EIP

When is a transmission not a transmission?

A recent case in the English courts raises questions that could affect the way global business is performed over the internet.

Since 1998, databases have been protected in the UK under a 'sui generis' right commonly known as the database right. The database right enables a rights owner to prevent extraction and/or re-utilisation of the whole or a substantial part of the contents of their database. While database rights exist throughout the EU, enforcement is a matter of national law, and hence raises some interesting questions on jurisdiction when a potential infringement takes place over the internet.

Generally, for the English courts to have jurisdiction, an infringing act must occur within the UK. However, where a reutilisation of protected data involves the data being made available on a server outside of the UK, but accessed by members of the public within the UK, it is presently unclear where that reutilisation can be considered to occur. This problem arose recently in the case of Football Dataco Ltd & Ors v Sportradar GmbH & Anor EWCA Civ 330 (29 March 2011).

The claimants between them held UK database rights in a database called "Football Live", of which they alleged the defendants had copied a substantial part for use in their "Sports Live Data" service. The defendants contracted with betting companies to provide "Sports Live Data" via their website betradar.com. Punters accessing the betting companies' websites would be redirected to betradar.com when requesting live scores, after which the data would be displayed under the banner of the originating betting company.

In this case, the defendants' server was located in Austria, which raised the question of whether any of the defendants' actions had directly infringed the UK database right

asserted by the claimants. Reasonable grounds could be found for pursuing the defendants as joint tortfeasors (in combination with the betting websites with which they contracted) for effectively authorising the reutilisation of the extracted data within the UK. However, it was uncertain whether the claimants could pursue the defendants for direct infringement in the UK.

UK legislation describes "re-utilisation" as "any form of making available to the public ... [including] by on-line or other forms of transmission". The claimants asserted that "transmission", in the case of provision of data over the internet involves both the act of hosting a website and also the act of a user accessing it ("communication theory"). If this premise is accepted, the making available performed by the defendants had occurred, at least in part, in the UK, and hence would allow a case for direct infringement to be brought before the English courts. The defendants opposed this view and asserted that the act of making available only occurs in the place of transmittal ("emission theory").

Both the communication and emission theory are arguable from physical and policy perspectives. Indeed, both viewpoints can draw support from parallels with other areas of intellectual property law. As a result, the Court of Appeal decided to refer the question to the Court of Justice of the European Union (CJEU).

The CJEU's response to this question will bring much needed clarity to the infringement of database rights. If the CJEU decide in favour of communication theory, a party's actions in a state where no database right exists could amount to infringement within the EU if protected data is made available to members of the public within the EU. The effects of this decision could be felt acutely by countries outside of the EU, particularly in territories where no database right exists per se, such as the US.