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In time for the World Cup — Copyright in Football Fixture Lists

The English High Court has given an interesting ruling on the intellectual property rights subsisting in the English and Scottish football league fixture lists, finding that such lists, while not capable of protection by database right, do enjoy protection as copyright works. The English and Scottish football leagues sued Britten Pools, Yahoo!, and Stan James for allegedly using its fixture lists without a licence. Football fixture lists are protected by database copyright but not by the EU's database right, the High Court said. The ruling means that sporting bodies can charge users of their fixture lists licence fees.

This is the first English judgment recognizing that database since the EU's Database Directive came into force in 1996. The Database Directive created an entirely new intellectual property right designed to give creators of databases the right to protect them independently of copyright law, as long as there has been a "substantial investment" in obtaining verifying or presenting the contents of the database. UK copyright law on the other hand awards a separate copyright protection to some databases and applies only if the selection and/ or arrangement of the contents of the database is original and constitute the author's own creation.

This ruling only adds to the long controversy around intellectual property rights in fixture lists and the ongoing debate between bookmakers and sports bodies on paying for the use of fixture lists will surely continue. Sports bodies have already tried (and failed) to establish database rights in fixture lists and racing details, when the European Court of Justice (ECJ) surprised the legal world with its narrow interpretation of the Database Directive, thereby

significantly reducing the scope of protection to the creator of a database.

The current ruling however has moved the goalposts yet again and now clearly awards copyright protection to fixture lists. Mr Justice Floyd has said that the English and Scottish football leagues cannot protect their fixture lists under the Database Directive, but that the lists are protected by the database copyright in the UK's Copyright Patent and Designs Act. Following this review, he found that, as a matter of fact, creation of the fixture lists "involves very significant labour and skill in satisfying the multitude of often competing requirements of those involved."

Mr Justice Floyd suggested four steps in determining the subsistence of database copyright i.e. whether a database is original by reason of the selection or arrangement of the contents of the database, and whether the database constitutes the author's own intellectual creation: (1) Identify the data which is collected and arranged in the database; (2) analyse the work which goes into the creation of the database by collecting and arranging that data, to isolate that work which is properly regarded as selection and arrangement; (3) 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 (4) Is the work quantitatively sufficient to attract copyright protection?

The judgment is unlikely to be the last word on these controversial issues. One can envisage the ruling being appealed and a possible further reference, either in this case or another, to the ECJ.

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USA Update



California introduces Internet Poker Bill

California has introduced its bill to legalise online poker for Californian residents. The bill, which was introduced on 28 May 2010, limits the number of online casinos offering legal gambling in California and would raise a minimum of 20% of revenue from these websites to help counter the state's huge budget deficit which is expected to reach USD19.1bn by June 2011. The bill has been designated as an urgency measure and could go into effect immediately upon signature by the Governor. Treating an online gambling bill as "urgent" only highlights California's need to fill its growing budget deficit by regulating and taxing the online gambling sector. Tribal groups are expected to oppose the legislation

The part of the bill that specifies that only California-based operators would be allowed to offer online poker services in the state may be a bad omen for the online gambling world, with analysts predicting that any future US remote gambling legislation will require a physical presence in the USA.

Unlawful Internet Gambling Enforcement Act comes into force

With more than two years delay, the Unlawful Internet Gambling Enforcement Act (UIGEA) finally came into force on 1 June 2010. Although UIGEA was approved in 2006, implementation was delayed following protests from civil liberties groups.

The most significant part of the new legislation is the requirement placed on financial institutions to block transactions with online gambling websites and effectively enforces a total ban on online gambling. It is questionable however, how this requirement can in fact be implemented, bearing in mind that many financial transactions involving US players are coded and cannot therefore be easily detected. It is believed however that most reputable financial institutions will steer away from

online gambling transactions with US players altogether to avoid any repercussions and penalty payments similar to the ones imposed on online gambling operators in 2009.

Interestingly enough, the ban may potentially not be in force for very long, considering that Barney Frank's proposal to regulate and tax online gambling will be considered this summer. In addition, Rod Wright, leader of the Californian Senate Committee on Gambling, has proposed a bill (see above article) which would license up to three Californian-based companies to provide online poker websites for Californian residents. It is expected that taxation will be more than 20% of the licensed operators' gross revenues.

Safe Harbour Certification may not be enough

The Düsseldorfer Kreis, a German privacy protection organization, informed companies to conduct their own checks on US companies' conduct before passing personal data to them, even if they are signed up to the EU-US Safe Harbour data protection scheme. The organization published a report stating that only 340 out of 1,100 organisations registered in the US under the Safe harbour scheme meet most of the basic EU requirements. Many organisations did not have privacy policies publicised and failed to comply with Principle 7 (Enforcement and Dispute Resolution), as they did not identify an independent dispute resolution process for consumers.

Bearing in mind that EU based data controllers will always remain liable for any transfer of personal data outside the EU, it is advisable to conduct basic checks and due diligence on any US companies, regardless of whether or not they are registered within the Safe Harbour Framework.

European Update



European Court of Justice decides in favour of Dutch monopoly

Betfair and Ladbrokes have failed in their efforts to open the Dutch online gambling market. On 3 June 2010, the European Court of Justice (ECJ) published its judgments stating that EU member states can restrict nationals from accessing the websites of gambling operators licensed in other EEA member states.

The ECJ's arguments closely followed the Santa Casa ruling last year and confirmed the EU principle of free movement of services does not apply automatically to the online gambling industry, allowing member states to restrict EEA licensed operators from offering their services. The ECJ stated that any online gambling offering other than the monopoly can be restricted, even if operators are licensed in other EU countries, until such time as appropriate EU legislation is passed and egaming laws are harmonised.

However, the ECJ's rulings do not address the fact that consumer choice between regulated products is being not only restricted but totally ignored. Consumers are unable to make an informed choice and decide on the best product available on the market and have to settle for state monopolies instead.

All signs appear to be heading to further legal challenges, however, this time EU Competition Law and consumer's rights are the ones to watch.

The Spanish Presidency of the EU published a progress report on gambling prepared by the working group. The report defines "illegal gambling" as "gambling in which operators do not comply with the national law of the country where services are offered, provided those national laws are in accordance with EU Treaty provisions." This is an interesting definition of illegality, which in fact would encompass any licensed online gambling operator who attempts to provide its services to customers based in member states where national gambling licenses are required. The report also concludes that ISP blocking could be an effective means of regulating the sector in line with the EU Treaty principles. All signs are pointing towards the French and Italian model of national licensing regimes, with the UK's current consultation on the introduction of its own national gambling licence as the most prominent follower. The EU Council does not have the powers to introduce legislation and it remains to be seen whether the European Commission's Green Paper will advocate an EU wide gambling legislation.

France: The first French online gaming licences have finally been granted by French regulator ARJEL. As expected, most of the eleven lucky licence holders are French based companies or European companies with French strategic alliances. Austrian based Bwin however, is the only non-French operator to receive an online licence from ARJEL. Although further licences are expected to be granted by the end of this month, ARJEL's tough technology and compliance requirements will undoubtedly restrict access to the French online gambling market to a selected few.

Germany: The German Interstate Treaty on Gambling (ITG) has long been criticised by the gambling industry, however the Treaty is now under considerable scrutiny from German sports bodies. A number of sporting associations, including German football and Olympics governing bodies, have formed a working group to lobby for a licensing system for private sports betting operators. These sporting associations are concerned to protect integrity in sports and also want the ability to generate funding through levies on gambling operators. Reaching an agreement between sports groups, gambling operators and the Länder will be a significant challenge, however, with the ECJ's judgments on the validity of the ITG expected later this year, a reform of the draconian ITG is expected.

BSkyB and EDS settle IT dispute for £318 million

BSkyB will be paid the total sum of £318 million to settle a dispute over a contract entered into with IT suppliers EDS in 2000. The settlement marks the end of one of the IT sector's most expensive court case and highlights the importance of fraudulent misrepresentation when negotiating IT contracts.

By way of background, BSKyB agreed for EDS to build a customers relationship management system for £48 million. BSKyB later alleged that EDS made fraudulent misrepresentations in relation to resources, time, cost and available "state of the art" technology and sued EDS for £700 million. In January, the High Court upheld BSKyB's claims, finding that EDS's statement to "deliver on time and within the budget" was fraudulent and ordered EDS to make an interim payment of £270 million to SkyBet pending a final ruling on damages, disregarding the £30 million limitation of liability contained in the agreement between the parties.

Hewlett Packard, who acquired EDS in 2008, agreed to settle the claim for the total sum of £318 million. This £318 million payment in the context of an IT contract worth (only) £50 million and which contained a limitation of liability cap set at £30 million is a very painful and expensive reminder to technology businesses that the law of misrepresentation is alive and kicking and that sales strategies and promises need to be considered carefully before agreeing to sign a IT deal.

Mobile Gaming—Apples for everyone



Betfair is the first major betting company to offer a downloadable gambling application from Apple's iPhone App Store, marking a significant change on gambling products from the "other big Apple".

This signals a significant shift in Apple's approach to mobile gambling which has been strongly influenced by the US egaming ban.

Betfair was well aware of Apple's cautious approach and has provided it's downloadable game not only with the relevant due diligence (Know Your Client) and age verification equipment, but also with a GPS device to ensure that bets can only be placed from certain territories.

William Hill has also grabbed the opportunity and submitted an iPhone bid, closely followed by Ladbrokes and Bwin. William Hill's application consists of a downloadable World Cup predictor which would allow cash bets via the William Hill website.

It is expected that the Apple love affair will trigger renewed interest in mobile gambling, bearing in mind that technology and mobile products have become much more sophisticated in recent years. Watch this space!

Data Retention – No Privacy left?

The new Data Retention Directive is currently being considered by the UK Parliament and may add additional hurdles on online operators to abide by strict Data Protection requirements. The Data Retention Directive requires telecoms operators to keep details for a set period and varying between six to 24 months, depending on the country in question. Details of calls made and internet usage are kept but not the content of the communications. However, following recent proposals, the Data Retention Directive should now also be used as a "early warning system" and include the content of communications and search engine use as well.

The "early warning system" is introduced as a suitable measure to detect and prevent child pornography on the internet. This not only brings back memories of the German draconian law on internet gambling (which is also based on a draft legislation originally intended to prevent child pornography) but also begs the question: why should these records be retained in the first place and why for so long? If indeed this is an "early warning system", then surely there is no need to store any data for six months and more. Where is the "early" in that? The Data Retention Directive was adopted under previous legislature despite considerable pressure from civil rights groups.

UK Gambling Commission Issues Guidance on SWPs



The Gambling Commission has issued new guidance to manufacturers and suppliers of machines and those who make machines available for use. The guidance sets out the basis on which the Commission will determine whether a particular game played on a prize machine is, in fact, gaming.

The guidance sets out a framework, which consists of a series of questions to be asked to determine whether a game is a game of chance or skill. The first question is whether there is a prize; if there is no prize (an opportunity to play again is not considered to be a prize) the machine is not offering gaming. Subsequent questions establish whether the game contains an element of chance. If so, and even if there is also an element of skill, the machine is offering gaming.

Further, if the machine is *presented* as involving an element of chance, even if it in fact does not, it will be offering a gaming product. In considering this issue, the Commission will have particular regard to how the game appears to players and the graphics, signage and marketing material. Any graphics associated with gambling games such as the turn of a wheel, the spin of a coin, the roll of a dice, reel bands or other random selection of numbers will indicate that the machine is presented as involving an element of chance.

EU Competition Law:

The European Commission has published a revised block exemption regulation and guidelines relating to vertical agreements (agreement between parties at different levels of the distribution and production chain). All businesses involved in supply and distribution agreements should consider the new rules carefully to ensure that existing arrangements fall within the revised legislation.

The new rules came into force on 1 June 2010. A one year transition period will apply to allow operators to adjust to the new conditions of the revised vertical agreements block exemption (VABE). The most significant changes in the VABE are:

- **Online Sales:** More clarification on online active sales and online passive sales (i.e. between sales made from active marketing as opposed to sales made because a consumer took the initiative). The VABE clarifies the types of behaviour that may be considered as hardcore restrictions of passive sales on the internet, specifically stating that exclusive distributors may not prevent customers in another territory from viewing its website, or automatically terminate potential transactions.
- **Market Share:** a new 30% market share threshold for both buyers and seller above which the VABE will not apply. The inclusion of buyers in the new legislation is intended to address the significant buying power of operators for the benefit of smaller enterprises. Above the 30% level operators are advised to consult with their legal advisers to ensure that no competition concerns arise.
- **Resale Price Maintenance (RPM):** the VABE also provides for further guidance on RPM, which is still considered as a hardcore restriction, but the Commission acknowledges that there may be instances which may justify an exemption.

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We offer unparalleled legal experience, knowledge and commercial understanding of the industry. We understand not only the law associated with betting, gaming, licensing and the provision of entertainment facilities, but the business behind it. We aim to provide a full service to the gambling and leisure industry, including specialist regulatory, corporate and commercial advice.

We have advised many of the world's largest gambling and leisure operators. We also advise UK companies in all areas of land-based and online gambling. Our clients include governmental organisations, casinos, hotels, bars, restaurants, event venues, bookmakers, online gambling operators, start up ventures and manufacturers of gambling equipment.

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UK Gambling Advertising Update

Prize Draws: A recent adjudication by the Advertising Standards Authority emphasises the need for organisers of free prize draws to provide accurate terms and conditions.

St Jude's Hospital offered a free cycle of fertility treatment as a prize in a random draw. The winner complained that her prize was subsequently withdrawn because she refused to attend a TV interview at short notice at the clinic's request. St Jude's version of events contradicted the winner's; they submitted that the winner had refused to attend a medical appointment to discuss her need for IVF.

Regardless of which version of events was correct, the ASA held that the prize draw details should have explained that the winner may not necessarily receive treatment, depending on their suitability for IVF. The requirement to attend a medical appointment was a significant condition which should have been made clear in the online prize draw details. In fact, no terms and conditions had been made available to entrants at all. The ASA felt this was likely to mislead and disappoint participants.

Responsible Advertising: A TV ad for EurosportBet was challenged on the basis that it implied gambling could be an alternative to employment, and encouraged socially irresponsible behaviour. The ad showed an elderly woman speaking on the phone with a laptop on her knee. The woman said "to be a winner requires hard work, dedication and preparation...Or you could just listen to your dear old Nan and put your money on United".

The ASA did not believe the ad was irresponsible, as the context showed that the whole phrase was concerned with placing bets and researching potential winners, rather than suggesting betting was an alternative to hard work. Further, the ASA did not feel that offering to match the first £50 deposited was irresponsible, because it was a one-off payment and was unlikely to encourage irresponsible gambling.

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