

Claim No: HC10C01377

Neutral Citation Number: [2010] EWHC 2911 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2010

Before :

THE HON MR JUSTICE FLOYD

Between :

(1) FOOTBALL DATACO LIMITED
(2) THE SCOTTISH PREMIER LEAGUE LIMITED
(3) THE SCOTTISH FOOTBALL LEAGUE
(4) PA SPORT UK LIMITED

Claimants

- and -

(1) SPORTRADAR GmbH (a Company Registered in Germany)
(2) SPORTRADAR AG (a Company registered in Switzerland)

Defendants

James Mellor QC and Lindsay Lane (instructed by DLA Piper UK LLP) for the Claimants
Hugo Cuddigan (instructed by Bird & Bird LLP) for the Defendants

Hearing dates: 22nd October 2010

Judgment

Mr Justice Floyd :

1. There are two application notices before the court. The first, the jurisdiction application, is an application by the defendants, Sportradar GmbH and Sportradar AG (“GmbH” and “AG” respectively) for an order declaring that the court has no jurisdiction to entertain the claim against them (alternatively that any such jurisdiction should not be exercised) and setting aside service of the claim form accordingly. The second, the amendment application, is an application by the claimants to amend their particulars of claim, as they would put it, to clarify existing alleged acts of infringement and add new ones.
2. The first claimant is owned by The Football Association Premier League Limited, the Football League Limited and the second and third claimants, all of whom are engaged in the business of organising professional football matches in various leagues and competitions in England and Scotland respectively. The first claimant is engaged in the business of creating and exploiting certain data and rights, including intellectual property rights, relating to the playing of football matches organised by the Leagues. The fourth claimant is engaged by the first claimant as a sub-contractor to assist it in the creation and exploitation of the data and rights referred to above. For the purposes of these applications there is no need to distinguish between the various claimants.
3. GmbH is a German company. AG is a Swiss company. AG is the holding company of the Sportradar group of companies and is the parent company of GmbH. GmbH provides live scores, results and other statistics relating to football and other sports, including UK football matches, to customers via the internet. They have a website at betradar.com. The extent of involvement of AG in these acts is one of the issues on the jurisdiction application.
4. The proceedings are for infringement of (a) copyright and (b) database right. The rights are alleged to subsist in a database known as Football Live compiled by the claimants which comprises the statistics from UK football matches. Examples of these statistics are goals scored, goalscorers, penalties, yellow (caution) and red (sending off) cards and substitutions. The data is referred to as “live data” as it is both updated and provided to third parties while matches are taking place.
5. GmbH provides a competing service to the claimants. This data is called “Sport Live Data”. The data is stored on web servers in Germany and Austria, but can be accessed via links from elsewhere, including from the United Kingdom. The claimants say that, in assembling their data, GmbH and AG are copying data from Football Live, and are therefore liable for infringement of UK copyright and database right. The allegation of copying is denied.
6. These proceedings were commenced by the claimants by the issue of a claim form on 23rd April 2010. It is relevant to note that, no doubt prompted by the present claim, further proceedings were issued against the claimants by GmbH on 14th July 2010 in the Landgericht Gera in Germany seeking, amongst other things, negative declarations that the activities of GmbH do not infringe any intellectual property rights of the claimants. GmbH contend that, for any claim of which the English court was not properly seised before 14th July 2010, the German Landgericht was the court first seised. It is therefore of importance to examine with some care what, if any, claims were made in the proceedings in the original particulars of claim, over which

the English court has jurisdiction. That exercise must be done without the benefit of the amendments which the claimants now wish to make, which were applied for only when the Landgericht was already seised of the declaratory claim, and for which permission is required which has not yet been granted.

The jurisdiction application

7. Because jurisdiction is governed in the case of GmbH by the Judgments Regulation (Council Regulation (EC) No 44/2001) and in the case of AG by the Lugano Convention, it is common ground that the claimants must show a “good arguable case” of copyright and/or database right infringement in order to establish jurisdiction in this country. In default, GmbH and AG would have to be sued in their states of domicile, that being the primary rule of jurisdiction under those instruments. Moreover, copyright and database right are strictly territorial rights. No copyright or database right other than UK copyright or database right is asserted in the action. It follows that it is necessary for the claimants to show in both cases that there is a good arguable case of an act in the UK which infringes those rights. GmbH and AG submit that they perform no infringing acts, or indeed any acts at all, in the UK. They submit accordingly that the particulars of claim fail to make out a good arguable case against either of them of an act in the United Kingdom.
8. Parts of the case advanced on behalf of GmbH and AG are based on arguments that the particulars of claim simply do not make the relevant allegation. Those questions are susceptible of a “yes” or “no” answer. Other parts are based on an examination of the evidence in relation to issues which are properly raised by the pleading. These latter issues have to be decided according to the principles set out by Waller LJ in *Canada Trust v Stolzenberg* [1998] 1 WLR 547 and subsequently approved on appeal at [2002] 1 AC 1 at 12, and then in the Privy Council in *Bols Distilleries v Superior Yacht Services* [2007] 1 WLR 12. At the risk of over-compression, those principles are that I must come to a view, within the limits of the interlocutory process, as to which party has the better of the arguments on the available material. That is what is meant by “a good arguable case”.
9. Sometimes a question of whether the court has jurisdiction turns on a question of law. In *Chellaram v Chellaram (No 2)* [2002] 2 All ER 17 Lawrence Collins J, as he then was, indicated the approach to be taken where the court has to decide an issue of law for the purposes of deciding whether to accept jurisdiction, at [136]:

“Where jurisdiction depends on a question of law or construction, the court will decide it rather than apply the good arguable case test: see cases at Dicey and Morris, para 11-127, n. 34¹. That approach has consistently been applied to cases where jurisdiction has depended on the applicable law of a contract for the purposes of what is now CPR 6.20(5)(c). In such cases the court does not consider whether the claimant has

¹ The cases cited are now, I think, to be found at 11-151 in the 14th Edition of Dicey & Morris at note 13.

a good arguable case that the contract is governed by English law, but rather whether the contract *is* governed by English law. Some of the most important cases on the applicable law of a contract at common law were decided under predecessors of this rule (e.g. *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.* [1984] AC 50) and I do not consider that anything in the *Seaconsar* case is intended to throw doubt on their approach. Accordingly in a case such as this, if jurisdiction depends on the identification of the applicable law, the claimant would have to satisfy the court that the applicable law was English law, and the good arguable case test would only have a role to play if there were a relevant factual issue (for example, if an express choice of law were said to be ineffective on the facts of the case). ”

10. In addition to the fundamental point about acts in the jurisdiction, GmbH and AG run a series of further points as to why the court has no jurisdiction. They submit:
 - i) that the claims to subsistence of copyright and database right are either liable to be struck out or very weak;
 - ii) the claim for a reproduction of a substantial part of the copyright work cannot be maintained;
 - iii) the particulars of joint tortfeasorship do not support an arguable case against AG;
 - iv) the reliance on a customer, Bet 365, accessing the data is misplaced in the light of the terms of a licence between the claimants;
 - v) GmbH and AG have the better argument on whether there has been copying.

No act in the UK

11. The particulars of claim, from paragraph 24 onwards, identify the rights relied on. In summary, Football Live is alleged to enjoy the following rights, some of which are said to be cumulative and others alternatives:
 - i) Copyright as a database pursuant to sections 1(1)(a), 3(1)(d) and 3A(2) of the Copyright Designs and Patents Act 1988 (“the Act”) (paragraph 25);
 - ii) Database right pursuant to Regulation 13 of the Database Regulation, by which is meant the Copyright and Rights in Databases Regulations 1997 (SI 1997/3032) 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”);
 - iii) Copyright in a table or compilation other than a database pursuant to sections 1(1)(a) and 3(1)(a) of the Act;
 - iv) Copyright in a literary work pursuant to sections 1(1)(a) and 3(1)(a) of the Act.

12. Paragraphs 32 to 36 of the particulars of claim are headed “The Defendants”. Paragraphs 32 and 33 identify GmbH and AG as companies organised and existing under the laws of Germany and Switzerland respectively and that AG is the holding company of the Sportradar group and the parent company of GmbH. Much stress is laid by the claimants on paragraph 34 which describes the business of AG and GmbH, so I set it out here:

“The Defendants are engaged, inter alia, in the business of providing live scores, results, and statistics relating to football, to customers, including customers in the United Kingdom. Their customers include:

(i) Bet365 Group Limited, trading as Bet365, a UK company. Bet365 provides online betting services, inter alia, to customers located in the UK, through a website at bet365.com (“the Bet365 Website”); and

(ii) Stan James Plc, a company registered in Gibraltar, which provides online betting services, inter alia, to customers located in the UK, through a website at stanjames.com (“the Stan James Website”).”

13. I read this paragraph as a general description of the nature of the businesses of GmbH and AG, identifying two commercial customers for their data, and asserting that the two identified customers provide data to a further level of customers in the UK, through the two identified websites.
14. Paragraph 35 alleges that AG and GmbH advertise their services through a website at betradar.com.
15. Paragraph 36 is a generalised allegation of joint and several liability for infringement of copyright and database right:

“The Defendants each carried out or participated in or directed, procured or controlled the acts of copyright and/or database right infringement about which complaint is made herein and are jointly and severally liable for those acts. Pending disclosure and/or evidence, the Claimants rely on the following facts and matters:

(i) The Defendants’ Website bears a Copyright notice which states “© Copyright 2003-2009, Sportradar AG”.

(ii) The Defendants’ Website states that “Our Live Scores department is mainly operated from our office in Gera, Germany”. The website also indicates that that office is part of the First Defendant.”

16. There is an issue between the parties as to the adequacy of that plea as a basis for implicating AG. However, it is clear that the persons to whom joint and several liability is sought to be attached are AG and GmbH. Further, the acts for which they

are said to be jointly and severally liable are “the acts of copyright and/or database right infringement about which complaint is made herein”. These are yet to be identified. It is at least possible at this stage of the pleading that the “acts of which complaint is made” will be, or include, acts of third parties, such as customers of AG and GmbH in the United Kingdom. Alternatively, the plea may be limited to acts of AG and GmbH, the objective being to show joint liability of the defendants amongst themselves. To determine which is intended, it is necessary to read on.

17. Paragraph 37 is therefore the crucial paragraph, at least so far as copyright infringement is concerned. It is headed “Infringement of the Claimants’ rights”. It reads, so far as material, as follows:

"From a date presently unknown to the Claimants but prior to the issue of the Claim Form in these proceedings, *the Defendants have used the whole or a substantial part of Football Live*, without the consent of the Claimants or any of them. Pending disclosure and/or evidence, the Claimants rely on the following facts and matters:

(i) *The reproduction of data from Football Live on pop-up windows hosted on the Defendants' Website which are linked to from the Bet365 Website and the Stan James Website, during the 2008/2009 and 2009/2010 seasons. These pop-up windows appear when the "Live Score" option on the Bet365 Website and the Stan James Website is clicked on.* [Screen prints of the windows from the two websites are then attached and referred to]. These screen prints show examples of the data displayed (at the end of each game) in relation to all of the games played in each of the Leagues, on the relevant dates. *The data which is displayed for each game is left on the Defendants' Website until the end of the day on which the game is played.*

(ii) By way of further illustration, attached as Annex 4 is a table showing the extent of types of live data displayed...

(iii) By reason of the matter is aforesaid, it is to be inferred that the defendants reproduce *and/or authorise the reproduction* of the following events for every game in every League...(a) goals; (b) goalscorers (shown by the player’s name, and a football icon); (c) own goals (shown by the player's name followed by "(og)" and a football icon); (d) penalties (shown by the player's name followed by "(pen)"; (e) yellow cards (shown by the player's name, and a yellow card icon); (f) red cards (shown by the player's name and a red card icon); and (g) substitution (shown by the names of the players coming on and off, and an icon comprising two circular arrows). ...

(iv) *By reason of the matters aforesaid, it is to be inferred that the Defendants reproduce and store all of the aforesaid data in an underlying electronic database.*

(v) The Defendants' Website states that the Defendant has been operating an "in-house Live Score service" since February 2005. In the premises, it is to be inferred that the Defendants had carried out the aforesaid (or similar) activities since at least 2005." (emphasis supplied)

18. Sub-paragraphs (i) to (v) are intended to be matters relied upon in support of the principal allegation that AG and GmbH have “**used** the whole or a substantial part of Football Live”. Use, of itself, is not one of the acts restricted by copyright: see section 16(1) of the Act. Copyright is infringed by any person who does, or authorises another to do, any of the restricted acts in relation to the work or a substantial part of it: see section 16(2) and 16(3)(a). By virtue of section 16(1)(a) “copying” the work is a restricted act. “Copying” is defined in section 17(1), as reproducing the work in any material form. I shall refer to committing a restricted act as “primary infringement” to distinguish it from authorising.
19. Because the main part of the plea is not expressed in the statutory language, recourse must be had to the sub-paragraphs of the plea to see what restricted act or acts are in fact relied upon. The first sentence of sub-paragraph (i) makes clear that “reproduction” is relied on. Mr Cuddigan, who appeared on behalf of GmbH and AG, submitted that the “overarching plea” in paragraph 37 was of acts committed by GmbH and AG. The act of reproduction pleaded in sub-paragraph (i), and by implication the other sub-paragraphs, was one by GmbH or AG or both of them and committed abroad. The sub-paragraph stresses that the pop-up windows are hosted on the website of GmbH and AG, and that the data displayed is left on their website until the end of the day. These are events occurring on GmbH’s webserver in Vienna. Sub-paragraph (iv) makes good this impression by drawing the inference that all the data is reproduced and stored by the defendants in an “underlying electronic database”. There was accordingly, so he submitted, no act of reproduction in the UK by any customer alleged against him.
20. Mr Mellor QC who appeared for the claimants with Ms Lindsay Lane, submitted that the act of reproduction relied on is, or at least includes, that which occurs when someone clicks on the Live Score option on the Bet365 or Stan James Websites. That is an act which is committed by the customer of Bet 365 or Stan James when the option is clicked. He relies on the fact that paragraph 34, which precedes this paragraph, has already made clear that there are two levels of customers, and customers of Bet 365 and Stan James will cause the reproduction to be made on the screens of their computers. He also relies on the fact that, given the territorial nature of copyright, one should approach the exercise of interpretation of the pleading on the basis that it is likely that it would be restricted acts occurring in the United Kingdom which would be the intended subject of complaint.
21. Despite the contents of paragraph 36 of the pleading, which specifically alleges that each of the defendants carried out the acts of which complaint is made, Mr Mellor expressly disavowed at the hearing any reliance on an allegation that GmbH and AG had themselves reproduced anything in the United Kingdom. That had not always

been the claimants' position. The witness statement of Ruth Hoy, the claimants' solicitor, summarised the case of copyright infringement in paragraph 8 of her witness statement on the jurisdiction application as:

"The Defendants' infringing acts in relation to copyright are:"

- a) copying the whole or a substantial part of Football Live (contrary to s 17 of the Copyright Designs and Patents Act 1988)
- b) authorising the act described in (a).

22. That paragraph asserts primary infringement by reproduction, because copying means reproducing. Similarly, in paragraph 38 of their skeleton argument, the claimants maintained that GmbH and AG:

"are either directly responsible for each act of reproduction, since it is their server that sends the data to the end user's computer. Alternatively, they thereby authorise the act of reproduction".

23. Mr Mellor warned me against too literal an interpretation of paragraph 37(i), without taking account of the context of paragraph 34. He reminded me that to allege a cause of action a pleading needs only to plead the necessary material facts. Mr Mellor accepted that the particulars of claim in the present case could have been improved upon. Nevertheless he submitted that the claimants had clearly pleaded that when the customer in the UK clicks on the "Live Score" option he or she would cause a reproduction of the whole or a substantial part of Football Live to be made on their computer.

24. Mr Cuddigan, for his part, drew my attention to the judgment of Gloster J in *National Navigation Co v Endesa Generacion SA* [2009] EWHC 196 (Comm) (unreported, 1st April 2009) in which she decided to award costs against a claimant on the indemnity basis when a claim had been struck out as failing to make out a case under the Judgments Regulation. She summarised the position in this way at [72](v) and (vi):

"(v) In short, the claim form ... gives every impression of a document that was hurriedly put together in an attempt to ensure that this court was first seised under the Regulation, in circumstances where proper consideration of the factual and the legal position would have shown that it was extremely dubious that this court had any such jurisdiction. If [the claimant's solicitor] genuinely believed that there was such jurisdiction, then it was incumbent upon him to set out in the claim form the factual basis for that belief, in a manner that was transparent and comprehensible.

"(vi) It is very important in cases said to fall under the Regulation, where this court takes jurisdiction on the basis of a statement in a claim form pursuant (now) to CPR 6.33, and accordingly there is no requirement for the court's leave to

serve the proceedings out of the jurisdiction, that solicitors issuing proceedings take particular care to ensure that they have a reasonable basis for their belief, and that the facts supporting it are stated in a transparent fashion in the claim form. First seizure under the Regulation may obviously have important consequences for both parties, and for proceedings in other jurisdictions. It is therefore vitally important: (a) that jurisdiction is not wrongly asserted without reasonable belief; and (b) the grounds are clearly stated so that a jurisdictional challenge can, if necessary, be speedily and easily made.”

25. There is no suggestion in the present case that the claim form and particulars of claim asserted jurisdiction without reasonable belief. Moreover it is the facts supporting the basis of jurisdiction which must be clearly pleaded: there is no requirement for anything more than that.
26. I did not find this a particularly easy question. However, I have in the end come to the conclusion that paragraph 37(i) does allege, amongst other things, an act of reproduction of the whole or a substantial part of Football Live by a customer in the UK. I think Mr Mellor is right that, read in the context of the pleading as a whole, that is the meaning which the pleading conveys.
27. Nevertheless, as the customers are not parties, and as primary infringement is no longer alleged, it is necessary to consider the case on authorisation and joint tortfeasance before one could conclude that there is an adequate plea of an act of infringement over which the court has jurisdiction.

Authorisation of copyright infringement

28. It is common ground that, where authorisation of an act of infringement of United Kingdom copyright is relied on, the act of authorisation does not have to occur in the United Kingdom, provided that the primary act of infringement so authorised does: see *ABKCO Music and Records Inc v Music Collection International Ltd* [1995] RPC 657 at 660.
29. As to authorising, the law is helpfully summarised by Kitchin J in *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21 at [85]-[90]. In short,

““authorise” means the grant or purported grant of the right to do the act complained of. It does not extend to mere enablement, assistance or even encouragement. The grant or purported grant to do the relevant act may be express or implied from all the relevant circumstances. In a case which involves an allegation of authorisation by supply, these circumstances may include the nature of the relationship between the alleged authoriser and the primary infringer, whether the equipment or other material supplied constitutes the means used to infringe, whether it is inevitable it will be used to infringe, the degree of control which the supplier retains and whether he has taken any steps to prevent infringement. These are matters to be taken into account and

may or may not be determinative depending upon all the other circumstances.”

30. There is no allegation of authorisation in the primary plea in paragraph 37. The word “authorise” appears for the first time in paragraph 37(iii), where it is alleged, amongst other things, that GmbH and AG have reproduced or authorised the reproduction of certain “events”. Accordingly, Mr Mellor submits that, if one accepts, as I have, that sub-paragraph (i) pleads a case of reproduction on the screens of a user, paragraph (iii) must be pleading a case of authorisation of that act by GmbH and AG. It matters not that that authorisation occurs from abroad, as the act of primary infringement – reproduction – occurs here.
31. Mr Cuddigan’s primary submission was that, given that there is no act of any customer sufficient to amount to infringement properly pleaded against his clients, there is equally no case of authorisation of any relevant act. I am bound to reject that submission because I have found that such an act is pleaded in sub-paragraph (i). In the alternative he submitted that, even if he was wrong and sub-paragraph (i) did plead an act of a customer, there was no adequate plea of authorisation. He referred me to two cases where allegations of authorisation had been held to have been inadequately pleaded or made out: *A&M Records v Audio Magnetic* [1979] FSR 1, a decision of Knox J; and *Philips Domestic Appliances and Personal Care BV v Salton Europe and another* [2004] EWHC 2092 (Ch).
32. In *A&M Records* the defect in the pleading was that no specific act of infringement was identified as having been authorised. In the present case, on the finding I have made about sub-paragraph (i), that is not the case. In *Philips* Laddie J, after citing a passage from the speech of Lord Templeman in *CBS Songs Ltd v. Amstrad Consumer Electronics Plc* [1988] AC 1013, said this at [44] of his judgment:

“In my view a number of matters are apparent from this passage. First, merely passing on something which will inevitably be used for infringement is not authorising. This was the incorrect suggestion in the First Edition of *The Modern Law of Copyright*. Second, as Lord Templeman said, “lenders and sellers do not authorise infringing use”. You have to do more than sell. Third, a crucial factor in a case like this is whether EE had any “control over the use” of its products “once they are sold”.”
33. In the present case, although the matters relied on are not conveniently pulled together in the form of a set of particulars, it is clear that complete control is exercised by GmbH over the content of the pop-up windows. This is not a case of a mere supply, leaving it to the customer to choose what use is made of the data.
34. Mr Cuddigan submitted that the reference to authorisation in sub-paragraph (iii) was merely to authorisation of the defendants amongst themselves. I think there would have been force in that submission had I rejected the claimants’ case on sub-paragraph (i). But once it is accepted that sub-paragraph (i) pleads a case of reproduction by a customer, then it follows in my judgment that sub-paragraph (iii) is pleading a case of authorisation of that act as well.

35. I conclude that the claimants have adequately pleaded a case of authorising reproduction by customers in the UK.

Joint infringement of copyright with customers?

36. As indicated above, paragraph 36 of the particulars of claim alleges the joint and several liability of GmbH and AG for the acts about which complaint is made, which fell to be identified. Mr Cuddigan submitted that paragraph 36 is an allegation of joint liability of the defendants amongst themselves only, not an allegation of joint liability of each defendant with the customer in the UK. He points to the fact that the particulars given certainly do not explain how GmbH and AG might be individually or jointly liable with customers in the UK.
37. I first consider the case of the alleged joint liability of GmbH and AG with customers in the UK. In connection with copyright infringement, a case that GmbH and AG are jointly liable with customers is an alternative way of putting the authorisation case. There would be no need for GmbH or AG to do any act in the jurisdiction. The pleading asserts that GmbH has procured etc. the acts of which complaint is made, which include the act of reproduction by a customer. As I have held that there is an adequate plea of an act of infringement of copyright by a customer in the UK, there is also an adequate plea of joint infringement between GmbH and AG with the customers.
38. Mr Cuddigan had a separate point about AG. He relied on the following principles derived from the cases, which were not in dispute:
- i) In order to be jointly liable for another's torts, a party must have conspired with that other party or procured or induced his commission of the tort or he must have joined in the common design pursuant to which the tort was committed: it is not sufficient that a party merely knew of or facilitated another party's tortious acts - see *Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep 19, at p29;
 - ii) The mere fact that a holding company has overall control of its subsidiaries in the sense that it could, if necessary, override the decisions of the boards of directors of the subsidiary companies by the exercise of financial or voting control, is not sufficient to establish an arguable case of joint tortfeasance - *Unilever Plc v Chefaro Proprietaries Ltd* [1994] FSR 135;
 - iii) A case of joint tortfeasance will not be made out simply by showing that a parent company looked on its subsidiaries' infringing acts with approval. The fact that a company asserted a strong proprietary claim to all the assets and activities of its subsidiaries was neutral as to joint liability - *The Mead Corporation v Riverwood* [1997] FSR 484.
 - iv) The fact that one company owns an intellectual property right such as a copyright or trade mark which another company uses does not make the rights owner an infringer. At all times the courts are looking to see whether there is a credible case made out that the joint tortfeasor has really become involved in some way with the tort which is the subject of the action - *Napp v Astra* [1999] FSR 370.

39. In the light of those principles Mr Cuddigan submitted that the fact that the Defendants' website bore a copyright notice with the name AG and that the office from which the Live Scores service is operated is part of AG (even if correct) did not amount to a case of joint tortfeasance. He relied on the evidence of Mr Koerl, the CEO of AG, who stated in paragraph 6 and 7 of his second witness statement:

“[AG] is not involved in any way in the creation, reproduction or distribution of the Live Score Data in issue in this action. Further, [AG] does not exercise any control over the activities of [GmbH] beyond that provided by its position as corporate parent. So while it formally enjoys financial and voting control over [GmbH], it does not and has not in practice controlled or directed the activities of [GmbH] that are the subject of complaint in this action.

In their Particulars of Claim, the Claimants define the website at betradar.com as “the Defendants' Website”. That is misleading. The content and rights in this website, and the website at sportradar.com, are owned by [AG] in its capacity as holding company. Both websites serve to promote the activities of the Sportradar group companies. However it does not follow that [AG] exercises any control over the activities of its subsidiaries which are promoted on that site, and as I have stated above, it does not do so.”

40. The General Terms and Conditions of the Sportradar Group are available online, and were produced in evidence by Ms Hoy. These show that it is AG who undertakes to deliver the relevant products/services to the customer and that the customer may use them in return for payment to AG.
41. On the material before me I think that the claimants have shown a good arguable case of joint tortfeasance between AG and the customers and between the defendants amongst themselves. I do not accept that the terms and conditions can be properly reconciled with Mr Koerl's evidence to reach a conclusion that AG are not involved in the distribution of the data.

Further points on good arguable case of infringement of copyright

42. I have held that there is an adequate plea of authorisation of copyright infringement in the jurisdiction (or the joint commission of such an act). I still need to decide the further issues raised by GmbH and AG, which go to the merits of the copyright claim.

No adequate plea of subsistence of copyright

43. Mr Cuddigan first took an unashamedly technical point. He submitted that the particulars of claim did not make out a case of subsistence of copyright. That is because, he said, the particulars of claim did not plead that the authors were “qualified persons”. He drew attention to paragraph 25 of the particulars which merely states that

“By reason of the matters aforesaid, copyright subsists in Football Live...”

44. None of the “matters aforesaid” included the relevant qualification of the authors. He submitted, therefore, that the conclusion does not follow from any of the premises.
45. I reject that submission. The reason Mr Cuddigan recognises that it is a highly technical submission is that the overwhelming likelihood is that the authors are qualified persons. There is therefore a good arguable case of subsistence of copyright.

No reproduction of a substantial part

46. Mr Cuddigan combined his next two points. He relied on the decision of the CJEU in *Infopaq International A/S v Danske Dagblades Forening* Case C-5/08; [2009] ECDR 16, at [38]-[39]. In that case the Court of Justice said:

“ [37] ... Copyright within the meaning of art.2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.

[38] As regards the parts of a work, it should be borne in mind that there is nothing in Directive 2001/29 or any other relevant Directive indicating that those parts are to be treated any differently from the work as a whole. It follows that they are protected by copyright since, as such, they share the originality of the whole work.

[39] In the light of the considerations referred to in [37] of this judgement, the various parts of a work thus enjoy protection under art.2(a) of Directive 2001/29 I did that they contain elements which are the expression of the intellectual creation of the author of the work.”

47. This approach was summarised by Arnold J. in *SAS v World Programming* [2010] EWHC 1829 at [244] as follows:

“It is now clear from *Infopaq* at [31] – [48] that there will only be reproduction of a substantial part of a literary work ... where what has been reproduced represents the expression of the intellectual creation of the author of that literary work.”

48. Mr Cuddigan submitted that there could be no infringement unless there was a good arguable case that what the defendants were alleged to have taken by reproduction was itself protectable as a copyright work, in the sense that it could be described as the author’s own intellectual creation. Although he accepted that there might be data fields where that criterion might be satisfied, he submitted that there was no possibility of such a finding in relation to the fields identified in paragraph 37 of the pleading. Matters such as goals, goalscorers, and red and yellow cards left no room

for judgment or discretion. They were simply collected mechanically by an observer according to a fixed rule.

49. Paragraph 22 of the particulars of claim alleges that the compilation of Football Live involves “considerable skill, effort and/or intellectual input by experienced personnel to generate, select and/or arrange its contents”. There is also an allegation that a substantial part has been used: see paragraph 37. In the light of the law as stated above, those combined allegations must include the allegation that what is taken is a substantial part of the intellectual input of the authors. Those allegations are supported by a statement of truth from each claimant. Mr Cuddigan’s argument that the part alleged to have been reproduced by his clients does not amount to an intellectual creation is not supported by any evidence. Whilst the court might have a view based on its own impressions, I do not think that it would be right to place those ahead of what is properly in evidence. In those circumstances, whilst there may ultimately prove to be force in the argument, I think the claimants have a good arguable case on this issue.

Bet 365

50. The next point concerns the terms of a contract with Bet 365. This point would not in any event be conclusive, because of the alternative contract with Stan James. I therefore need say no more about it in relation to copyright.

Insufficient evidence of copying

51. The claimants place reliance on what they claim are errors copied from Football Live which have appeared in the defendants’ data as evidence of copying. One of these errors would appear to be inapplicable as the defendants’ operative logged it before the claimants. GmbH and AG submit that the remaining errors would need to be viewed against the totality of errors, particularly as some of the errors may have a common source such as incorrect attribution of goals by announcement at the ground. At the moment, however, on the evidence before me, I consider that the claimants have a good arguable case.

Database right

52. No additional acts are relied upon in support of the allegation of database right infringement. The allegations are contained in paragraphs 40 to 42 of the particulars of claim:

“40. Further or alternatively, by reason of the matters aforesaid, the Defendants have without the consent of the Claimants or any of them, extracted and/or re-utilised the whole or a substantial part of Football Live.

41. Alternatively, by reason of the matters aforesaid, the Defendants have, without the consent of the Claimants or any of them, repeatedly and systematically extracted and/or re-utilised insubstantial parts of Football Live in a manner which conflicts with a normal exploitation of that database and/or which unreasonably prejudice is the legitimate interests of its

maker. Pending disclosure and/or evidence, the Claimants will rely upon the following facts and matters:

(i) The Claimants normally exploit and have for many years exploited Football Live by licensing it to third parties for payment.

(ii) The substantial cost to the Claimants of producing Football Live is covered by the payments received from third parties for its use. In the absence of such payments, the Claimants' legitimate interest in recovering these costs is prejudiced.

42. In the premises, the defendants have infringed the Claimants' database rights in Football Live.”

53. “Extraction” and “re-utilization” are the rights which Art. 7(1) of the Database Directive requires member states to give to the owner of the right. The pleading tracks the definitions of “extraction” and “re-utilisation” in the Database Directive which are made part of our law by paragraph 12 of the Copyright and Rights in Database Regulations 1997. “Extraction” is defined by Art 7(2)(a) of the Database Directive as:

“the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form”.

54. “Extraction” can be direct or indirect: *British Horseracing Board Ltd. v William Hill Organisation* Case C-203/02 [2005] RPC 13. Extraction includes downloading: *Directmedia Publishing GmbH v Albert-Ludwigs Universität Freiburg* Case C-304/07; [2009] RPC 10.

55. “Re-utilization” is defined by Art 7(2)(b) as:

“any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission”.

56. In domestic law this has become:

“in relation to any contents of a database, making those contents available to the public by any means”

57. The Database Directive also has a “little and often” provision which applies where what is being transferred or transmitted is not enough to constitute a substantial part of the whole database. Article 7(5) provides:

"The repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted."

58. Unlike copyright, there does not appear to be any provision corresponding to section 16(2) of the Act which prevents “authorising”. So the claimants must show that GmbH or AG have done the acts in question, or plead some act of extraction or re-utilization by someone else and rely on joint tortfeasorship.

Extraction

59. So far as “extraction” is concerned I can see no basis on which it has been alleged that GmbH or AG extracted the data in the UK. Mr Mellor’s skeleton contains the following paragraph 52:

“Accordingly, it can be seen from the evidence referred to above in relation to reproduction that the Defendants and/or end users in the UK carry out the act of extraction when the data is downloaded from the Defendants’ server to the end user’s computer terminal.”

60. In my judgment it is the end users in the UK who would carry out any act of extraction in the UK. They would do so by downloading information necessary to allow the pop-up windows to appear on their screen. GmbH’s acts of extraction occur abroad, not here.
61. Nevertheless I consider that, despite the absence of a specific allegation to that effect in paragraph 40, the particulars of claim, viewed as a whole, do allege sufficient facts for the claimants to be able to maintain that customers have extracted the data in the UK. The pleading is far from tidy in this respect, but paragraph 40 does refer back, amongst other things, to paragraph 37 which is a general paragraph concerned with infringement of the claimants’ rights. It is clear from 37(i), read in context, that customers in the UK are alleged to be downloading a substantial part of Football Live.
62. Mr Cuddigan had a rather refined point here concerning the allegation in paragraph 41 about repeated and systematic extraction of insubstantial parts. He submitted that there was no good arguable case that any individual end user repeatedly and systematically does anything. This point did not feature in Mr Cuddigan’s skeleton. No evidence was adduced relating to it. There was no sustained argument about what was meant by “repeated and systematic”, or as to whether the threshold is low or high. I am left therefore to form my own impression of whether there is a good arguable case that the sort of downloading an end user does is properly characterised as repeated and systematic. Whilst there may be range of different uses, it seems to me that there are bound to be users whose downloading would be properly described as repeated and systematic. That is after all what the defendants are hoping to achieve by providing the data from every match, every week. I would be reluctant to hold that they had not succeeded in what is evidently their objective. I consider the claimants have a good arguable case on this issue.

Re-utilization

63. “Re-utilization” raises a question of law. Where does “making available to the public all or a substantial part of the contents of a database by ... on-line ... transmission” occur? Does it occur where the server is situated? Or where the public are? Or in both locations?

64. The issue is closely related if not identical to a question raised in the amendment application. One of the amendments sought is to plead a further case of copyright infringement under section 20 of the Act, relying on “communication to the public”. Under section 20(2)(b), communication to the public includes:

"the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them"

65. Section 20 derives from Article 3.1 of the Information Society Directive (Directive 2001/29/EC) which provides:

“Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”

66. The debate in relation to both these provisions is similar to that which occurred in relation to “broadcasting”. That debate has now been resolved, so far as the European Union and satellite broadcasts are concerned, by the Directive on Satellite Broadcasting and Cable Re-transmission, Directive 93/83 EC, and by amendments made to section 6 of the Act by the Copyright and Related Rights Regulations 1996 (SI 1996/2967) for all wireless broadcasts. By those provisions the place where the act of broadcast occurs is where the signals are introduced under the control of the person making the broadcast into an uninterrupted chain of communication. This is known as the “emission theory”. There is no corresponding definition for either of the restricted acts in issue here.
67. Does the emission theory apply in the case of infringement of database right by making available to the public by online transmission? Mr Mellor submitted that it did not. He submitted firstly that the emission theory made sense in the context of satellite broadcasting, principally because of the approximate coincidence between the footprint of the satellite and the sphere of regulatory influence over the broadcasters, i.e. the European Union. With online transmission the server could be positioned anywhere – and in particular in states which are not party to any international obligations. He was, however, unable to point to any case or *travaux préparatoires* which indicated this as the basis for the emission theory as it applies to broadcasting. Moreover it is significant that the UK has adopted the emission theory for all wireless broadcasts, not solely satellite broadcasting: see section 6(4) of the Act.
68. Secondly Mr Mellor submitted that the emission theory would make the right to prevent online transmission worthless, as the server could be positioned in a state where there was no redress. I do not accept that this is the case. The right would prevent transmission or re-transmission in a state to which the Directive applies. Other restricted acts would prevent any further use of the database within the state of reception if the transmission originated from outside the EU.

69. Thirdly Mr Mellor submitted that the defendants were arguing for a theory which went beyond that which applies to satellite broadcasting, as the defendants need to contend that subsequent communication in the state of reception cannot be prevented. I do not think that is a necessary contention on the part of the defendants on this part of the case. They simply maintain there can be no primary infringement of database right by placing data on a server outside the United Kingdom.
70. Finally he submitted that to apply the theory would be tantamount to applying a rule of exhaustion as soon as a digital work was published. This was expressly prohibited by Article 3.3 of the Information Society Directive. I do not see how that is the case. There is no question of subsequent infringing acts ceasing to be actionable.
71. Mr Cuddigan had arguments the other way based on the wording of the Directives. He drew attention to the fact that it is making the data *available* which is the restricted act. The public do not in fact have to avail themselves of the database. The act is committed once the data is placed on a server from which it *can* be accessed.
72. That submission is supported by the authors of *Copinger and Skone James on Copyright* 15th Edition in their commentary on communication to the public under section 20 of the Act, at paragraph 7-117:

“Where does the act of making available take place? This will often be a vital point where the transmission has occurred across national boundaries. In principle it resurrects the arguments which existed as to the place where a broadcast should be regarded as occurring. Again, however, since the restricted act is defined by reference to the "making available" of the work, and not its actual transmission or reception, it is suggested that the place where the apparatus is situated and from where access to the work can be obtained is the place where the restricted act occurs.””

73. Although the words "may access it" add even more force to Mr Cuddigan's submission, neither side suggested that there was or could be any sensible distinction between the interpretation of making available to the public of the work by an electronic or online transmission in section 20(2)(b) of the Act and Article 3.1 of the Information Society Directive on the one hand and Article 7(2)(b) of the Database Directive and paragraphs 12 and 16 of the Copyright and Rights in Database Regulations on the other.
74. I have come to the conclusion that the better view is that the act of making available to the public by online transmission is committed and committed only where the transmission takes place. It is true that the placing of data on a server in one state can make the data available to the public *of* another state but that does not mean that the party who has made the data available has committed the act of making available by transmission in the State of reception. I consider that the better construction of the provisions is that the act only occurs in the state of transmission.
75. The point of law does not however dispose of the question of jurisdiction. In my judgment, for the same reasons as in the case of “extraction”, namely the reliance on

paragraph 37(i), the particulars of claim do allege sufficient facts to make out a case of re-utilisation by Bet 365 and Stan James.

76. Here, it is necessary to consider an argument that Bet 365 were licensed by the claimants. Stan James are not said to be operating their server within the jurisdiction: it is in Gibraltar. If Bet 365's activities are licensed by the claimants, then their acts are not infringements on which the claimants can rely either.
77. In October 2006 the first claimant entered into a licence agreement with Bet 365 which permitted Bet 365 to reproduce football match data online covering football seasons 2004/5 up to 2010/11. The agreement was contained in a letter from Bet 365 countersigned on behalf of the claimant. It is framed as an agreement not to sue Bet 365 provided they comply with certain conditions. It contained an undertaking as follows:

"You undertake that, as long as all the Payments are made and we reproduce and make use of the Data only on the Online Platform, the Call Centre Platform and on Branded Skins (all as defined in the Licence) and only in accordance with the terms of the Licence ("the Purposes"), you will take no action against us in respect of our reproduction and use of the Data throughout the Term for the Purposes."
78. "The Licence" in this undertaking is defined as the "attached new media betting licence" ("NMBL"). Clause 3.1 of the NMBL requires the licensee to acquire the Data from an Approved Supplier. GmbH and AG are not Approved Suppliers.
79. Mr Cuddigan submits that Bet 365 have only undertaken to observe the NMBL in relation to reproduction and use of the data. They have given no undertaking in relation to its acquisition. He draws attention to aspects of the NMBL which are inconsistent with the terms of the letter, such as the acceptance of the existence of the claimants' rights. So not all of the NMBL should be taken as applying to Bet 365.
80. Mr Mellor answers this point by submitting that use by Bet 365 is not in accordance with the NMBL if the data which is used is acquired from a non-Approved supplier. The letter obviously takes precedence where there is a conflict with the NMBL, but otherwise the two should be construed together.
81. This is not a point of construction of the kind which can be decided on an interim application. Much will depend on the factual matrix which existed at the time that the claimant and Bet 365 entered into the agreement. For present purposes I consider that the claimants have the better of the arguments. The most plausible reason why the NMBL regulates the source of the data is to ensure that control is maintained over the data which is used. I think the better interpretation of the NMBL is therefore that use on data from non-Approved suppliers is not use in accordance with the NMBL. Such use is precisely the sort of use which the NMBL is seeking to avoid.

Joint infringement of database right with customers?

82. This point can be disposed of quite shortly. Paragraph 36 alleges joint and several liability for procuring etc the acts of which complaint is made. These include, on the view which I have taken, acts of extraction and re-utilisation by customers.
83. It follows that the claimants have not made out a good arguable case of primary infringement of database right, but have made out a good arguable case of joint liability with customers.

The amendment application

84. It is first necessary to consider the principles applicable when permission is sought to amend proceedings in this country when proceedings are pending in another Convention country involving the same subject matter.
85. The background is Art.27 of the Judgments Regulation:
- “1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.
86. The term “cause of action” has an autonomous meaning in EU law. It includes both the same *cause* and the same *objet*. The cause is the facts and the rule of law relied upon. The *objet* is the end in view or the objective. These principles were established in *The Tatry* [1994] ECR-I 5439 at [38]-[45].
87. These principles have been considered in the case of amendment in a number of cases. In *Lloyd’s Underwriters v Sinco* [2008] 2 CLC 187 the claimant syndicates sought to amend to add a claim for breach of an exclusive jurisdiction clause to an existing contractual claim. The Greek court was already seised of a challenge to its jurisdiction. Beatson J held that the Greek case did not raise the same *cause* as the amended claim for breach of the exclusive jurisdiction clause. However he went on to reject a claim that the English court was already seised of the amended contract claim at the date of its original claim form, not least because there had been no breach at that date. At [67], page 209 he said this:

“The new claim is an additional allegation of breach of the same contract as the contract giving rise to the claims issued in January. At one level, it has the same *cause* and *objet* as the remainder of the claim because the essential claim is for compensation for breach of obligations under and associated with the binders. But at another level, the *cause* of the jurisdiction clause claim differs from that of the remainder of the claims in the English proceedings because the facts relied on differ. The facts giving rise to the jurisdiction clause

claim—the institution of the Greek proceedings—had not taken place when the claims were issued in January.”

88. Other authorities have looked at the appropriate level of generality to assess identity of *cause* and *objet* between proceedings here and in the rival jurisdiction. In *J P Morgan Europe Ltd v Primacom AG* [2006] I L Pr 11 Cooke J said at [45]:

“Fundamentally, it is the rights and obligations of the parties in relation to the same facts which, in my judgment, matters here. Each court will be concerned with the respective rights and obligations of the parties, however those are classified and determined by the national courts of each country. I consider therefore that, notwithstanding the different approach to the question of enforceability of the interest provisions and the consequent effect, the declaratory proceedings and the Mainz proceedings do involve the same cause of action within the meaning of Art.27.”

89. Having considered an approach suggested in *Briggs & Rees, Civil Jurisdiction and Judgments*, at 2.189, he added this at [47]:

“It appears to me, however, that this is too narrow an approach, since otherwise it would be possible to argue that Art.27 did not apply to proceedings where a national court's decision, based on the application of its domestic law (which it found to be applicable under its rules of private international law) did not answer the question determinable by a different national court under its own law (which it regarded as applicable under its own rules of private international law). The way the claim is framed and the arguments in support of it may fall to be taken into account, but ultimately, the question must be seen broadly in terms of the judgment sought and not in terms of the issues raised on the way...”

90. In the circumstances of the present case I should not allow any amendment which raises a new cause of action in this sense if it is within the scope of the proceedings in the Landgericht Gera. In such a case it would be the Landgericht Gera which was first seised, and I would have to stay or strike out the amendment accordingly.

91. The amendments sought are the following:

- i) An amendment to paragraph 36, expressed to be for the avoidance of doubt, to assert that the allegation includes joint liability (a) for the acts of the customers located in the UK of reproduction and/or extraction carried out by customers located in the UK accessing the pop-up windows and re-utilisation which are relied on and (b) for the acts of reproduction, communication to the public, extraction or re-utilisation by Bet 365 and Stan James as set out in paragraph 37(1) and 40.
- ii) An amendment to paragraph 36 to add a further sub-paragraph (iii) placing reliance on passages from the evidence in support of joint tortfeasance by AG.

- iii) An amendment to sub-paragraphs (i) and (iii) of paragraph 37 to place reliance on “communication to the public” as an additional restricted act as provided for by section 20 of the Act.
92. I can see no objection to the first category of amendments. I have held that there is an adequate basis in the pleading for the allegation of joint infringement of copyright and database right with customers. On this basis the amendments merely make that clear.
93. In the light of my findings I can also see no objection to the second category of amendment, which would give further particulars of joint tortfeasance with AG. Mr Cuddigan pointed out, rightly in my view, that the suggested amendment would more closely conform to the rules if it were pleaded by reference to the facts relied upon rather than passages from the evidence. Mr Mellor did not resist the suggestion that this should be done, and, subject to that, I allow the amendment.
94. The third category of amendment places reliance on communication to the public. The position here is a little more complicated. I consider that the reliance on section 20 to plead that acts of customers communicate the data to the public is allowable. It is based on facts already pleaded in support of the reproduction, extraction and re-utilization claims. At the appropriate level of generality it has the same *cause* and *objet*.
95. However as I have held that there cannot be primary liability of GmbH and AG for this act, I should not give permission to amend to allege primary infringement by communication.

Reference to CJEU?

96. The issue of law which I have decided concerning the place where the act of making available by online transmission occurs is a question of some importance, not merely to the parties to this case. Whilst I have felt able to decide the point, it is fair to say that it is not *acte claire*. I therefore would have jurisdiction to refer the matter to the CJEU for a preliminary opinion under Art 267. I am not, however, bound to do so.
97. If I were to refer questions on the Database Directive and the Information Society Directive to the CJEU I would have to delay reaching a decision on jurisdiction and amendment until after the answers to those questions had been received. Such a course might be justified in a case where such a reference would be determinative of whether the court has any jurisdiction at all. It may however be a disproportionate step where the question referred goes to only a minor part of the pleaded claim.
98. I have decided not to refer any question to the CJEU. The causes over which the court has jurisdiction seem to me to be adequate, if any prove to be justified, to achieve the object the claimants have in view. Moreover, even if primary infringement of database right and copyright were permitted to be in issue, it might not prove necessary for the court to decide the issue of law. The case might fail on a variety of other grounds, such as absence of copying. A reference to the CJEU in the circumstances of this case is, in my judgment, unnecessary.

Conclusion

99. I have come to the conclusion that the court has jurisdiction over the claim for authorising, and joint liability for, copyright infringement and the claim for joint liability for database right infringement. I will allow the amendments save for those raising the case of primary infringement under section 20 of the Act. The particulars of claim should be amended to make it clear that the case is limited to the claims over which I have held there to be jurisdiction, and otherwise to bring them into conformity with this judgment.
100. I will hear counsel as to the form of order.