

# Through the Looking Glass: The Diminished Legal Status of Fixture Lists and Sports Event Data Following BHB v William Hill

Date of publication: November 2005

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In Lewis Carroll's classic children's tale of 1871, *Alice Through The Looking Glass*, the heroine of the piece, Alice, wonders what it would be like to walk through the mirror in her room and how strange a world she might find there. Surprised actually to be able to do so, she "*noticed that what could be seen from the old room was quite common and uninteresting, but that all the rest was as different as possible.*"

Such is the position of English intellectual property lawyers and certain sports administrators who emerge, following the ruling of the European Court of Justice<sup>1</sup> and the final decision of the Court of Appeal in the case of *BHB v William Hill*<sup>2</sup>, in a place where a lot of what they thought they knew about fixture lists, listings and sporting event data is, at best, very different or, at worst, very wrong. For years, common law practitioners had been secure in a regime where it was settled law that such databases and compilations of information were protected by copyright as literary works. Then, at the behest of an EU Directive, Council Directive 96/9<sup>3</sup>, (the "Directive") the position was changed with the establishment of the *sui generis* "database right" and a raising of the bar in terms of the criteria by which databases (as defined in the Directive) are able to qualify for copyright protection. This Directive – and the provisions of the various national laws that enacted it throughout the EU – was widely interpreted by many commentators, for seemingly perfectly good reasons, as extending the potential for protection and commercial licensing of fixture lists and official sports governing bodies' event calendars throughout Europe. Partly as a result of this, certain sports invested in the establishment of special purpose joint ventures to take advantage of the perceived opportunities<sup>4</sup>. In the case of horseracing, the entire sport shifted its business model and accepted fundamental structural changes to its funding base partly because it supposed that a certain interpretation as to the law regarding protection of pre-race data was correct. However, the European Court of Justice has now, to almost everyone's surprise, (including, apparently, a number of our most esteemed intellectual property judges) held that we had all been labouring under a fairly colossal misapprehension. It

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<sup>1</sup> *British Horseracing Board Ltd v William Hill Organisation Ltd* C203/02 [2005] 1 C.M.L.R. 15 (ECJ)

<sup>2</sup> *British Horseracing Board Ltd v William Hill Organisation Ltd* [2005] EWCA (Civ) 863

<sup>3</sup> [1996] O.J.L77/20-28

<sup>4</sup> *The FA Premier League, Football League and Scottish Premier League established Football Dataco Ltd and appointed a company, Fixtures Marketing Ltd, to oversee international licensing of, primarily, football fixture lists.*

appears that, like Alice, we have indeed gone through the looking glass to a place where all is “as different as possible”.

This article will look at how we arrived at a position where so many commentators, lawyers and sports administrators made assumptions regarding the legal status of certain sporting data that were, in fact, wrong. It will also question whether, in the light of fundamental differences – and tensions – between the common law approach to copyright law (which includes pragmatically affording protection to relatively uncreative but nonetheless valuable works which are products of economic investment) and the civil law *droit d’auteur* approach of continental Europe (which includes affording protection only to works which constitute an intellectual creation), we might possibly have been able to have seen this coming.

### The Legal Position Preceding the Directive: “Sweat of the Brow” Copyright

Before the enactment of the Directive, it was clear that fixtures lists, schedules of events, listings and race cards were capable of protection under copyright law as literary works.

Indeed, English copyright law had long held that lists of information, compilations, tables and databases were the proper subject of copyright law. Such a position has been held out as evidence of why the common law tradition of protecting essentially “economic” copyrights is preferable when compared to the more restrictive *droit d’auteur* traditions of jurisdictions in continental Europe, which, due to the relatively lofty standards of intellectual creation and originality demanded by the law before affording copyright protection, struggled for years to protect rights in economic works such as computer software, databases, tables and compilations of information.

Examples of pragmatic and sensible solutions adopted by common law courts included the judgments in the following cases:

Cox v Land and Water Journal Company<sup>5</sup>

This case concerned the copying by the publishers of “The Hunting Field of 1870” of the plaintiff’s work, “The List of Hounds” contained in the “Field” newspaper. The judges presiding over the case were quick to find that such lists of the various packs of hounds, names of hunts, nearest towns to the hunts, hunting days, names of masters, huntsmen, whips and addresses of the kennel could all be the subject of copyright, the copying of which may be actionable. In his judgment, Sir R. Malins, V.C. said, “*It is clear that in this case the getting of the names of masters of hunts, the numbers of hounds, the huntsmen and whips and so forth is information open to all those who seek to obtain it; but it is information they must get at their own expense as the result of their own labour, and they are not entitled to the results of labours undergone by others.*”

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<sup>5</sup> (1869) L.R. 9 Eq. 324

Thus began a long line of cases that pragmatically rewarded the producers of lists of dull but valuable information with so-called “sweat of the brow” copyright in such works.

British Broadcasting Co. v Wireless Gazette Publishing Co.<sup>6</sup>

In this case it was decided that the British Broadcasting Company (as it was then entitled) had copyright in the listings of radio programmes published in the Radio Times. Astbury J held that the BBC’s compilation was the product of considerable time, labour, expense and skill and, being a compilation of a number of simple facts (i.e. date, time, and name of programme), was entitled to copyright protection notwithstanding that there was no copyright in the simple facts themselves.

Winterbottom for the Western Australian Turf Club v Wintle<sup>7</sup>

This case involved the preparation of a race card of runners in horse races. The list of runners entering races was prepared before it was sent to a handicapper who, after much study of each runner’s form, would allot weights to each horse. It was decided again here that the race card was a product of sufficient skill labour and judgement to support a claim that it was protected by copyright.

Football League Ltd. v Littlewoods Pools Ltd<sup>8</sup>

This case involved an action brought by the Football League who claimed that Littlewoods infringed copyright in the League’s fixture lists by publishing pools coupons which included lists of football matches that were copied from the fixture lists. It was not in doubt that Littlewoods did in fact copy the fixture lists. Counsel for Littlewoods, however, contended that copyright could not subsist in the lists themselves as they were merely the chronological presentation of a list of unprotectable facts, the production and presentation of which as a chronological list resulted inevitably from the production of each individual fixture. Upjohn J disagreed with this argument, ruling that *“in my judgment.... the League....are entitled to claim that the chronological list is produced as a result of the entire skill, labour, time, judgment and ingenuity of the League, their servants and agents.... Accordingly, in my judgment, the plaintiffs are entitled to the copyright in the chronological list.”* He went on, *“Upon the whole I have come to the conclusion that this systematic pirating by the defendants week by week throughout the season of that part of the League’s list which is relevant to that week.... amounts in the end to a reproduction of the plaintiff’s compilation and infringes accordingly.”*

Independent Television Publications Ltd. v Time Out Ltd. and Elliott; and  
The British Broadcasting Corporation v Time Out Ltd. and Elliott<sup>9</sup>

In this case the producers and publishers of listings of television programmes (ITP and the BBC) brought proceedings against the publishers of Time Out magazine who they alleged were copying their listings. Again it was not in dispute that the listings were being copied. What was in dispute, once again, was whether copyright could subsist in chronological lists of programming information. Once again, in spite of elegant arguments by counsel for the defendants, the answer was squarely a pragmatic affirmative.

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<sup>6</sup> [1926] 1 Ch. 433; 42 T.L.R. 370

<sup>7</sup> (1947) 50 W.A.L.R. 58

<sup>8</sup> [1959] 1 Ch. 637

<sup>9</sup> [1984] F.S.R. 64

Whitford J ruled, *"Here it stands agreed that there is a great deal of skill and labour involved in arriving at the daily programme schedules. In my judgment they are compilations which are entitled to protection as copyright works."*

## First Signs of a Culture Clash

Magill

In 1986, Magill, an Irish publisher sought to publish a guide to television listings in Ireland, featuring the schedules for RTE, the BBC, ITV and Channel 4. An injunction was granted against Magill by the Irish courts for similar reasons as are set out in the cases above.

Magill, however, did not let the matter lie there, claiming that the broadcasters' refusal to license the information needed for the television guide constituted an abuse of dominant position under European competition law.<sup>10</sup> Through various appeals and rulings from the Court of First Instance and the European Court of Justice, Magill won the case subject to the caveat that the owners of such copyrights are entitled to a reasonable licence fee for making available their intellectual property.

This case can be seen as an example of how competition has been promoted in the EU by judicial restriction of the scope of monopolies afforded by intellectual property rights. Its reasoning has been followed in a number of cases since with the practical effect that owners of intellectual property need to consider whether they are in a dominant position in the market and, if so, whether the exercise of their exclusive rights in their intellectual property means that they are effectively abusing that position. If so, they face being forced to license their competitors their intellectual property rights on reasonable terms to be set by a third party arbitrator.

However, this appears curious to many common law practitioners. As Watts and Durie have pointed out, *"The Court held that that, while the existence of an intellectual property right was a matter for national law, the exercise of that right was a matter for EC law. The distinction between the existence of a right and the exercise of the right in these circumstances may be regarded as dubious. It is somewhat nonsensical to say that copyright, which includes the right to prevent copying of a work and its publication, can remain intact if a court withdraws those rights and renders the copyright owner powerless to prevent copying and dissemination, in return for a "licence fee" which a third party arbitrator deems reasonable."*<sup>11</sup>

Various commentators, with whom this author agrees, have pointed out that the Magill decision appears to find its roots, tacitly at least, in the differences in approaches between common law and civil law copyright doctrines and that the court in Magill viewed listings and schedules, protected as they were by "sweat of the brow" copyright in national law, as somehow "second class" or less worthy copyright. Certainly the "sweat of the brow" doctrine, as has been pointed out previously, is not accepted in the majority of civil law

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<sup>10</sup> *Contrary to Article 86 of the Treaty of Rome as it then was (now article 82 of the EC Treaty)*

<sup>11</sup> *Margot Watts and Robin Durie: A Comparative Study of TV Listings with Reference to the United Kingdom, Australia, New Zealand and Europe. Ent L.R. 1992, 133.*

jurisdictions where an intellectual, creative or aesthetic contribution in the production of a work is preferred to an economic one when assessing whether a work will qualify for protection under copyright. Viewed in this way, at the heart of the Magill judgment we can detect a clash of ideologies, traditions and cultures which was resolved by judges from civil law traditions effectively placing severe restrictions on the effect of centuries of pragmatic rulings made by common law courts.

#### The Directive

The next illustration of the differences (and tensions) between the civil law and the common law approach to “sweat of the brow” copyright came in the form of the Directive itself. The illustration manifests itself in two ways.

Firstly, it is present in the necessity for the Directive per se. As has been noted common law systems had long afforded copyright to lists, databases and schedules. Civil law systems struggled with this. Thus producers and licensors of databases in civil law jurisdictions faced uncertainty as to whether such databases and their contents were protected by intellectual property rights. Largely, in order to allay such concerns and promote the development of the European database industry, the EU, issued the Directive.

Secondly, it can be seen in the two fundamental effects of the Directive on English law:

- it introduced a *sui generis* “database right” (entirely separate and distinct from copyright) into the laws of all member states to protect intellectual property in databases that qualify for such database right. The key provision is Article 7(1) which reads:

*“Members States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or reutilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database”; and*

- it raised the bar, over and above the “sweat of the brow” doctrine found in the UK and Irish law, for copyright protection of databases by introducing criteria whereby they would only qualify for protection if they were the author’s own intellectual creation. The key provision is Article 3(1) which reads:

*“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 that protection.”* At a stroke, the body of law built up over years of development of the sweat of the brow doctrine was rendered null and void in respect of databases.

As has been noted above many sports bodies read the Directive as giving them *sui generis* databases rights in their calendar information. The commercial response in UK football and horseracing at least was to engage in fairly aggressive licensing campaigns whereby users of fixtures and pre-race data were expected to

pay for the perceived intellectual property they were using. Such users who agreed to pay licence fees included, in particular, bookmakers and media companies.

Clearly such sports rights holders, as responsible licensors of intellectual property rights, were obliged to take action against those who they thought were using such rights without an appropriate licence (and without paying for them).

Such was the case, when the British Horseracing Board ("BHB") took action against William Hill, alleging that it was using the BHB's data outside the scope of the licensing arrangements that were in place.

### The BHB Case

At first instance<sup>12</sup>, Laddie J conclusively reached a decision that the BHB clearly enjoyed *sui generis* database right in the lists of runners and riders on account of the very substantial investment made by the BHB when compiling the database. Commentators were unsurprised, the decision fitted with the traditions of English law and seemed, certainly in terms of public policy at least, the correct and pragmatic approach. However, William Hill appealed, arguing in essence that the Judge at first instance had misinterpreted the Directive.

The Court of Appeal were persuaded that, since questions of the interpretation of European law had been raised, it would be appropriate to refer certain questions of law for clarification to the European Court of Justice (ECJ).<sup>13</sup> Certain other questions of law arising from cases based on broadly similar points relating to football fixture lists<sup>14</sup> were also referred to the ECJ at around this time and so the ECJ decided to hear all of the cases together.

The Advocate General's opinion was broadly that both the BHB's pre-race information and the football fixture lists. Again, commentators must have breathed a sigh of relief safe in the knowledge that normal service was about to be resumed and that, although the basis of the law might have been changed by the Directive, the practical effect of the law was broadly the same as prior to the Directive. It is generally the case that in the majority of cases before the ECJ, the Advocate General's opinion is followed by the court. It was therefore an enormous surprise to English practitioners and sports administrators alike (particularly in horseracing and football) when the ECJ delivered a bombshell of a judgment which disagreed with the Advocate General's opinion and effectively ruled that the BHB's lists and football fixture lists could not be the proper subject of *sui generis* database right<sup>15</sup>. Although a detailed analysis of this judgment has appeared in a previous edition of this journal, it is worth again reciting the reason for this decision. The ECJ essentially held: "*The resources used to draw up a list of horses in a race and to carry out checks in that connection do not constitute investment in the obtaining and verification of the contents of the database in which that list appears*" and, thus, there was no basis for the *sui generis* database right. The same result occurred in relation to each of the football cases. The Court of Appeal has now applied this ruling to the BHB case and, to the surprise of most English practitioners who are interested in this area (and certainly

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<sup>12</sup> Case No. HC 2000 1335, 9 February 2001

<sup>13</sup> [2001] EWCA Civ 1268

<sup>14</sup> *Fixtures Marketing v OPAP*, Case C-444/02; *Fixtures Marketing v Oy Veikkaus*, Case C-46/02; and *Fixtures Marketing v Svenska Spel*, Case C-338/02

<sup>15</sup> Case C-203/02, [2005] RPC 260

the BHB), the BHB have now lost their case and find themselves in a puzzling situation when contemplating the basis on which they can support their data licensing activities.

As noted previously however, when set against the backdrop of civil law copyright traditions, it is perhaps not so surprising after all that a European Court has ruled this way. Perhaps we have all been a little too Anglo-centric in our suppositions of what the law relating to databases means.

### The Other Side of the Looking Glass: Where are we now?

Perhaps all is not lost for the BHB and other sports administrators looking to claim, licence and enforce intellectual property rights in lists of event and related data.

Glimmers of hope lie in two areas. The first is in copyright law. Although untested, it is perhaps possible that a national court could be persuaded that sports bodies' databases constitute their own intellectual creation and thus qualify for copyright protection under Article 3(1) of the Directive. This, however, is unlikely in the author's view. The second relates to the opportunity, following the judgment to somehow contrive a different way of producing the data whereby substantial investment is made in obtaining and verifying data as opposed to creating it. In such a situation *sui generis* database right could subsist. It is hard to envisage exactly what could be done to make this a reality but perhaps not beyond the ingenuity of those advising sports bodies. Whether courts will accept such attempts as anything other than artificially contrived shams remains to be seen.

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