INTELLECTUAL PROPERTY RIGHTS, SPORTS BODIES AND BOOKMAKERS

For the past six years, sports bodies have been searching for legal justifications to insist on bookmakers paying a "fair return" for the use of their events. With the rapid growth in online betting across Europe and the significant profits made by the online betting industry, the pressure on bookmakers has been rising, with increasing calls from the sports industry to protect its "sports rights" and "betting rights". Currently, neither of these rights has a foundation in intellectual property rights. As a result, a long and onerous odyssey through various national courts and the European Court of Justice has been undertaken by both sides, which has exposed the limited use of intellectual property rights in obtaining a slice of betting profits. This article highlights some of the battles that have been fought and suggests some issues that might win the war.

TO IP OR NOT TO IP?

Trade Marks

The issue of trademark infringement by bookmakers has been tried and tested in the French courts, which have decided that, although sports bodies clearly have a right to take legal action to stop bookmakers from infringing their trademarks, they cannot prevent bookmakers from using trademarks to identify sports bodies and events.[1]

Infringement occurs when bookmakers use sports bodies' trademarks to promote their own betting activities and thereby take unfair advantage of the distinctive character or repute of the trademark[2]. However it is not an infringement "to use trademarks for the purposes of identifying goods or services as those of the proprietor or a licensee… in accordance with honest practices"[3].

Database Rights

Attempting to establish database rights in fixture lists and racing details resulted in a further blow to the sport industry, 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 ECJ did so in the William Hill and Fixtures Marketing cases[4], when it held that database rights protect investments in the resources used to find existing materials and collect these in a database; but they do not protect either the resources used for the creation of materials, or those used for verification during the stage of creation. The resources used to organise races, decide on dates, time and locations etc., are seen as investment in the creation of materials and therefore do not receive the benefit of database protection

[1] *PSG c/ Bwin et Unibet* (TGI Paris, 17 Juin 2008)
[2] *Juventus Football Club c/ Unibet Limited et William Hill Credit Limited* (TGI Paris 30 Janvier 2008)
[3] Trade Mark Act 1994 is section 10(6)
[4] *British Horseracing Board and Others v William Hill Organization Ltd.* [2004] ECR
Fixtures Marketing Limited v Organismos Prognostikon Agonon Pododfairou AE. [2004]

Controversy surrounds this interpretation of the Directive by the ECJ, which may well have been influenced by policy considerations in an attempt to restrict monopolistic tendencies. In its first evaluation of the Directive in 2005, the European Commission found that the ECJ's narrow construction went against the Commission's original intention of protecting databases and concluded that the Directive had failed to encourage the creation of more databases within the EU.

The jury is still out on whether to retain, scrap or amend the Directive, but for the time being, the status quo applies: sports bodies have an uphill struggle.

Copyright

Can sports bodies' databases be protected by copyright law instead? Before the Copyright and Rights in Databases Regulations (CPDA) in 1997, the English High Court found that literary copyright subsisted in football fixture lists as compilations[5].

However following the implementation of the Directive into English law, the CDPA was amended: in order for copyright to exist in a database, the selection or arrangement of the contents must be the author's own intellectual creation. Any other criteria for copyright protection in databases are clearly excluded by the Directive. This test introduces a higher standard for originality than the traditional test in English law and so it is possible that databases will be unprotected under both the database and copyright laws.

If the recent decision in a landmark copyright case in Australia[6] is indicative, sports bodies might choose to refrain from spending more money on lengthy litigation to establish copyright in databases and compilations. The Australian High Court held that IceTV did not infringe copyright by reproducing factual information from Nine Network's weekly television schedules, because the skill and labour used in respect of compilations must be focused on the originality of the expression of work. US law also requires some element of "creativity" in the selection and arrangement of material.

ALTERNATIVES TO IP RIGHTS?

Contract law to the rescue?

Invoking IP rights to charge bookmakers has proved to be unsatisfactory. As a result, contractual obligations assume a more significant role in allowing sports bodies to control access to their databases.

This was highlighted when the bookmaker Victor Chandler (VC) argued that in light of the ECJ judgment in William Hill, the IP rights underlying BHB's data licensing agreements had been destroyed[7]. VC also argued that BHB was abusing its dominant position by forcing bookmakers to pay excessive charges in breach of Article 82 of the EC Treaty. Both arguments failed: even if there are no rights to be licensed, a licensee is bound by the terms of any existing licence or contract. Also,

[5] *Football League Ltd v Littlewoods Pools Ltd* [1959] 1 Ch 637
[6] *Nine Network Australia Pty Limited v IceTV Pty Limited* [2009] HCA 14
[7] *BHB Enterprises PLC v Victor Chandler (International) Ltd* [2005] EWHC 1074(CH)

high prices or high margins are not the same as unfair prices and so it could not be said that BHB was in breach of Article 82.

This decision does not, however, require betting operators to enter into new licence agreements and sports bodies will struggle to convince them otherwise.

Regardless of the existence of any underlying property rights, sports bodies could choose to restrict access to their databases by selling relevant information to selected bookmakers. This might nevertheless backfire on the sport industry, because the limited amount of publicly available information may significantly lower the public's interest in the sports events themselves and could also give rise to rights under the European Convention on Human Rights on the freedom of information relating to current affairs, including sport events.

How much is it worth?

Whether by voluntary agreements, contractual or other means, the price payable for information and materials that do not attract IP protection is something of a moveable feast. Should information and materials be charged at the same rate as IP rights? When will prices become excessive? What constitutes abuse of a dominant position if sports bodies insist on these charges?

When BHB threatened to stop providing pre-race data to Attheraces (ATR) through the Press Association[8] unless ATR entered into a data licence agreement, ATR brought proceedings against BHB claiming an abuse of BHB's dominant position, and that its prices were in any event excessive. It was not disputed that BHB had a contractual right; the issue was whether BHB could exercise this right without breaching competition law.

ATR won its claim at the High Court, but BHB successfully appealed and the Court of Appeal held that BHB's refusal to provide ATR with pre-race data was legitimate (although there were some terms in the licence agreement that BHB could not insist on in the light of the ECJ's decision in William Hill that BHB had no IP rights in the database). Importantly however, the Court of Appeal also considered that there might have been an abuse of a dominant position if ATR had raised this point and BHB would have declined to offer more favourable terms in spite of the ECJ judgment.

This leaves the door wide open to renegotiations of existing licence agreements and future litigation assessing what would be a reasonable economic price for data, bearing in mind that digital information can be copied without significant costs.

Direct Levy?

Presently, horse racing in the UK is the only sport that enjoys direct funding from the betting industry by a statutory levy. The British Greyhound Racing Fund (BGRF) on the other hand is funded through voluntary contributions by the betting industry.

[8] *Attheraces v British Horse Racing Board* [2005] EWHC 3015 (Ch)
Attheraces v British Horse Racing Board [2007] EWCA Civ 38

A levy deal was recently struck in record time between bookmakers and the Horserace Betting Levy Board, six months before the deadline. Bookmakers will continue for one further year to contribute what many regard as an enormous 10% of their gross profits on UK horseracing, totalling approximately £100m. There will also be a change in the next levy process, whereby racing, instead of bookmakers, will present proposals each year. Whether this change will be of real benefit is itself worthy of a flutter, even if 10% will go to the levy.

These arrangements appear to be acceptable for the time being and other sports bodies may wish to enter into similar agreements to get a share of the betting profits. However, the horseracing levy existed before the UK joined the European Union and a new football levy for example could breach EU state aid provisions. Also, in light of online betting and overseas operators advertising in the UK, it puts the UK betting industry at a disadvantage and may encourage bookmakers to offshore their businesses.

THINK AGAIN

The next few years may see interesting developments, with sports bodies trying to persuade the European Commission to adopt legislation currently being drafted in France, which would force bookmakers to hand over a proportion of all sports-betting turnover to organisers.

Exclusively French?

The French have always been known for their stylish exclusivity. It is therefore no surprise to see France proposing exclusive property rights for sport organisers. On 5 March 2009, French Finance Minister, Eric Woerth, announced proposals for a statutory relationship between sports bodies and betting operators, to include exclusive property rights for sport event organisers, with the need to have a direct agreement between them and betting operators seeking to take bets on that event.

As is the nature with everything exclusive however, it will be a right reserved to a selected few and so competition amongst bookmakers will decrease significantly, leaving consumers with less attractive odds and possibly a reduced interest in such exclusive sports.

The consequence of this French approach is a neo-colonial “divide and rule” response, whereby bookmakers are left to fight amongst themselves for the best deal, while the sports industry continues to enjoy significant increases in its exclusive income. “Divided we stand, united we fall” seems to be the slogan for the betting industry, which many regard as being too self absorbed to address the ongoing campaign against it.

Having The Cake And Eating It?

The Sports Rights Owners Coalition (SROC) – a coalition including the FA and UEFA – has welcomed the French initiative and seized on the opportunity to push for the Europe-wide adoption of a 1% turnover levy on all sports bets. The SROC also

emphasized that recognition of a clear "competition organiser's right"[9] would be a positive development for sport.

Ironically, the most vocal resistance to the SROC's proposals comes not from the betting industry, but from the media: the News Media Coalition (a lobby of about 40 news organizations including Reuters and The Associated Press) champions the recognition of the freedom of the press to cover sport events critically and independently. It fears that sports bodies are trying to create new areas where rights fees can be charged on media coverage of sport events.

So, where are the bookmakers in all this? Some commentators are questioning why bookmakers are not showing a united front with the media; and are predicting that failure to do so might result in surviving bookmakers witnessing an exceptional introduction of a new sports rights with far-reaching consequences on other industries as well: an exceptional sports law with exceptional exceptions for the media industry, but with the betting industry footing the bill.

It is also questionable whether a 1% turnover levy on all sports is desirable for an industry that craves public attention and lives from publicity: both wanting one's cake and eating it is not always wise. The Premier League, for example, has changed its previous strategy from selling its rights to the highest bidder and is now considering offering at least one free-to-air deal to expand its global reach. "Some critics believe the emphasis has been overly biased towards bringing in cash today rather than strategically growing the market for tomorrow… In China the German Bundesliga, shown on the free-to-air state network CCTV, is far bigger, thanks to the Premier League's decision to do a deal with fledgling payTV company WinTV".[10]

This brings back memories of the "Turf TV wars". Turf TV was launched by 31 of UK's 59 racecourses to provide exclusive live coverage of racing, leaving bookmakers with little choice but to buy pictures from the 31 racecourses at higher prices than they had previously paid. Asking for a 1% turnover levy on all sports on top of the sports bodies' exploitation of its existing IP rights may therefore be something of an own goal. Consider also how eating cakes led to another inventive approach by the sports bodies in 2004 to raise more income in terms of the proposed Junk Food Levy in sports centres, requiring firms such as McDonalds and Walkers to contribute tens of millions of pounds towards sports facilities. What next?

What is fair?

Sports bodies' have often mentioned in one breath their right to a "fair return" together with preserving "integrity", as if these two issues are closely interlinked. The only logical conclusion is that sports bodies attempt to convince the public that a "fair return" is necessary to preserve integrity; and they have done a pretty good job so far.

That said, if a fair return really is required for preserving integrity, then some may ask why sports bodies have spent so little on preserving integrity. For example: in 2007, the Horseracing Betting Levy Board (HBLB) raised £90million from the Levy, but spent only £23.7 million on horseracing integrity. The Greyhound Racing Board

[9] Press release SROC 10 March 2009 www.sroc.info

[10] The Guardian: Premier League To Go Free-To-Air To Expand Global Reach, Owen Gibson, 4 June 2009

raised £11.4 million in voluntary contribution from bookmakers and was happy to spent only £1.9 million on integrity in 2006[11].

The betting industry may therefore wish to pause and consider that, although it is already one of the most highly regulated industries, its reputation as a "clean" industry is under attack, simply for the purposes of generating even more income for the sports industry. As Lord Truscott put it in a House of Lords debate on gambling and football: "the sport is not necessarily poor; it has an income of some £1.35 billion per annum". Fairness presumably has no place when it comes to sports bodies' commercial profits.

Some interested parties might take the view, therefore, that it seems more fair, in law and in principle, for bookmakers to start charging sports bodies a "fair return" for actively promoting and advertising sports events and thereby increasing the sports bodies' profits. What is the commercial value of sports events that are not reported in the media and on which no bets have been placed? Fighting fire with fire might well be an alternative way forward for the betting industry before calls for unfair returns and new and (arguably) unnecessary IP sports' rights become even more widespread and specific.

Overseas betting operators – The new Sacrificial Lamb?

In the UK, 544 out of 580 MEPs voted in favour of sports being able to demand payment from bookmakers offering markets on their events. Additionally, Sports Minster, Gerry Sutcliffe, announced recently that overseas gambling operators advertising in the UK could face new requirements, including contributing towards the costs of regulation, the treatment of problem gambling and the Horserace Betting Levy. It is unclear, however, whether overseas operators advertising in the UK will be required to obtain a licence, which would be in line with developments in France.

Treating overseas betting operators in the same way as UK bookmakers might be a good initiative to assist the UK betting market in the short term. It does not, however, resolve the wider context of sports bodies' call to receive a "fair return" from the betting industry, nor does it account for the introduction of a new sports law and, most importantly, it fails to address the underlying problem of why betting operators went offshore in the first place (i.e. to avoid a heavy 15% gross profits tax). A lower tax rate would bring overseas operators back to the UK, thereby increasing tax revenues and creating new jobs.

Having offshore betting operators as the new sacrificial lamb may therefore not bring the required results. Whilst it would surely make UK bookmakers more competitive in comparison with offshore operators, it would not relieve them from high taxation, the statutory levy and voluntary contributions. The only real beneficiary would be the sports industry, which would see a further boost to its profits. If the intention is indeed to support UK based bookmakers as well, then the emphasis should be on sharing the burden and not increasing it. One compromise might be the introduction of a more competitive tax regime; and a significant reduction of the 10% levy ought perhaps to be on the negotiation table as well, to reflect the additional contributions of offshore betting operators to the levy.

[11] Gambling Commission: *Integrity in Sports Betting*. Issues Paper, May 2007

AND FINALLY

Policy makers and regulators may therefore wish to look at the wider picture before requiring the betting industry to share its profits with sports bodies. The underlying issues are more complicated and the sports bodies' call for the creation of new IP rights needs to be considered in this context, otherwise bookmakers may face a double taxation whammy: a “fair return” to contribute towards the costs of treatment for problem gambling and the regulations, as well as a “fair return” for a newly created “competition organiser’s right”.

Voluntary arrangements and a closer cooperation between the betting industry and sports bodies may not be the perfect solution, but it may be the only workable alternative before policy makers address the underlying issues in full.

The betting industry may have the (IP) law on its side for now, but increasing pressure from sports bodies on a national and European wide level may need to be met with an equally united front to “set the record straight” when it comes to issues of integrity and to have a balanced say in any future change in legislation.

Place your bets now…

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June 2009