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Claim No: IL-2020-00040

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

Royal Courts of Justice
7 Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 1 December 2021

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

- (1) GENIUS SPORTS TECHNOLOGIES LIMITED (previously known as Genius Sports Limited)
(2) BETGENIUS LIMITED
(3) GENIUS SPORTS SERVICES LIMITED
(4) GENIUS SPORTS ANZ PTY LIMITED (a company organised and existing under Australian law)
(5) GENIUS SPORTS MEDIA INC (a company organised and existing under the law of Delaware)
(6) GENIUS SPORTS EOOD (a company organised and existing under Bulgarian law)
(7) GENIUS SPORTS SERVICES EESTI OU (a company organised and existing under Estonian law)
(8) GENIUS SPORTS SERVICES COLOMBIA SAS (a company organised and existing under Columbian law)
(9) GENIUS SPORTS NETWORK ApS (a company organised and existing under Danish law)
(10) GENIUS SPORTS DANMARK ApS (a company organised and existing under Danish law)
(11) DATA PROJECT SRL (a company organised and existing under Italian law)
(12) GENIUS SPORTS LT (a company organised and existing under Lithuanian law)
(13) GENIUS SPORTS ASIA PTE LIMITED (a company organised and existing under Singaporean law)
(14) GENIUS SPORTS CH SARL (a company organised and existing under Swiss law)
(15) GENIUS SPORTS GROUP LIMITED Claimants
- and-
- (1) SOFT CONSTRUCT (MALTA) LIMITED (a company organised and existing under Maltese law)
(2) ROYAL PANDA LIMITED (a company organised and existing under Maltese law)
(3) VIVARO LIMITED (a company organised and existing under Maltese law)
(4) SOFT CONSTRUCT CJSC (a company organised and existing under Armenian law)
(5) SOFT CONSTRUCT UKRAINE LLC (a company organised and existing under Ukrainian law)
(6) SOFT CONSTRUCT LIMITED (a company organised and existing under the law of the Isle of Man)

Defendants

Mr Tom de la Mare, QC and Ms Jessie Bowhill (instructed by Fieldfisher LLP) appeared for the Claimants
Mr Daniel Jowell, QC, Mr Philip Roberts, QC, Ms Alaina Newnes and Ms Jennifer McLeod (instructed by Reynolds Porter Chamberlain LLP) appeared for the Defendants

Hearing date: 23 November 2021
Approved Judgment

Covid-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be NB 10:00 AM on 1 December 2021.

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MR JUSTICE MARCUS SMITH

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Mr Justice Marcus Smith:

A. THE NATURE OF THE CLAIMANTS’ CLAIM

1. The Claimants – who I will refer to as such or collectively as **Genius Sports**¹ – carry on business as the supplier of sports data services and technology and sports betting services and technology. Genius Sports gathers and processes live and non-live sports data in a number of sports – including, relevantly, basketball, volleyball and football – in certain databases. These proceedings concern:

- (1) Live basketball data from leagues which are members of the International Basketball Federation (**FIBA**).
- (2) Live football data from leagues which are members of regional associations including the Union of European Football Associations (**UEFA**), the South American Football Confederation (**CONMEBOL**), Federation Internationale de Football (**FIFA**), the FA Premier League Limited (**FAPL**), the Football League Limited (**FLL**) and the Scottish PFL Limited (**SPFL**).
- (3) Live volleyball data from leagues which are members of the International Volleyball Federation (**FIVB**).

2. As regards this data, paragraph 3 of the Amended Particulars of Claim pleads as follows:

“The aforesaid data is arranged in a systematic or methodical way, and is individually accessible by electronic or other means such that the database is a “database” within the meaning of Article 1(2) of the Database Directive (Directive 96/9/EC) (the **Directive**) and Regulation 6 of the Copyright and Rights in Databases Regulations 1997 (SI 1997/3032) (the **Regulations**). It is the Claimants’ primary position that the aforesaid database is a single database, alternatively there are separate and individual databases comprising the data for each sport, each of which contain data which is arranged in a systematic or methodical way and which is individually accessible by electronic or other means. For convenience, the aforesaid database or databases are referred to hereinafter as the **Database**. Many sports leagues have appointed one of the Claimants as their official data partner.”

3. Genius Sports has entered into a significant number of **Data Rights Agreements** – in excess of 200 – governing the use and ownership of the data entered into the Database. Paragraph 28 of the Amended Particulars of Claim pleads as follows:

“The Claimants have each entered into [Data Rights Agreements] with numerous leagues, including basketball leagues which are members of FIBA (the **Basketball Leagues**), football leagues which are members of the UEFA, CONMEBOL, FIFA and FAPL, FLL and the SPFL (through Football Dataco Limited) (the **Football Leagues**), and volleyball leagues which are members of the FIVB (the **Volleyball Leagues**). Pursuant to the Data Rights Agreements, the Claimants have obtained, collated, checked and entered into the Database, data relating to basketball, football and volleyball fixtures (as the case may be) for those leagues and continue to do so. Data so obtained, collated, checked and entered is and has been distributed to the leagues and Genius Sports’ customers for their respective purposes...”

¹ The terms and abbreviations used in this Judgment are listed in Annex 1 hereto, which also sets out the paragraph of the Judgment where each term/abbreviation is first used.

4. I shall refer to the parties with whom Genius Sports contracts to form the Data Rights Agreements as the **Counterparties** and the leagues to which the Data Rights Agreements relate as the **Leagues**.
5. It is necessary to explain in a little greater detail the diversity that differentiates the various Data Rights Agreements. They are in no sense standard form agreements. This diversity may be described under a number of heads:
 - (1) *Geographic diversity*. The Leagues to which the Data Rights Agreements relate are geographically diverse. The portfolio is, essentially, worldwide. For reasons that I shall come to, it is necessary to differentiate between Leagues located in the United Kingdom, Leagues located in the European Economic Area (**EEA**) and Leagues located outside the United Kingdom and/or the EEA.² The geographic diversity of the Counterparties – in terms of their seat or domicile or habitual residence – reflects, but does not necessarily mirror, this geographic diversity of Leagues.
 - (2) *Diversity of sport*. As has been described, there are three sports here in issue – basketball, football and volleyball. The relevant Leagues can be classified into Basketball Leagues, Football Leagues and Volleyball Leagues. The difference matters because each sport appears to be organised differently in terms of how data relating to that sport is collected.
 - (3) *Diversity of counterparty*. Although paragraph 28 of the Amended Particulars of Claim (quoted above) suggests that the Counterparties are all the persons owning and/or operating Leagues, that is not strictly accurate. Although many of the Data Rights Agreements are indeed with Leagues as Counterparty (I shall refer to these as **Sports Counterparties**), some are with data collection bodies who are not Leagues (I shall refer to these as **Data Counterparties**).
 - (4) *Diversity of form and substance of Data Rights Agreements*. As I have noted, these are not standard form agreements. The detail and length and legal sophistication of the Data Rights Agreements varies significantly, as do the rights that are accorded to Genius Sports under those agreements. The Data Rights Agreements are unsurprisingly confidential, but (suitably anonymised and redacted) reference can safely be made to their terms:
 - (a) Agreement with Counterparty 1. This is an agreement dated November 2017 (i.e., prior to the United Kingdom’s withdrawal from the European Union) between Genius Sports and a Sports Counterparty outside the EEA. The agreement:
 - (i) Confers a license in the following terms on Genius Sports:

“[Counterparty 1] hereby grants to [Genius Sports] the exclusive, worldwide, royalty free right to use, copy, store, distribute, publish, adapt, supply, sub-licence and/or exploit all data and statistics (including live

² Because Sport Genius’ claim straddles the period when the United Kingdom left the European Union (and the EEA) it is necessary to differentiate between those cases where the League in question was both outside the United Kingdom and the EEA and outside one or other of these territories.

scoring data and historical scoring data) collected using FIBA LiveStats software (**Official Data**).”

This agreement relates to a Basketball League (the reference to FIBA makes this clear), and it is clear that Genius Sports is being given an exclusive licence over the Official Data as opposed to ownership of the data.

(ii) This is made clear by a later clause, which provides that “[a]ll intellectual property rights in...the Official Data belongs to [Counterparty 1].

(iii) The agreement is governed by English law and the parties agreed to submit to the exclusive jurisdiction of the English courts.

(b) Agreement with Counterparty 2. This agreement is dated April 2019, and is with a Football League outside the EEA. The agreement confers on Genius Sports an exclusive licence to data, but not ownership of that data. The agreement is governed by the law of Singapore, and the parties agree to submit to the exclusive jurisdiction of the Singapore courts.

(c) Agreement with Counterparty 3. This agreement is dated July 2020, and thus post-dates the United Kingdom’s withdrawal from the European Union but pre-dates the expiry of the transition period agreed in the **Withdrawal Agreement** between the United Kingdom and the European Union. This agreement is significantly more detailed than the agreements with Counterparties 1 and 2. Counterparty 3 is within the EEA and the agreement records that Counterparty 3 owns the Official Data. The agreement is governed by English law, and the parties agree to submit to the exclusive jurisdiction of the English courts.

6. Genius Sports contends that the above-named Defendants have infringed the Claimants’ intellectual property rights in the Database. The nature of these alleged infringements are irrelevant for present purposes. It is sufficient to note that Genius Sports claims (amongst others) the following remedies against the Defendants in its prayer for relief:

“(1) A declaration that database right subsists in the Database and that the Claimants are the owners and/or the exclusive licensees of that right;

(2) Injunctions prohibiting the continuation of each of the wrongful acts aforesaid, including injunctions to restrain the Defendants...from infringing database right in the Database;

(3) An order for delivery up and subsequent destruction (in the case of electronic materials by deletion) of all data, materials, documents or articles the use, retention or distribution of which by any of the Defendants might contravene the foregoing injunction;

(4) An inquiry as to damages or, at the Claimants’ option, an account of profits;

...”

B. THE PROPER PARTIES TO THE CLAIM AND THE APPLICATION

7. It is trite that the claims advanced by Genius Sports can only properly be advanced if Genius Sports is the owner of the rights that the Defendants are said to be infringing. If and to the extent that such ownership³ is divided between several persons so as to give rise to concurrent rights, then it is trite that all persons holding such rights should be joined to the proceedings – either as a claimant or else as a defendant: see rule 19.3 of the Civil Procedure Rules (**CPR**).⁴

8. Further, section 102 of the Copyright, Designs and Patents Act 1988 – as applied by regulations 5 and 23 of the Regulations – materially provides:

“Exercise of concurrent rights

(1) Where an action for infringement of copyright brought by the copyright owner or an exclusive licensee relates (wholly or partly) to an infringement in respect of which they have concurrent rights of action, the copyright owner or, as the case may be, the exclusive licensee may not, without the leave of the court, proceed with the action unless the other is either joined as a plaintiff or added as a defendant.

(2) A copyright owner or exclusive licensee who is added as a defendant in pursuance of subsection (1) is not liable for any costs in the action unless he takes part in the proceedings.

...”

9. An exclusive licensee, whilst only enjoying personal rights in the property in question, is given the right to claim in his or her own name by section 101 of the Copyright, Designs and Patents Act 1988. Hence the reference, in section 102(1), to exclusive licensees.

10. Although paragraph 29 of the Amended Particulars of Claim asserts in terms that “[u]nder the Data Rights Agreements...Genius Sports was the owner of the intellectual property rights in the data relating to games in the leagues”, this plea of sole ownership is not tenable in all cases:

(1) It is obvious from the first paragraph of the prayer – quoted above – that Genius Sports does not necessarily claim as sole owner, but potentially as only an exclusive licensee.

(2) It is also obvious from the alternative pleas of right set out in paragraphs 29A to 29F of the Amended Particulars of Claim. The point of potential concurrent ownership is expressly conceded in paragraphs 4 and 5 of Genius Sports’ written submissions in support of the application to which I now turn.

11. By an application dated 16 November 2021, Genius Sports seeks permission to join five Counterparties to the proceedings as “representative and non-participating defendants to the Claimants’ database right infringement claim” (the **Application**). The Application is supported by a statement from a Mr Nicholas Rose of Fieldfisher LLP, Genius Sports’ solicitors. This is Mr Rose’s sixth statement in these proceedings (**Rose 6**). There is a

³ It is right to speak of the division of ownership in this way: ownership is no more than a “bundle” of rights, and if those rights are divided, then ownership may be.

⁴ To which I return below.

further statement – **Rose 7** – to which I will also have regard. Additionally, the Application comes with a Draft Re-Amended Claim Form and Draft Re-Amended Particulars of Claim, describing the consequential amendments to be made if the Application were to succeed.

12. Rose 6 appears to accept that *prima facie* all of the Counterparties ought to be joined to the proceedings, if not as claimants, then as defendants. Paragraph 13 of Rose 6 then goes on to state:

“Amended Annex 2 to the [Amended Particulars of Claim] lists over 220 [Data Rights Agreements] which are relevant to these proceedings. It is plainly not sensible, proportionate, nor realistic to join each and every counterparty as an additional party, and that would waste both sides’ legal costs and considerable court time. The Claimants therefore consider that a proportionate and sensible approach would be to join to the [proceedings] a selection of counterparties as representative parties...”

13. The rest of the statement seeks to justify the approach of Genius Sports and – specifically – the selection of representative Counterparties. Rose 6 also explains why the Defendants’ counter proposals as to Counterparty representation are “disproportionate, excessive and contrary to the overriding objective”. It is important to note that the Defendants’ objections to the course suggested by Genius Sports operate at two levels:

- (1) First, the Defendants say that the representative Counterparties are not sufficiently representative of the diversity of interest amongst the totality of the Counterparties, and that a larger number of representative Counterparties is required. The Defendants thus do not go so far as to say that Genius Sports must join all Counterparties. However, they do contend that the number of representative Counterparties must be increased so as to cover certain classes of Counterparty.
- (2) Secondly, the Defendants submit that Genius Sports’ proposed level of engagement with the Counterparties (both those joined as representatives and those not joined) falls far short of what is desirable. More specifically:
 - (a) The Defendants consider that Genius Sports’ proposal that the representative Counterparties be joined as “non-participating” defendants is “unprecedented and ill-conceived. It would not respect the applicable statutory and procedural safeguards and does not accord with the interests of justice”.⁵
 - (b) The Defendants consider that certain information should be provided to the unjoined Counterparties, so that they at least know what is going on. Genius Sports contended that no communication to these Counterparties was either necessary or desirable, although that position changed during the course of the hearing.

14. Before I turn specifically to determine the Application, it is necessary:

- (1) To consider the relative rights to the Database of Genius Sports and its Counterparties. That will require a consideration of the Directive and the

⁵ Paragraph 5(a) of the Defendants’ written submissions.

Regulations, as well as a consideration as to how the law has changed because of the United Kingdom’s withdrawal from the European Union.

- (2) To consider the law of joinder of claimants and defendants and, in particular, the law regarding joinder of representative parties.

15. These matters are considered in turn in the following Sections.

C. DATABASE RIGHTS SUBSISTING IN THE DATABASE

(1) The law “pre-Brexit”

16. It is necessary that I be clear that I am in no way seeking to state the law in any conclusive way. Rather, this Section seeks to articulate the sort of issues that arise when database rights are under consideration, so as to better understand the extent to which the representative Counterparties suggested by the parties are appropriately put forward.⁶

17. Database right is a property right, whose object is to protect the investment undertaken in obtaining, verifying and presenting the contents of a database. The Directive says this in its recitals:

“(38) Whereas the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be copied and rearranged electronically, without his authorisation, to produce a database of identical content which, however, does not infringe any copyright in the arrangement of his database;

(39) Whereas, in addition to aiming to protect the copyright in the original selection or arrangement of the contents of the database, this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collection the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor;

(40) Whereas the object of this *sui generis* right is to ensure protection of any investment in obtaining, verifying or presenting the contents of a database for the limited duration of the right; whereas such investment may consist in the deployment of financial resources and/or the expending of time, effort and energy;...”

18. The “investment” protected goes beyond financial investment: although investment may consist of the deployment of financial resources, the investment may be in the expenditure of time, effort and energy, as recital (40) makes clear. What is more, the investment must be in the resources used to seek out, verify and present independent materials, rather than in creating those materials.⁷ Thus, plainly, the “investment” protected by database right is likely to turn on quite fact specific matters.

19. Prior to the withdrawal of the United Kingdom from the European Union and the expiry of the transition period (laid down in the Withdrawal Agreement) at midnight on 31 December 2020, two conditions had to be met in order for database right to subsist:

⁶ My analysis is largely drawn from Annex 1 to the Claimants’ written submissions. I am very grateful to Mr de la Mare, QC and Ms Bowhill for the very clear articulation of the property principles on which their clients’ case rests.

⁷ Case C-203/02, *British Horseracing Board Limited v. William Hill Organisation Limited*, EU:C:2004:695.

- (1) First, the maker (or, if made jointly, one or more of its makers) had to be a qualifying individual or corporation.⁸ That means a national of an EEA State or a company or firm formed in accordance with the law of an EEA State and having their registered office, central administration or principal place of business within the EEA, and its operations linked on an on-going basis with the economy of an EEA State.
 - (2) Secondly, there must have been a substantial investment in obtaining, verifying or presenting the contents of the database by the maker, who is the person who takes the initiative and the risk of investing.⁹
20. If database right subsists, the maker (or makers, where made jointly) is the first owner.¹⁰
 21. As a property right, database right can be transferred, assigned or granted under a licence. We have seen the right to bring proceedings accorded to an exclusive licensee, but this is only one way in which the bundle of rights that comprise what we call “ownership” can be partitioned.
 22. Article 11 of the Directive requires the “maker or rightholder” to comply with the qualification requirements described in paragraph 19(1) above, such that the qualification requirements affect not merely the subsistence of database right, but also any transfer of that right. In other words, the restriction on persons capable of owning database right – described in paragraph 19(1) above – is one that affects not merely the creation of database right (i.e., who is the original owner) but also its transfer. Genius Sports accepted – indeed, as we shall see it is explicitly a part of Genius Sports’ pleaded case – that if there was a transfer of database right to a non-qualifying individual or corporation, then that transfer was ineffective. That – for non-EEA Counterparties – is a significant point to which I will revert.
- (2) **The law “post-Brexit”**
23. The “post-Brexit” period begins at the end of the transition period agreed between the United Kingdom and the European Union in the Withdrawal Agreement, which occurred at midnight on 31 December 2020.
 24. The “post-Brexit” law is substantially the same as the “pre-Brexit” law, save that the restriction on persons capable of being the “maker” has been narrowed and there is no reference to the rightholder. Thus, according to the Intellectual Property (Copyright and Related Rights)(Amendment)(EU Exit) Regulations 2019, the maker must now be a United Kingdom national or body incorporated in the United Kingdom. Thus, the qualification for new database rights is now limited to United Kingdom-based entities.
- (3) **Transition**
25. The transition between the two regimes – “pre-Brexit” and “post-Brexit” – is governed by Article 58 of the Withdrawal Agreement. This provides that the holder of a database right which arose before the end of the transition period will continue to maintain an enforceable intellectual property right provided that the right-holder complies with

⁸ Article 11 of the Directive and regulation 18 of the Regulations.

⁹ Article 7 of the Directive and regulation 13 of the Regulations.

¹⁰ Article 7 of the Directive and regulation 15 of the Regulations.

Article 11 of the Directive. Article 58(2) of the Withdrawal Agreement provides that nationals of the United Kingdom and undertakings established in the United Kingdom are deemed to comply with the requirements of Article 11.

26. Thus, in order to continue to benefit from protection, the holder of the right must be either a United Kingdom or an EEA national or body established in the United Kingdom/EEA with operations genuinely linked to the economy of the United Kingdom or an EEA State.

(4) Postscript: database entries, not databases

27. During the course of submissions, it was made clear to me by counsel for the Claimants that database right subsists in relation to work done in seeking out, verifying and presenting individual data elements in a database rather than in relation to the database as a whole. One must, therefore, be careful in equating a single database to a single database right, rather than focussing on the manner in which the individual entries in a (unitary) database came to be made. Whilst database right is a unitary property right, as I have described, the work that it protects is not necessarily what a user would regard as a single database.

28. The differentiation between investment going to the database as a whole as opposed to investment going to specific entries in a database is one that I can see might be evidentially complex. It is a difference that I consider I need to be aware of, but I explicitly do not seek to further articulate the law in this regard.

D. JOINDER AND CPR PART 19

(1) The general rule

29. CPR 19.3 provides, so far as material:

- “(1) Where a claimant claims a remedy to which some other person is jointly entitled with him, all persons jointly entitled to the remedy must be parties unless the court orders otherwise.
- (2) If any person does not agree to be a claimant, he must be made a defendant, unless the court orders otherwise.”

I have already made reference to the related section 102 of the 1988 Act.

30. It was Genius Sports’ position that the interests (in the broadest sense) of the Claimants and the Counterparties were aligned, in the sense that both the Claimants and the Counterparties had an interest in ensuring that database right in the Database was not infringed. That, as it seems to me, is very likely to be right, and I proceed on that basis.

31. Of course, a Counterparty might very well have an interest in database right in the Database being enforced even if the sole proprietor of the database right was Genius Sports. Genius Sports contended that this was the case as regards a number of Counterparties, where database right vested solely in Genius Sports. I am in no position to assess the correctness of this assertion but, clearly, to the extent it is correct, no joinder under CPR 19.3 or section 102 would be required.

32. I propose – from this point on in this Ruling – to focus on those Counterparties that do prima facie need to be joined under CPR 19.3, and I shall refer to these Counterparties as **Interested Counterparties**.
33. The starting point under CPR 19.3 is that the Interested Counterparties should (unless the court orders otherwise) be joined, as claimant if they consent, and as defendant if they do not. I obviously cannot “order otherwise” without a proper reason. *Prima facie*, as it seems to me, unless a proper reason can be shown by Genius Sports, all Interested Counterparties should be joined.
34. I take the point that joinder of all Interested Counterparties would involve Genius Sports incurring considerable effort and expense, as is described in paragraph 13 of Rose 6.¹¹ However, I do not accept, without more, that such effort and expense is not “sensible” or “proportionate” or “realistic” (to use Mr Rose’s words). The fact is that the rights and interests of Interested Counterparties are engaged, and *prima facie* they should be parties, so that their interests can be articulated (should they choose to articulate them, which is of course a matter for them).
35. I also take the point that it is – tactically speaking – in the Defendants’ interests to make the process of joining Interested Counterparties as extensive and so as time-consuming and expensive as possible. Whilst I found Mr Roberts, QC’s submissions on behalf of the Defendants measured and reasonable, and so very helpful, I nevertheless bear in mind that the number of Counterparties makes this litigation challenging for Genius Sports and such challenges ought – where possible and consistent with the overriding objective – to be minimised so that property rights can efficiently and cost-effectively be vindicated in this jurisdiction.
36. The procedure for adding and substituting parties is described in CPR 19.4. It is sufficient to note that the application to join a new party may be made without notice,¹² but that nobody may be added as a claimant unless that person’s consent has been obtained in writing and filed with the court.¹³

(2) **Representative parties**

(a) ***CPR 19.6***

37. CPR 19.6 is the procedural rule dealing with representative parties with the same interest. There is no equivalent provision in the 1988 Act. The rule provides:

“(1) Where more than one person has the same interest in a claim –

- (a) the claim may be begun; or
- (b) the court may order that the claim be continued,

by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

¹¹ Quoted in paragraph 12 above.

¹² CPR Part 19.4(3).

¹³ CPR Part 19.4(4).

- (2) The court may direct that a person may not act as a representative.
- (3) Any party may apply to the court for an order under paragraph (2).
- (4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule –
 - (a) is binding on all persons represented in the claim; but
 - (b) may only be enforced by or against a person who is not a party to the claim with the permission of the court.

...”

(b) *Lloyd v. Google*

38. In *Lloyd v. Google*,¹⁴ Lord Leggatt (with whom the other Justices all agreed) authoritatively set out the law in relation to representative parties. He made clear that the origins of the rule were not recent, but old, and that what underlay it was a very practical aim of convenience. Thus, in *Duke of Bedford v. Ellis*,¹⁵ Lord Macnaghten said:

“The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice, the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could “come at justice”, to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience, it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.”

39. Lord Leggatt made clear that the definition of a class – so as to avoid conflicts of interest internal to that class – was extremely important.¹⁶ But the essential test – whether the members of the class had “the same interest” – was not to be a procedural straitjacket:¹⁷

“The phrase “the same interest”, as it is used in the representative rule, needs to be interpreted purposively in light of the overriding objective of the civil procedure rules and the rationale for the representative procedure. The premise for a representative action is that claims are capable of being brought by (or against) a number of people which raise a common issue (or issues): hence the potential and motivation for a judgment which binds them all. The purpose of requiring the representative to have “the same interest” in the claim as the persons represented is to ensure that the representative can be relied on to conduct the litigation in a way which will effectively promote and protect the interests of all the members of the represented class. That plainly is not possible where there is a conflict of interest between class members, in that an argument which would advance the cause of some would prejudice the position of others...”

40. Lord Leggatt stressed the distinction between “conflicting” interests, where a single person could not represent the class appropriately, and “merely divergent interests”, where (provided there was no prejudice to individual class members, but also no

¹⁴ [2021] UKSC 50.

¹⁵ [1901] AC 1 at 8, cited by Lord Leggatt at [38] of *Lloyd v. Google*.

¹⁶ Making particular reference to *Emerald Supplies Limited v. British Airways plc*, [2010] EWCA Civ 1284, *Lloyd v. Google* at [56]ff.

¹⁷ At [71].

advantage) the representative process might nevertheless be appropriate.¹⁸ Of course, conflicts within a class can be resolved by having several classes, each differently represented:¹⁹

“Even if it were considered inconsistent with the “same interest” requirement, or otherwise inappropriate, for a single person to represent two groups of people in relation to whom different issues arise although there is no conflict of interest between them, any procedural objection could be overcome by bringing two (or more) representative claims, each with a separate representative claimant or defendant, and combining them in the same action.”

(c) *Discretion and court control of the representative process*

41. Assuming the same interest test is met, the court has a discretion as to whether to allow a claim to proceed as a representative action. The court must exercise that discretion to seek to give effect to the overriding objective of dealing with cases justly and proportionately.²⁰

42. The following specific points need to be mentioned:

(1) The ability to act as a representative under the rule does not depend upon the consent of the persons represented, but only on community of interest between them. Members of the represented class need not take any positive step in the proceedings or even be aware of them to be bound by the result.²¹

(2) However, it is always open to the judge managing the case to impose a requirement to notify members of the class of the proceedings and to establish a simple procedure for opting out of representation, if this is considered desirable. The procedure is a flexible one.²² That said, where a member of the class wishes to represent him- or herself, rather than be represented, that is a matter which should generally be facilitated.

(3) The class definition is important, and it is important that the class be clearly defined. But, at the end of the day, this is a factor that bears on discretion.²³

(d) *The inter-relationship between the “same interest” test and discretionary factors*

43. Genius Sports submitted that the discretionary factors that I have described – in particular the right of the judge managing the case to impose notification requirements on the represented class – could have the effect of softening the rigours of the “same interest” requirement.

44. I do not accept this submission. It seems to me that the “same interest” requirement, purposively regarded, is a not overly rigorous requirement, particularly in the way it accommodates divergent, although not conflicting, interests. It seems to me that if the members of a class have conflicting interests, then it would be an error to permit a representative action to proceed on the basis of that class, whatever requirements as to

¹⁸ At [72].

¹⁹ At [74].

²⁰ At [75].

²¹ At [77].

²² At [77].

²³ At [78].

notice were imposed. Of course, that does not mean to say that the problem cannot be avoided by having multiple classes. But I do not consider that the use of, e.g., rigorous notice requirements can cause the “same interest” test to be re-defined, stretched or widened.

E. THE PRESENT APPLICATION

(1) The nature of the relationship between the Claimants and the Interested Counterparties

- 45.** The relevant class here under consideration is that of Interested Counterparties, as I have defined that term. It is necessary, at the outset, to appreciate that the interests of the Claimants and those of the Interested Counterparties are, essentially, in opposition.
- 46.** Although I quite accept that – in the broadest of terms – the interests of the Claimants and the Interested Counterparties as against the Defendants are basically aligned, in the sense that neither the Claimants nor the Interested Parties want any database right in the Database to be infringed by the Defendants, as between themselves the Claimants and the Interested Counterparties are in opposition.
- 47.** As I have described, the extent of any database rights in the Database is enormously dependent upon the “investment” (as defined in paragraph 18 above) in the Database. Because database rights exist not in relation to the Database as a whole, but to specific data within the Database (see paragraphs 27 and 28 above) it follows that the question of who is the maker – and so, who is the first owner of database right – is enormously fact dependent. It very much depends on who obtained, verified and presented the contents of the Database. That – as Mr Roberts, QC made good in submissions – is liable to vary from sport-to-sport and from Counterparty-to-Counterparty. Mr Roberts gave some very good examples where the collection of data varied from sport-to-sport. There is also likely to be a material difference between Sports Counterparties and Data Counterparties. There is the further difficult question of whether any investment was devoted to creating data as opposed to seeking out, verifying and presenting it. Only the latter case gives rise to database right.²⁴
- 48.** On all these difficult questions of fact, the Claimants will be minded to maximise their “investment” at the expense of that of the Interested Counterparties. This will increase Genius Sports’ interests at the expense of the Interested Counterparties. That is nowhere clearer than in the case of the non-EEA (and, post-Brexit, non-United Kingdom) Interested Counterparty. So far as these Counterparties are concerned:
- (1) A number of the Data Rights Agreements, as has been seen,²⁵ involve the assertion of intellectual property rights over the data the subject of the agreement by the Counterparty. In short, the Counterparty is the owner; and Genius Sports the exclusive licensee.
 - (2) However, where the counterparty is a non-EEA/non-United Kingdom Counterparty, that Counterparty cannot be the “maker” of the data in the Database,

²⁴ See paragraph 18 above.

²⁵ See paragraph 5 above.

even if they have “invested” in it, because of the requirement of nationality or of a corporate link with the EEA/the United Kingdom.²⁶

- (3) Whilst that might be considered to lead to an outcome where there is no maker as regards that data, that is not the way the Claimants plead their case. Rather, the Claimants appear to contend that the assertion of ownership in favour of the Counterparty amounts to an assignment of database right that is ineffective. Thus, paragraph 29C of the Amended Particulars of Claim pleads:

“On a true construction of the Directive, any leagues that were not at the material time a qualifying body corporate under Art. 11 (“the Non-EEA Leagues”) could not be the beneficiary of the protection conferred by database right. Accordingly, any assignment of database right to the Non-EEA Leagues would either result in that right being extinguished, or result in the Data Rights Agreements being void for mistake. As to the latter, if the parties purported to assign the protection conferred by database right to any Non-EEA League, those parties could only have done so in the belief that Non-EEA Leagues could benefit from the protection conferred by database right under the Directive. Such belief (that Non-EEA Leagues could benefit from the protection conferred by database right under the Directive) was (i) false for the reasons set out above at paragraphs 29A and 29B, (ii) one that went to the root of the contract, (iii) such as to make the performance of the contract (and in particular the purported assignment) impossible, and (iv) such as to amount to a common mistake of law which would render the Data Rights Agreement void accordingly. In the premises, if the construction of the Data Rights Agreements was such that there was an assignment of database rights to the Non-EEA Leagues, the Data Rights Agreements entered into with Non-EEA Leagues would be void. It is averred that this (namely, the right being extinguished or the Data Rights Agreement being void) was not the intention of the parties. In the premises, on a proper interpretation of the Data Rights Agreements there was no assignment of any database rights to the Non-EEA Leagues.”

I say nothing about the merits of this argument, which will be a matter for trial. I simply note that this paragraph illustrates, with clarity, the fundamental opposition between the Claimants and the Interested Counterparties they have contracted with. What, one might ask rhetorically, would an Interested Counterparty, having the benefit of a Data Rights Agreement governed by the law of Singapore, and with an exclusive Singapore jurisdiction clause, make of such a contention?

(2) Inappropriateness of the Claimants’ approach

49. It might be said that this opposition between the interests of the Claimants and the interests of the Interested Counterparties is nothing to the point. The Application, after all, merely seeks to join a certain number of Counterparties as “representative and non-participating defendants” (to quote from the Application notice).
50. That is precisely the problem. I do not see how this court can – by its own order – at one and the same time order certain parties to be both representative and non-participating. Yet, to quote from paragraph 1 of the draft order accompanying the Application notice, Genius Sports seeks an order joining “representative and non-participating defendants to the Claim”.
51. Of course, a defendant, properly joined, may choose to be non-participating and will have to bear the consequences of such non-participation, whatever those might be. But it is not

²⁶ See paragraph 19 above.

for the court to impose such a status. Indeed, it is quite hard to think of something more antithetical to the overriding objective than this.

52. The Application essentially seeks to tie-in and bind to the outcome of these proceedings all Counterparties, without making clear (either to the court or to the Counterparties) the full extent of the conflict of interest that might subsist between the Claimants and the Counterparties.
53. Genius Sports made much of the fact that the so-called non-participating representative defendants had (at least for themselves) consented to this course. By way of example, I was shown a letter of consent from a non-EEA Counterparty, which reads as follows:²⁷

“I write in my capacity as president of the [non-EEA Counterparty] (the “League”). I confirm that I have the authority to act on behalf of the League. I understand that [Genius Sports] has commenced legal proceedings in the High Court in London (the “Proceedings”) against Soft Construct (Malta) Limited and others (the “Defendants”) in relation to claims for infringement of [Genius Sport’s] database rights. [Genius Sports] alleges that the Defendants have been scraping data from [Genius Sport’s] data feeds where [Genius Sports] own the rights to supply the data.

[Genius Sports] and the League entered into a Data Rights Agreement dated 9 November 2017, which was subsequently amended on 2 October 2020 (the “Agreement”). In the Agreement, the League appointed [Genius Sports] as an exclusive provider of match data to betting customers for all matches in the LSB Basketball League, and any other basketball leagues, tournaments or matches that utilise the FIBA LiveStats software from time to time. [Genius Sports] obtains, collates, checks and enters into a database data relating to the above-stated basketball matches and then distributes this to the League and [Genius Sport’s] customers. [Genius Sports] confers valuable benefits in kind (in the form of use of [Genius Sports] software and access to and use of the processed data) in return for the provision of the data and rights granted in that data.

I understand that under the terms of the Agreement the League is the owner of the relevant database rights and [Genius Sports] is the exclusive licensee. Section 102(1) of the Copyright, Designs and Patents Act 1988 (the CDPA) states that an exclusive licensee or owner of copyright may not proceed with an action for infringement of copyright in which the exclusive licensee or copyright owner may have concurrent rights of action without joining the other as plaintiff or adding the other as a defendant. This provision equally applies to the owner of database rights as per Regulation 5 of the Copyright and Rights in Database Regulations 1997/3032. Consequently, I understand that [Genius Sports] will make an application to join the League to the proceedings.

Please take this letter as confirmation that (i) the League consents to being joined to these proceedings; (ii) wishes to be joined as a non-participating defendant; and (iii) agrees that any application to join the League to these proceedings may be dealt with without a hearing. The League does not wish to take any active role in these proceedings and does not require any documents (including the Statements of Case) to be served upon them. The League is happy for [Genius Sports] to have conduct of the litigation in respect of any rights that the League may own. I understand that a new defendant does not become a party to the proceedings until the amended claim form has been served upon that defendant. In this regard, I confirm that Fieldfisher is instructed to accept service of the amended claim form (and the order for addition of the League) on behalf of the League.

Section 102(2) of the CDPA states that "A copyright owner or exclusive licensee who is added as a defendant in pursuance of subsection (1) is not liable for any costs in the action unless he

²⁷ Underlining added by way of emphasis.

takes part in the proceedings". As stated above, the League has no desire to take any active role in these proceedings and understands that, provided it does not do so, it will not be liable for any costs in this action.”

54. A number of concerns arise in relation to this communication:

- (1) First, the nature of Genius Sport’s case – certainly so far as non-EEA Counterparties are concerned – clearly has not been explained to the League. The passages that I have underlined demonstrates a gulf between what the League thinks Sports Genius’ case is and what that case in fact is.
- (2) Secondly, the notion that one can “contract out of” the CPR is not one that is recognised in this jurisdiction. If a party is properly joined, whether as a claimant or a defendant, then that party is subject to the proper rigour of litigation in this jurisdiction, and the status of “non-participating defendant” is one that does not exist.
- (3) Thirdly, the status of the League as a representative party does not appear to have been explained to the League.

55. It seems to me that the Application is a fatally flawed one, and that the Application must be refused – without going into the detail of representatives of the class – because the proposed way forward is so at variance with CPR 19 and the overriding objective.

(3) The way forward

56. I have given anxious consideration as to whether there is anything that I can do, at this stage, to “cure” the deficiencies in the Application, so as to enable the Interested Counterparties to be regularly and properly joined without further application. As I have indicated, I have some sympathy with the logistical difficulties that Genius Sports has in dealing with a large number of Interested Counterparties, many of whom will (for reasons that I will not go into, but which I accept) be disinclined to participate actively, particularly if that involves the expenditure of time and money.

57. It was suggested that, provided the Claimants’ solicitors wrote to the Counterparties, or some of them, explaining the position, the position might be regularised. I do not consider that that can be right. Whilst it may be possible to secure some form of joint representation by the Claimants of the Counterparties, it seems to me that that will involve further work and effort on the part of the Claimants, which it would be unwise for me to anticipate. Certainly, there is nothing in the Application that can be “cured” by a tweak or ruling on my part. As I have stated, the Claimants’ approach raises a number of quite fundamental concerns, and these must, in the first instance, be addressed by Genius Sports.

58. I say the following by way of non-binding indication for any future joinder application. Since the proceedings have been docketed to me, such guidance may assist:

- (1) It seems to me that the range of Interested Counterparties before the Court needs to embrace:
 - (a) Representatives from each sport.

- (b) Non-EEA and non-United Kingdom representatives.
- (c) A Sports Counterparty and a Data Counterparty.

This number of parties needs to be before the Court in some form so that the nature of the database rights in issue can properly be explored, in particular supported by relevant disclosure. I am not saying that one representative party cannot meet multiple requirements in terms of characteristics that need to be before the court, and I do not consider that it is helpful for me to be explicit in terms of laying down what the Claimants should or should not do.

- (2) Whilst – for the reasons I have given – the interests of the Claimants and those of the Counterparties are in opposition (because they have, or may have, concurrent interests in the Database), my present thinking is that *inter se* the representative parties described in sub-paragraph (1) above have divergent and not conflicting interests. Whilst, as it seems to me, it is necessary to have all of them before the court, that is really so as to enable the Defendants to test the case made against them and in particular to enable disclosure. For my part, I can see little difficulty in these representatives being represented by a single legal team acting in co-operation with (but not the same as) the Claimants’ team.
- (3) Again, the extent to which the Interested Counterparties not joined are informed of what is going on is a matter for the Claimants. My own view is that this is a matter that correlates closely to the parties that are joined, and the manner in which they are represented.

(4) Disposition

- 59.** Paragraph 58 above is entirely without prejudice to what may be said and/or determined on a future occasion. It is written in the hope that it will assist the efficient progress of these proceedings. However, it does not form any part of my determination of this Application, nor does it bind anyone in relation to any future application.
- 60.** For the reasons I have given, the Application is dismissed.

ANNEX 1

TERMS AND ABBREVIATIONS USED IN THE JUDGMENT

(paragraph 1, footnote 1)

Term/abbreviation	First use in the Judgment
Application	§11
Basketball Leagues	§3 (in quotation)
CONMEBOL	§1(2)
Counterparties	§4
Counterparty 1	§5(4)(a)
Counterparty 2	§5(4)(b)
Counterparty 3	§5(4)(c)
CPR	§7
Database	§2 (in quotation)
Data Counterparties	§5(3)
Data Rights Agreements	§3
Directive	§2 (in quotation)
EEA	§5(1)
FAPL	§1(2)
FFL	§1(2)
FIBA	§1(1)
FIFA	§1(2)
FIVB	§1(3)
Football Leagues	§3 (in quotation)
Genius Sports	§1
Interested Counterparties	§32
Leagues	§4
Official Data	§5(4)(a) (in quotation)
UEFA	§1(2)
Regulations	2 (in quotation)
Rose 6	§11
Rose 7	§11
SPFL	§1(2)
Sports Counterparties	§5(3)
Volleyball Leagues	§3 (in quotation)
Withdrawal Agreement	§5(4)(c)