day and Opening Day fixtures must be accounted for.

28. The fifth stage is the review by Mr Fagan of the draft fixture list produced by Mr Thompson. In the 2008-2009 season there were three drafts worked on by Mr Fagan: Draft A, Draft B and Draft C. The majority of fixtures were changed by the time Draft C was reached.

Scottish Premier League fixture lists

29. Since 2000, the SPL has been a 12 team league, with 38 fixtures for each team. However, they are broken down into fixtures before the "split", during which each team plays every other team three times, giving 33 fixtures in total, and "post-split" fixtures where each of the top six teams play one game against the five other teams in the top six and each of the bottom six teams play one game against the five other teams in the bottom six, giving a further five games per club, bringing the total to 38 fixtures for one season. Since the last five fixtures for each team cannot normally be determined until the last game of the initial 33 games has been played, there need to be two fixtures lists for each season. Further, the manner in which the Scottish Premier League First Fixture List is created has recently changed. Thus it is necessary to consider the position up to and including the 2007-2008 season and that from 2008-2009 onwards.

Scottish Premier League First Fixture List up to 2007-2008

30. Up to and including the 2007-2008 season, the Scottish Premier League First Fixture List essentially had one main author, Iain Blair, the company secretary of the SPL. Up to and including that season, the method of preparation of the Scottish Premier League First Fixture List did not involve work of the kind carried out by Mr Thompson on sequencing and pairing or a computer program of any kind. Mr Blair carried out the process as follows.

31. First, he creates a Fixtures Skeleton, being a list of dates, showing which are available for SPL games and which are unavailable or potentially unavailable due to games being played in other competitions. It also involves identifying the start date for the season and the timing of the split games.

32. Secondly, Mr Blair works to produce the fixture list by taking one of six "models". The models are templates, without team names in, which work on the basis that the fixtures played in the first 11 weeks will be repeated with home and away teams being reversed in the second 11 weeks, and then the order of the first 11 weeks being repeated for the third 11 weeks.

33. Mr Blair allocates numbers 1 to 12 to each club, starting with paired clubs, which have to be allocated specific numbers, and taking into account "seeding". Mr Blair

experiments with different drafts of the model, allocating different numbers to different clubs, trying to comply with the "golden rules" for fixture preparation and avoid potential fixture issues. The "golden rules" include, for example, that no club will start with two home matches or two away matches. They are not absolute and can conflict with one another, so may be overruled if it is preferable to do so in a particular situation. He then reviews the fixture list produced to identify potential problems and then seeks to remedy such problems through moving whole blocks of fixtures to a different part of the season; reversing the order of fixtures for some part of the season; reversing or swapping individual fixtures.

34. In the course of this work, Mr Blair must take into account various considerations, including requests by clubs and police which the SPL will seek to accommodate (there are no Fixtures Questionnaires), the balance of home and away fixtures for each team, and trying to ensure that the previous year's champion is at home for the first game of the season.

Scottish Premier League First Fixture List from 2008-2009

35. Since the 2008-2009 season work on the Scottish Premier League First Fixture List has also involved Richard Stone of Optimal Planning Solutions Inc. ("Optimal"), a company which specialises in schedule development and database administration.

36. The process by which the Scottish Premier League is as follows. The SPL provides the following to Mr Stone:

    i) A list of constraints (both hard, i.e. the "golden rules" and soft, i.e. "nice to haves").

    ii) A document showing the balance of home and away fixtures for each club in the SPL over the previous four seasons.

    iii) The 2007-2008 Fixture List.

    iv) The 2008-2009 Outline Fixture List.

37. Once he has this information, Mr Stone starts by manually inputting the "golden rules" into the software. He then allocates penalty values to each constraint. These are of fundamental importance since they denote the importance of the constraint. The relative weighting of constraints can be difficult and, frequently, adjustments have to be made to try to find a better solution. The weighting is based on his experience in having carried out fixture scheduling for many different sports for a number of years and discussions and appreciations of the client's requirements.

38. The match dates must be put into the model. The model is then run iteratively and the results analysed to ensure the resulting fixtures accurately reflect the scheduling constraints. Once the program has produced a draft fixture list, there is further exchange with the client to discuss the issues thrown up. In 2008-2009 there were five versions of the draft fixture list discussed with the SPL and a number of other versions which were reviewed by Mr Stone, but not sent to the SPL. It appeared that this more software-based approach opened the eyes of the SPL to what could be achieved in terms of constraints. Nevertheless, the use of software does not eliminate

value judgments as to the importance of particular rules, as these are reflected in the weighting attributed to them.

Scottish Premier League Second Fixture List

39. This list is and has at all times been the work of Mr Blair, together with a Mr Mailer and a Mr Ogilvie.

40. This is an entirely manual process, more similar to the previous method used by Mr Blair to produce the fixture list for the pre-split fixtures than anything else. Before game 33 is played the exact positioning of the teams is not known, therefore, Mr Mailer and Mr Ogilvie put together a number of different scenarios. In 2008-2009 ten scenarios were produced. The drafts are reviewed by them, along with Mr Blair, to reduce the number of options. It is not possible simply to produce a single fixture list and drop the name of the relevant team into it, because each team will have had different home and away fixtures in the first 33 games and the aim is to balance the number of home and away games over the season as a whole.

Conclusions on the work done to prepare the Fixture Lists

41. I conclude that the process of preparing the Fixture Lists, whether in England or in Scotland remains one which involves very significant labour and skill in satisfying the multitude of often competing requirements of those involved. Mr Meade was obliged to accept in the light of the evidence that the process was not entirely deterministic.

42. The process is therefore not one where everyone would come up with the same answer. Some solutions will better accommodate the requirements of the clubs and rules than others. The more sophisticated the compilation process, the more permutations it will be able to consider and the more requirements it will be able to satisfy. Judgments have to be taken as to the relative importance of certain rules in comparison to others. On occasions rules will have to be broken.

43. This work is not mere "sweat of the brow", by which I mean the application of rigid criteria to the processing of data. It is quite unlike the compiling of a telephone directory, in that at each stage there is scope for the application of judgment and skill. Unlike a "sweat of the brow" compilation, there are some solutions which will simply not work, and others which will be better. Mr Thompson explained that it might be the case that the computer would say that there was no solution for a given set of constraints. The quality of the solution depends in part on the skill of those involved.

44. Mr Meade suggested that although the exercise was not in fact completely computerised, the exercise was one which could be performed by a computer. Mr Thompson did not accept this. There were aspects where the computer is used as a tool (more extensively in the lists prepared by Mr Stone and Optimal), but the use of the computer does not eliminate the use of judgment and discretion.

The law

Old domestic law

45. For nearly 50 years following the decision of Upjohn J in *Football League Limited v Littlewoods Pools* [1959] 1 Ch 637 the question of whether copyright subsisted in football fixture lists was regarded as settled. In that case it was held that copyright subsisted in football fixture lists as a literary work (which under the Copyright Act 1956 specifically included a compilation). It was argued for the defendant pools company that the work which went into deciding when and where the fixtures were to take place was not relevant: the only relevant skill and labour being that involved in reducing that information to material form. Upjohn J said at 651:

> "Copyright for such a compilation can be claimed successfully if it be shown that some labour, skill, judgement or ingenuity has been brought to bear upon the compilation. The amount of labour, skill, judgement or ingenuity required to support successfully a claim for copyright is a question of fact and degree in every case."

46. Later on the same page, the judge recorded this:

> "Mr Shelley ... submits, and I agree with him, that it is clearly settled law that there can be no copyright in information or in an opinion per se. Copyright can only be claimed in the composition or language which is chosen to express the information or the opinion. ... "

47. Upjohn J went on to summarise the defendants' argument that the skill and labour of the person who prepares the fixture lists (at that time one Sutcliffe) were directed to the creation of a programme of football games and not the reduction into writing of that information. The judge rejected that analysis. He said at 656:

> "In my judgement, on the facts of this case, it is not open to the defendants to try and dissect and break down the efforts of Sutcliffe in the way suggested. Accordingly in my judgment the plaintiffs are entitled to copyright in the chronological list."

48. So Upjohn J thought that in assessing the quantum of skill labour and judgment which went into a compilation for the purposes of the Copyright Act 1956, one should have regard to the whole history, including any work done to bring the data into existence in the first place.

The impact of the Database Directive and the FML decisions

49. As a result of Upjohn J's judgment, bookmakers, pools operators and others all subscribed to the various licensing schemes operated by the leagues. This state of compliance extended beyond the coming into force of the Copyright Designs and Patents Act 1988, which contained similarly inclusive provisions as regards literary works.

50. It was apparently perceived that the national copyright laws of other member states of the European Union did not afford the same protection to compilations. These perceived disparities led to the Database Directive. As the recitals to the Directive indicate, it was promulgated in an attempt to harmonise the legal protection afforded

to databases in member states, differences in protection being argued to present potential barriers to trade between them. A database is defined by Article 1 of the Database Directive as:

> "a collection of independent works, data or other materials arranged in a systematic way and individually accessible by electronic or other means".

51. It is important to note that what makes something a database is the collection and systematic arrangement of works, data or other materials (referred to in the Directive as "contents"). The Directive is concerned with ensuring harmonised protection for works which are created in this way, whilst expressly preserving any rights which may exist in the individual components which make up the database.

52. The Database Directive provided for two separate forms of intellectual property protection for databases. The first is a harmonised *copyright* protection in databases provided for in Article 3:

> COPYRIGHT
>
> *Article 3*
>
> **Object of Protection**
>
> 1. In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for protection.
>
> 2. The copyright protection of databases provided for in this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in their contents.

53. It is common ground that this criterion for subsistence of copyright in a database raised the bar so far as it concerned the accepted notion of originality for the subsistence of copyright in this country. The approach adopted here is that, to be original, the work must not be a mere copy of a pre-existing work: it must originate with the author rather than anyone else: see e.g. per Lord Pearce in *Ladbroke (Football) Ltd v William Hill* [1964] 1 WLR 273 at 291. I will have to return to the question of how much more, and more of what, Article 3 now requires.

54. Quite separately the Directive provides for a new form of right in databases. This right was intended to give legal protection to those who put substantial investment into obtaining, verifying and presenting the contents of a database. Article 7 provides:

> SUI GENERIS RIGHT
>
> *Article 7*
>
> **Object of protection**

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

55. The right created by Article 7 applies irrespective of the eligibility of the database in question or its contents for copyright protection (see Article 7 (4)). In addition to being infringed by the extraction or re-utilisation of the whole or substantial parts, the right is also infringed (see Article 7(5)) by "repeated and systematic extraction and/or re-utilisation of *insubstantial* parts of the contents of the database" subject to certain further conditions.

56. Fixtures Marketing Limited ("FML") is a company associated with the current claimants which is charged with the exploitation of rights in the Fixture Lists outside the United Kingdom. It commenced actions in Finland, Sweden and Greece seeking to enforce rights in the Fixture Lists. All three cases were referred to the European Court of Justice: *Case C-46/02 Fixtures Marketing Ltd v Oy Veikus AB (Finland); Case C-338/02 Fixtures Marketing Ltd v Svenska Spel AB (Sweden); Case C-444/02 Fixtures Marketing Ltd v Organismos Prognostikon Agonon Podosfairou (Greece).*

57. In Finland, national law originally provided that "lists, tables, programmes and other similar works in which a large quantity of data is combined" could not be reproduced for 10 years from first publication. Under this law, FML sued the gambling monopoly in Finland, which collected information on a weekly basis concerning Premier League and Division One (now Championship) matches from various sources such as the Internet and the clubs themselves. The trial court held that the Fixture Lists were protected under the original Finnish law as lists containing a large quantity of data, and the right in the lists had been infringed. The appeal court, whilst upholding the judgment on subsistence, held that the right had not been infringed by the activities of the gambling monopoly. After the amendment of the Finnish law to take account of the Database Directive, FML sued on the *sui generis* right in the Lists as a database. The trial court asked for a preliminary ruling on subsistence and infringement of the Article 7 right.

58. In Sweden, national law provided for copyright protection for databases. Under the law as amended by the Database Directive, the maker of a catalogue, table or similar work in which a large quantity of data has been collected or which is the result of substantial investment, was protected. FML sued a pools operator in Sweden under this law. The trial court held that the Fixture Lists were covered by catalogue protection because they were the result of substantial investment, but that there had been no infringement by the pools operator. It appears that the court did not consider that the Fixture Lists were protected on the first limb of the national law which protected catalogues with a large quantity of data. The highest Swedish appeal court therefore asked for a preliminary ruling on subsistence and infringement of the Article 7 right.

59. In Greece, FML sued the gambling monopoly under the Article 7 right alone. The Greek court referred questions of subsistence and infringement of the Article 7 right for a preliminary ruling.

60. In all three cases the Court rejected the claim to subsistence of the Article 7 right. The investment relied upon by Fixtures Marketing was held to be of the wrong sort: the investment was not in "obtaining, verification or presentation" of the contents, but in creating the contents in the first place. The Court put it in this way in the Finnish case:

> "32. Article 7(1) of the directive reserves the protection of the *sui generis* right to databases which meet a specific criterion, namely to those which show that there has been qualitatively and/or quantitatively a substantial investment in the obtaining, verification or presentation of their contents.
>
> 33. Under the 9th, 10th and 12th recitals of the preamble to the directive, its purpose is to promote and protect investment in data 'storage' and 'processing' systems which contribute to the development of an information market against a background of exponential growth in the amount of information generated and processed annually in all sectors of activity. It follows that the expression 'investment in … the obtaining, verification or presentation of the contents' of a database must be understood, generally, to refer to investment in the creation of that database as such.
>
> 34. Against that background, the expression 'investment in … the obtaining … of the contents' of a database must, as Veikkaus and the German and Netherlands Governments point out, be understood to refer to the resources used to seek out existing independent materials and collect them in the database, and not to the resources used for the creation as such of independent materials. The purpose of the protection by the *sui generis* right provided for by the directive is to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database.
>
> 35. That interpretation is backed up by the 39th recital of the preamble to the directive, according to which the aim of the *sui generis* right is to safeguard the results of the financial and professional investment made in 'obtaining and collection of the contents' of a database. As the Advocate General points out in points 61 to 66 of her Opinion, despite slight variations in wording, all the language versions of the 39th recital support an interpretation which excludes the creation of the materials contained in a database from the definition of obtaining…
>
> 37. The expression 'investment in … the … verification … of the contents' of a database must be understood to refer to the

resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. The expression 'investment in … the … presentation of the contents' of the database concerns, for its part, the resources used for the purpose of giving the database its function of processing information, that is to say those used for the systematic or methodical arrangement of the materials contained in that database and the organisation of their individual accessibility…

44. Finding and collecting the data which make up a football fixture list do not require any particular effort on the part of the professional leagues. Those activities are indivisibly linked to the creation of those data, in which the leagues participate directly as those responsible for the organisation of football league fixtures. Obtaining the contents of a football fixture list thus does not require any investment independent of that required for the creation of the data contained in that list.

45. The professional football leagues do not need to put any particular effort into monitoring the accuracy of the data on league matches when the list is made up because those leagues are directly involved in the creation of those data. The verification of the accuracy of the contents of fixture lists during the season simply involves, according to the observations made by Fixtures, adapting certain data in those lists to take account of any postponement of a match or fixture date decided on by or in collaboration with the leagues. As Veikkaus submits, such verification cannot be regarded as requiring substantial investment.

46. The presentation of a football fixture list, too, is closely linked to the creation as such of the data which make up the list, as is confirmed by the absence of any mention in the order for reference of work or resources specifically invested in such presentation. It cannot therefore be considered to require investment independent of the investment in the creation of its constituent data.

47. It follows that neither the obtaining, nor the verification nor yet the presentation of the contents of a football fixture list attests to substantial investment which could justify protection by the sui generis right provided for by Article 7 of the directive.

49. In the light of the foregoing, the answer to the first question referred should be that the expression 'investment in … the obtaining … of the contents' of a database as defined in Article 7(1) of the directive must be understood to refer to the resources used to seek out existing independent materials and

> collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database. In the context of drawing up a fixture list for the purpose of organising football league fixtures, therefore, it does not cover the resources used to establish the dates, times and the team pairings for the various matches in the league."

National law

61. Article 3 was made part of the law of the United Kingdom by means of an amendment to section 3, of the Copyright Designs and Patents Act 1988 and the addition of a new section 3A. Since 1 January 1998 section 3 of the CDPA 1988 has provided as follows (with emphasis added):

> 3. Literary, dramatic and musical works
>
> (1) In this Part—
>
> "literary work" means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—
>
> (a) a table or compilation **other than a database**, and
>
> (b) a computer program;
>
> (c) preparatory design material for a computer program; and
>
> (d) **a database**.

62. The words in bold were those which, so far as material for present purposes, were added by the amendment. New section 3A provides as follows:

> 3A. Databases
>
> (1) In this Part "database" means a collection of independent works, data or other materials which —
>
> (a) are arranged in a systematic or methodical way, and
>
> (b) are individually accessible by electronic or other means.
>
> (2) For the purposes of this Part a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation.

63. The "if and only if" in section 3A(2) is an implementation of the second sentence of Article 3(1) which requires that no other criteria be applied.

64. Article 7 was made part of the law of the United Kingdom by paragraphs 12 and 13 of the Database Regulation, but nothing turns on the wording of the Regulation.

What precise rights is the Directive harmonising?

65. There is a significant dispute about the level at which the Directive is seeking to harmonise copyright. Mr Meade submitted that the Directive requires the Court to ask, first, whether the work in question is a database within Article 1(2), i.e. whether it was "a collection of independent works, data, or other materials arranged in a systematic way and individually accessible by electronic or other means". If it is, then the only criterion one can apply to determining whether it attracts copyright is Article 3(1): one asks whether the selection or arrangement of the contents constitute the author's own intellectual creation. On this basis there is no room for other criteria to be applied, and databases which do not satisfy the unique criterion are not protected by copyright at all.

66. Mr Mellor submitted that this was wrong. The Directive was only seeking to harmonise copyright in databases insofar as subsistence depended on selection or arrangement of the contents. Thus for example, if a database failed to meet the selection or arrangement criterion, copyright could nevertheless subsist by virtue of other effort which had gone into the creation of the contents of the database, which did not qualify as selection or arrangement. He said that unless one approached the Directive in this way one was not giving effect to its insistence, both in Article 3(2) and in many other places, that the Article and indeed the entirety of the Directive is to be without prejudice to rights which subsist in the contents. He says that, before the Directive, the claimants could rely in support of copyright in their Fixture Lists, on the totality of skill and labour which went into preparing them. So, if this does not qualify as "selection or arrangement" there are rights in the contents of the database which are being prejudiced by Article 3(1). He developed the argument by supposing that someone created a database of poems, one for each letter of the alphabet. He says that if Mr Meade is right, the inclusion of the poems in the database destroys the underlying copyright in the poems, because their selection and arrangement into a simple alphabetical list would not be adequate to attract copyright and the application of any other standard is outlawed.

67. I think the correct analysis is that the Directive is seeking to harmonise copyright protection for systematically arranged, individually accessible collections of independent works, data or other materials. That follows from the definition of database in Article 1. On the other hand, the Directive recognises that the whole or parts of the contents may be protected in their own right, i.e. independently of any reliance on the collection and arrangement of independent works, data or other materials. Recitals (15) and (16) support the contention that the Directive is seeking to harmonise the criterion for subsistence of copyright in anything which meets the definition of database:

> (15) Whereas the criteria used to determine whether a database should be protected by copyright should be defined to the fact that the selection or the arrangement of the contents of the database is the author's own intellectual creation; whereas such protection should cover the structure of the database;
>
> (16) Whereas no criterion other than originality in the sense of the author's intellectual creation should be applied to determine

> the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied;

68. A better rendering of "defined to" in Recital (15) would be "confined to" or "limited to": contrast the French words "*se limiter au*" and the German word "*beschränkt*". It was plainly the intention of the Database Directive not to leave in place a patchwork of national laws protecting (by reference to a variety of different standards) the turning of independent works, data or other materials into a database. Of course, if there is another route to protection e.g. that the individual works are protected in their own right, then that protection will survive.

69. If this is right then there is no problem of the kind suggested by Mr Mellor's example of the alphabetical poems. In that example there is copyright in the contents of the database, both in the individual poems and therefore all of them. That copyright is preserved by Article 3. The present case could not be more different. It cannot seriously be suggested (and I did not understand it to be so suggested) that individual entries in the database (Hull v Wigan at 7.45 pm on February 20), or the list of dates and the list of matches could be the subject of copyright. They can only acquire protection by being collected and arranged together and incorporated into the database. It is at this level, namely that of conversion of independent works etc into a database, that the Directive requires a harmonised approach.

Does "selection or arrangement" exclude creation?

70. Mr Meade contends that, just as the phrase "obtaining, verification or presentation" in Article 7 excludes creation for the purposes of the *sui generis* right (as the Court of Justice held in the FML cases) so also do the words "selection or arrangement" for the purposes of Article 3 copyright. He argues, firstly, that the natural meaning of selection and arrangement does not include creation. Secondly, he submits that Recitals (9), (10) and (12) to the Directive, which the Court of Justice relied on in the *Fixtures Marketing* cases to support the restrictive meaning of "obtaining, verification or presentation" are not specific to the *sui generis* right, and are equally productive of a limited meaning for "selection and arrangement". These recitals are as follows:

> (9) Whereas databases are a vital tool in the development of an information market within the community; whereas this tool will also be of use in many other fields;
>
> (10) Whereas the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry calls for investment in all the Member States in advanced information processing systems;
>
> (12) Whereas such an investment in modern information storage and processing systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of makers of databases;

71. Mr Meade submits that there is no sense in which the Database Directive was concerned to encourage the creation of data: it was concerned only with its collection, storage and processing.

72. Mr Mellor submits that "selection" and "arrangement" are wider concepts than those referred to in the context of the *sui generis* right, or at least different from them. He submits that the Article 7 right was introduced in order to give protection for essentially non-creative compilations, sometimes referred to as "sweat of the brow" compilations. In contrast, the purpose behind Article 3 was to provide protection for compilations which involved an element of creativity. That different purpose justified giving the subsistence criterion a different and wider meaning. In particular it justified including the creation of the data itself within the notion of selection or arrangement. Without such a broad meaning, he submitted that the Directive would achieve less than complete harmonisation.

73. It is clear, in my judgment, that selection or arrangement of the contents of a database are notions which are clearly separate from mere non-selective gathering of information. That view is supported by a passage from Laddie, Prescott & Vitoria 3rd Edition §30.27:

> "The new requirement is not just a raising of the threshold. It imposes a requirement which is fundamentally different in kind. First it restricts consideration only to the arrangement or selection of the contents. So the skill and labour in gathering, (as opposed to any selection) or verifying is not relevant."

74. The more difficult, and different question is whether selection decisions which are taken in the course of creating data, which necessarily involve adopting one alternative and rejecting others, are properly to be regarded as part of the selection or arrangement of the contents of a database. Mr Meade says that they are not, otherwise more or less everything would be a "selection". By deciding that Hull v Wigan should kick off at 7.45 pm on 20th February you are rejecting all the other possible fixtures for that date, or dates for that fixture, but you are not making a selection of data for the purposes of Article 3(1).

75. Mr Meade also relies on Case C-203/02 *British Horseracing Board Ltd v William Hill Organisation* [2004] E.C.R. I-10415; [2005] E.C.D.R. 1; [2005] R.P.C. 13 (the 'BHB' case), a reference to the ECJ from the Court of Appeal in England.

76. The BHB case concerned the runners and riders database prepared by BHB for horse races. The BHB database contained the data relating to many thousands of entries in races in the course of a year. BHB extensively checked its data using a number of sources, including tape-recorded telephone calls to verify each entry. In its judgment the ECJ held that the 'runners and riders' database was not protected by the *sui generis* right:

> "38. However, investment in the selection, for the purpose of organising horse racing, of the horses admitted to run in the race concerned relates to the creation of the data which make up the lists for those races which appear in the BHB database. It does not constitute investment in obtaining the contents of

> the database. It cannot, therefore, be taken into account in assessing whether the investment in the creation of the database was substantial.
>
> 39. Admittedly, the process of entering a horse on a list for a race requires a number of prior checks as to the identity of the person making the entry, the characteristics of the horse and the classification of the horse, its owner and the jockey.
>
> 40. However, such prior checks are made at the stage of creating the list for the race in question. They thus constitute investment in the creation of data and not in the verification of the contents of the database.
>
> 41. It follows that the resources used to draw up a list of horses in a race and to carry out checks in that connection do not represent investment in the obtaining and verification of the contents of the database in which that list appears."

77. When the matter returned to the Court of Appeal, the claimants sought to argue that the ECJ had misunderstood the facts: *British Horseracing Board Ltd v William Hill Organisation Ltd* [2005] EWCA Civ 863; [2005] R.P.C. 35. At paragraphs 28 to 31 and 35 the Judgment, Jacob LJ explained why the ECJ had rejected the claim to *sui generis* right:

> "28. I now turn to what I think is the flaw in [BHB's counsel's] reasoning. He starts from the beginning of the process, working down to the final, officially published, list of riders and runners. By a series of steps he says Art 7(1) databases are created by a process of gathering in and checking.
>
> 29. But the Court has, I think, implicitly rejected that approach. It focussed on the final database - that which is eventually published. What marks that out from anything that has gone before is the BHB's stamp of authority on it. Only the BHB can provide such an official list. Only from that list can you know the accepted declared entries. Only the BHB can provide such a list. No one else could go through a similar process to produce the official list.
>
> 30. So if one asks whether the BHB published database is one consisting of "existing independent materials" the answer is no. The database contains unique information - the official list of riders and runners. The nature of the information changes with the stamp of official approval. It becomes something different from a mere database of existing material.
>
> 31. It is only on this basis that one can understand the crucial paragraphs in the ECJ's reasoning [37 -41].
>
> ...

> 34. It is true that in [38] the word "selection" is used. Out of context this might be taken to mean something like "creative choice" but in context it clearly does not have that meaning. Other language versions of the judgment (particularly the French *determination*) do not have the nuance of creative choice.
>
> 35. It follows that despite all [BHB's counsel's] ingenuity, the answer from the Court is clear. So far as BHB's database consists of the officially identified names of riders and runners, it is not within the *sui generis* right of Art.7(1) of the Directive. And I think the same reasoning applies in those cases (big races) where the BHB publishes a list of provisional runners prior to final declarations. Again what is published is different in character from a mere list of gathered in information. It is a list of horses that BHB have accepted as qualifying to race – as properly and actually entered"

78. So the view of the Court of Appeal was that the final list was what mattered and was something different in character. What went before, even though it may have involved selection, did not qualify the list for *sui generis* right.

79. In my judgment, care should be taken before applying the reasoning of the *sui generis* cases to Article 3 copyright. As Laddie J pointed out in the BHB case at first instance: [2001] RPC 31 at [23]:

> "courts have to guard against the assumption that principles which have become familiar in the copyright field automatically apply to the new right."

80. It is also true to say that notions appropriate to *sui generis* right may not apply automatically to the database copyright. Article 3 harmonises a particular copyright. The purpose of copyright is to provide encouragement for creative endeavour, and differs in that respect from the *sui generis* right which is designed to encourage investment in particular types of data gathering.

81. It would, I think, be an odd result if selection decisions taken during the process of creating the database fall to be excluded. Suppose a researcher conducts an experiment which produces a series of results for a particular parameter over time, taking measurements every hour. The researcher plainly creates a database within Article 1. Does the choice of the one hour time interval count as selection of data? It would certainly do so if the researcher first created a database with readings every minute, and then selected from that existing data readings at one hour intervals. It would be odd if copyright protection for the resulting table of data depended on which of the two alternatives was adopted.

82. In my judgment the selection or arrangement required by Article 3(1) is not confined to selection or arrangement performed after the data is finally created. The process of selection and arrangement of the contents of a database can and often will commence before all the data is created. I see no reason why selection decisions made about the contents of the database in the course of arriving at the final version should not

properly be described as selection or arrangement. To cut out from consideration these selection decisions, merely because they occur whilst the database is being created, seems to me to be arbitrary, and conceptually fraught with difficulty. Nevertheless it is necessary to focus on skill and labour which is actually concerned with selection and arrangement, and to exclude that which is not.

Author's own intellectual creation

83. It is clear from Recital 12 that not everything which originates with the author will satisfy the test:

> "Whereas, as a rule, the compilation of several recordings of musical performances on a CD does not come within the scope of this Directive, both because, as a compilation it does not meet the conditions for copyright protection and because it does not represent a substantial enough investment to be eligible under the *sui generis* right."

84. The Recital is not specific as to precisely why such a compilation would not be protected by copyright. However it must be referring to the single criterion, and, in that, the requirement that the selection be the author's own intellectual creation. The implication is that such a selection does not have enough of some quality. How much is good enough is not made clear, and will no doubt vary from case to case. The quality in question is the author's individual creativity.

85. Both sides drew my attention to the passage in Laddie Prescott & Vitoria immediately following that I have cited above:

> "More fundamentally the database must, when these two factors [selection and arrangement] are considered, constitute its author's own intellectual creation. This imposes a significant qualitative factor on the test. It would appear to exclude computer-generated databases. It is submitted that there must be something which has had the author's creativity stamped upon it. By this we mean that it must be something which could not be something which could fairly be said to be something which could have been created by many others. There must be some 'subjective' contribution. A 'sweat of the brow' collection will not do."

86. I think this is right. Although the court does not apply a qualitative or subjective assessment (in the sense of judging whether the work is good or bad) in applying the test to the finished work (see Recital 16), the *author* must have exercised judgment, taste or discretion (good, bad or indifferent) in selecting or arranging the contents of the database. Laddie, Prescott & Vitoria give examples of databases which would not attract copyright protection: a list of all Acts of Parliament in the last 100 years for example. The rote application of rules such as this is not enough. On the other hand a collection of the author's 1000 favourite poems would plainly pass both the quantitative and qualitative test.

87. The ECJ has not yet considered what it means for databases "by reason of the selection or arrangement of their contents, [to] constitute the author's own intellectual creation". However, in Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] E.C.D.R. 16 it had to decide what constituted 'reproduction' for the purposes of Article 2 of Directive 2001/29/EC. That Directive does not use the expression "author's own intellectual creation", but the Court considered that this concept was relevant and useful for determining whether a sufficient part of a newspaper article had been reproduced to constitute infringement. The Court said:

> "44. As regards newspaper articles, their author's own intellectual creation … is evidenced clearly from the form, the manner in which the subject is presented and the linguistic expression. In the main proceedings, moreover, it is common ground that newspaper articles, as such, are literary works covered by Directive 2001/29.
>
> 45. Regarding the elements of such works covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation.
>
> 46. Words as such do not, therefore, constitute elements covered by the protection.
>
> 47. That being so, given the requirement of a broad interpretation of the scope of the protection conferred by Article 2 of Directive 2001/29, the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article. Such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in Article 2(a) of that directive.
>
> 48. In the light of those considerations, the reproduction of an extract of a protected work which, like those at issue in the main proceedings, comprises 11 consecutive words thereof, is such as to constitute reproduction in part within the meaning of Article 2 of Directive 2001/29, if that extract contains an element of the work which, as such, expresses the author's own intellectual creation; it is for the national court to make this determination."

88. The Court is distinguishing between the common currency of the words used, which do not in themselves attract copyright and their combination through choice, sequence and combination into an expression of the creativity of the author, which does.

89. The claimants also drew my attention to a number of decisions of national courts on database copyright. Whilst not binding on me, I derived most assistance from *Pharma Intranet Information AG v IMS Health GmbH & Co. OHG* [2005] ECC 12. In that case the Oberlandesgericht in Frankfurt considered a database produced by the claimant for the pharmaceutical market containing figures for revenue and sales development for medicines sold in Germany, in which it asserted copyright. The data was divided into a large number of geographical segments. The court held that:

> "The concrete partitioning into segments, selected by the claimant with the participation of the Working Group, conveys the sufficient impression of individuality by the author of the collected work. This is because the individuality differentiates the work protected in copyright law from the unprotected mass of everyday things, from purely physical labour, routine performance. A selection or organisation that anyone would undertake in a particular manner does not constitute individual creation. If the selection or organisation is determined by the nature of the thing or is predetermined by purposefulness or logic, then there is no room for individual creative work...
>
> It is true that the organisation of the data into segments and those segments' border mappings occur consonant with aspects of purposefulness, because the claimant's customers want to receive information that is as specific and informative as possible. This fact, however, does not stand in the way of the assumption of a work that is protected in copyright law. What is determinant for the segment structure's ability to be protected within the meaning of s.4 of the UrhG, is that various criteria be considered for individual decisions and, in turn, can be variously weighted, such as, for example, the geographic position of bridges and rivers or the number of pharmacies within a segment. In the individual case, the decision goes beyond that which is manual labour or schematic and the decision allows sufficient manoeuvering room for an individuality that, in any case, satisfies the requirement of the so-called "small coin of copyright law".

90. The Oberlandesgericht therefore distinguishes between the purely deterministic and that which allows sufficient room for individual creative work. It plainly takes the view that not very much room for manoeuvre is required to allow for the creation of a copyright work. That view must be read subject to the CD example of Recital 19, where the room for manoeuvre in choosing recordings to put on a CD may be very large indeed, but something more than a "small coin" was required for originality.

Summary on database copyright

91. It seems to me that the task for the court is as follows:

i) Identify the data which is collected and arranged in the database;

ii) Analyse the work which goes into the creation of the database by collecting and arranging the data so identified, to isolate that work which is properly regarded as selection and arrangement;

iii) Ask whether the work of selection and arrangement was the author's own intellectual creation and in particular whether it involved the author's judgment, taste or discretion;

iv) Finally one should ask whether the work is quantitatively sufficient to attract copyright protection.

Application of law to the facts

Sui Generis right

92. I deal first with *sui generis* right. Here Mr Mellor QC faces the FML decisions directly. He submitted that the ECJ had misunderstood the facts. For example in one case they suggested that the Lists were created by drawing lots, which is not the case. I do not think there is anything in this. The burden of those decisions was that the claimants were involved primarily in creating the data, and that the extra effort (if any) in obtaining, verifying or presenting the data was trivial and not sufficient to attract the *sui generis* right. I reach the same conclusion on the evidence before me. The separate work which goes into obtaining, verifying or presenting the data in the Fixture Lists is trivial. The Fixture Lists are not protected by the *sui generis* right.

Database copyright

93. The first question is to ask what data is collected and arranged in the database. In my judgment that data includes at least (a) the dates on which matches in general will be played, (b) the matches which are to be played and (c) the dates of specific matches.

94. The second task for the court is to isolate the work of selection or arrangement of that data from all the other work done by the claimants. Mr Mellor submitted that the authors plainly exercised choice over the dates on which the fixtures were played and the identity of the teams to play in each match on those dates. The former was done when the initial list of fixture dates was created and the latter done in the work which I have described above. He submitted that if this was not selection, then it was arrangement. On this hypothesis the arrangement proceeds from the starting materials of (i) the clubs in the league and (ii) the dates of the rounds of matches, to produce an arrangement which brings them together.

95. I think Mr Mellor is right that there is relevant selection or arrangement here in the ways he identifies. I have rejected the notion that selection or arrangement effected while the data is being created is irrelevant. Although the overall list of matches in any league is ultimately a given, there is undoubted selection and arrangement in the choice of dates and the decisions as to which match is played on which date.

96. Next I should ask whether that specific work of selection and arrangement is the author's own intellectual creation. Mr Meade relied heavily on this passage of cross examination of Mr Thompson:

> "Q. You can put that away. When you get to the end of a season, a process, and you have come up with a fixture list which will be the final fixture list, obviously people in the know, know that you, Glenn Thompson, worked on it?

A. Yes.

Q. But just looking at the dates of the fixtures, the actual dates that come out at the end, there is nothing individual to you in that, is there?

A. Well, I would say there probably is, because I have come up with a sequence, with a pairing grid, so what I have done there is determine which clubs are at home on certain dates. I have also on some fixtures given the possibility of one or two dates when that fixture with can be played. Boxing Day fixtures I have determined by hand. At the end of the day I think probably that fixture list is based on my knowledge of doing creating the fixtures and on the input I have put into it. If you were to give the fixture list to someone else, they would come up with a totally different solution. I think in that respect because of the solution I come up with, it is probably my work. If someone else did it, it will be totally different.

Q. I know you have decided the fixtures, along with your colleagues by definition, as that is the job you were given, and it may be that someone else would come up with a different date, but if you think about the actual dates of homes and aways, the dates, that does not have a flavour of Glenn Thompson in it, does it?

A. Some of the homes and aways are maybe because I have requested either the Football League or the Premier League to change the date they selected for the fixtures. If you look at the dates, I have set [said] to them, "can we play a fixture on this date in the season rather that the date you have originally chosen." It depends what you mean on "a flavour of Glenn Thompson."

Q. Everybody knows that you were the person that did it, so we cannot have a blind tasting. If we could, nobody would say "Hull against Arsenal in March, that is pure Glenn Thompson" would they?

A. You may find that some of the football managers do try to accuse me.

Q. It does not have the stamp of your individuality on the actual result that comes out at the end, does it?

A. No, it is a piece of work that we are contracted to do by the Football League so we do the work to the best of our ability to meet the requirements from the Football League and the Premier League."

97. I do not think that "author's intellectual creation" requires the reader of a database to be able to identify the author. I do not therefore think that this passage really helps the defendants. Mr Thompson, and the other authors, were clear that there were numerous stages in the process of allocation of matches to dates, and in the selection of the dates themselves where judgment and discretion in the relevant sense had to be exercised.

98. Finally I have to consider whether what is done is quantitatively sufficient. I have no doubt that it is, based on the evidence. Whatever the true import of the CD example given in the Recitals to the Directive, the quantum of relevant work involved in producing the Lists for any of the Leagues is considerably greater and made more complex by the fact that no two fixtures can be freely interchanged without affecting others.

99. It follows that I conclude that the Fixture Lists are the subject of database copyright.

Copyright "irrespective" of database

100. It seems to me that the only way in which the Fixture Lists could conceivably attract copyright is by virtue of the collection and arrangement of the data contained in them, that is to say as a database. It follows that I do not see any scope for the subsistence of copyright by any other route.

Conclusion

101. The Fixture Lists are protected by database copyright, but not by *sui generis* database right or any other copyright. I will hear counsel on the appropriate order in the light of this judgment.