Exclusion clauses: how far can you restrict liability for intentional torts?

Kevin Appleton and Philip Bell

The question of whether an exclusion clause can exclude liability for an intentional tort was recently considered by the Court of Appeal in Mir Steel v Morris[1]. Although this case relates to an agreement to sell off the assets of a company in administration and a transfer of liability clause, the principles arising from it on the scope of exclusion clauses have broad application. The court’s judgment makes clear that whilst clear words are required to exclude claims for negligent wrongdoing (in line with the principles set out in the Privy Council case of Canada Steamship Lines[2]), the correct approach towards ascertaining the true scope of an exclusion clause is by reference to its overall commercial purpose.

In Mir Steel, the dispute arose following the sale of the assets of a company in administration. A third party claimed ownership over one of the key assets included within the sale (a hot strip mill) on the basis that it had retained title to it under its supply agreement with the company and that the administrator was therefore not entitled to have sold it. When the third party supplier brought a claim against the purchaser in respect of the disputed asset in which it claimed ownership, the purchaser sought to bring the vendor (now in liquidation) and the administrators into the litigation and sought a contribution from them towards the supplier’s claim. The issue was whether the vendor and/or administrator were liable in such
circumstances. This hinged on the interpretation of the sale agreement of the vendor’s assets, and in particular, the following clause:

“The Purchaser agrees that it shall be responsible for settling any claim made against it by [the supplier] in respect of the [asset] situated at the Property.

The question before the court was whether or not this clause was sufficiently broad in its scope to cover a claim for intentional torts (in this case, for inducing a breach of contract and conspiracy to injure through unlawful means) – or whether express words were required to that effect.

This issue needs to be considered alongside the well-known principle set out in the Canada Steamship case that clear, unambiguous words are required to exclude liability for negligence. In other words, where a clause states that it excludes “all liability”, it may be construed as if it had read, “all liability (except if caused by negligence)“.

The purchaser sought to persuade the court that the Canada Steamship Lines principles applied not only to excluding liability for negligence, but also to intentional torts which cannot be committed without a deliberate intention to cause harm.

The court held that while the principles established in Canada Steamship offer helpful guidance, they should not be read as absolute rules, and do not provide an “automatic solution” in any particular case. It highlighted the importance of considering the context in which the contract was made, and the parties’ commercial intentions, when interpreting the meaning of an exclusion clause. Therefore, the Canada Steamship principles should not be followed blindly when it is clear that the parties had an intention inconsistent with those principles.

On the facts of the case, the purchase price was reduced by £10 million on the basis that the purchaser received a clean title to all the assets “with the exception of the hot strip mill for which the buyer will take the risk that there may be a dispute about ownership”. In other words, the purchaser went into the sale with its eyes open about a potential claim over title of the hot strip mill.

The court held that, from the viewpoint of a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of entering into the agreement, the parties’ commercial intentions had been to include any claim in relation to the hot strip mill within the scope of the exclusion clause. In these circumstances, the court therefore construed the clause to transfer liability to the purchaser for settling any claims, including those relating to intentional torts, notwithstanding the absence of express wording to that effect.

In practice, it continues to remain important when drafting exclusion clauses to consider their scope – whether or not it is intended to cover intentional torts or a deliberate repudiatory breach. However this case highlights the limitations of seeking to rely on the Canada Steamship principles to exclude particular types of claims in light of the court’s current approach to contractual interpretation which looks to the parties’ overall commercial intentions.

Unveiling online anonymity: Supreme Court confirms court order against Viagogo to disclose user details

Tom Ohta and Philip Bell

The anonymity afforded by the internet creates difficulties for rightsholders who suffer wrongdoings at the hands of parties who adopt anonymous online identities to frustrate any attempts to take direct action against them.

Website operators may be involved in such wrongdoings (innocently or otherwise) by providing the means by which anonymous users carry out alleged wrongdoings. Rightsholders require website operators to disclose information about their users (such as their IP or email addresses) to enable them to take direct remedial action. However, in many cases, the website operator takes a commercial decision to decline voluntary disclosure of such information. This often leaves rightsholders with no option but to seek a court order to compel the website operator caught up in the wrongdoing to give the necessary disclosure.

In this context, a recent Supreme Court decision is of interest. In this case the court ordered Viagogo, one of the UK’s largest ticket exchange websites, to disclose information to the Rugby Football Union (RFU) about some users of Viagogo’s website who were re-selling tickets to rugby matches in breach of the applicable terms and conditions.

The RFU, which is responsible for selling tickets to England rugby matches, brought an action against Viagogo after it became aware that certain anonymous users of Viagogo were using the website to re-sell tickets to England rugby matches in breach of the ticket terms and conditions and often at significantly inflated prices: some with a face value of £55 were being sold for as much as £1,300.

The RFU initially sought voluntary disclosure from Viagogo about those users acting in breach of the ticket terms and conditions, but Viagogo’s decision to decline to give such disclosure frustrated RFU’s ability to seek injunctions against the users.

As an alternative, the RFU sought to compel Viagogo, by way of a court order, to give the RFU the names and addresses of those who had listed tickets for re-sale online. It did so by seeking a Norwich Pharmacal order, which is a means by which a third party which has assisted a wrongdoer (whether innocently or deliberately) may be compelled to provide information to an injured party in order to seek redress for an arguable wrongdoing.
In this case, it was established that there was an arguable wrongdoing as the resale of the tickets would constitute a breach of the terms and conditions of the ticket. Equally, it was clear that Viagogo was involved in the wrongdoing: as well as providing the platform by which the tickets could be offered for sale, the website provided users with a suggested price based on existing market data, with the website keeping a percentage of the price paid for the ticket.

The court acknowledged that the disclosure of the information could be ordered only if it were necessary and proportionate in all the circumstances. Recognising that an individual’s private details should only be disclosed either where that person has consented or where there is a legitimate legal basis for disclosure, the court applied a proportionality test, balancing the interests of the RFU against those of the private individuals who had anonymously listed tickets for sale.

The court ultimately determined that on the facts of the case, it would be fair and proportionate to order Viagogo to disclose the individual users’ details to the RFU. The court concluded that it was proper to have regard to the RFU’s overall aim in seeking the information, namely to prevent the future sale of tickets at inflated prices in clear contravention of its terms and conditions.

The court reiterated that where personal information is at stake, it will sometimes not be proportionate for it to be disclosed, but in the instant case and having considered the wider context, the court determined that it was just and proportionate to compel Viagogo to provide the RFU with the information sought.

Norwich Pharmacal orders may be of assistance to parties who have suffered wrongdoing at the hands of anonymous internet users. However, it is important to note that the applicant will normally be expected to pay for the legal costs of the respondent (such as a website operator) and the respondent’s reasonable costs of complying with a Norwich Pharmacal order, if granted. In some cases, it may be possible to recover these in subsequent proceedings, though generally only from the wrongdoer (whose identity was disclosed pursuant to the order) and not from the respondent party who gave the disclosure.

Football Dataco Ltd v Sportradar GmbH (Case C-173/11)

Tom Ohta and Claire Davies

The judgment of the Court of Justice of the European Union (the “CJEU”) in Football Dataco Ltd v Sportradar GmbH (Case C-173/11) has potential implications for anyone who owns or provides access to online content. Of particular interest is its ruling that liability for illegally providing access to online content can arise in the jurisdiction in which the defendant intends to target members of the public. This is a
clarification of the law which severely circumscribes the ability to avoid liability in a particular jurisdiction by simply locating data servers elsewhere. Although the case focuses on database right infringement, it is widely considered that its principles are of broad application to online publication and dissemination of content, including under copyright law, which will be a welcome development for rightholders seeking to protect their interests against online infringers.

Football Dataco Ltd (“Dataco”) compiled and marketed live data from English and Scottish Premier League football matches (e.g. goals, goal-scorers, yellow cards etc.) in its ‘Football Live’ database. Sportradar GmbH (“Sportradar”) was a German company which provided data relating to sports events, including English football matches, via its website to its clients which included a UK-based betting company.

Dataco brought a claim against Sportradar before the English High Court alleging infringement of its database right by Sportradar’s unauthorised use of its ‘Football Live’ database. Sportradar argued that the English court had no jurisdiction to hear the case because Sportradar’s data was stored on servers which were located in Germany and Austria and liability for infringing acts could only arise in the jurisdiction from which the data was sent (i.e. Germany/Austria) and not where it was received (e.g. by members of the public in England). The High Court’s judgment did not deal with this jurisdictional question, which was considered by the Court of Appeal which sought guidance from the CJEU.

The CJEU held that the infringing act (here, re-utilisation of data under the Database Directive) takes place at least in the Member State where the person who requested and then received the data is located, provided that there is evidence that the person sending the data intended to target members of the public in that Member State.

It is important to note that just because online data is accessible in a particular jurisdiction, that in itself does not provide a sufficient basis for establishing the court’s jurisdiction there. There must be evidence to show an intention to target persons in that jurisdiction, and the CJEU gave some guidance in this respect, as summarised below:

• Whether the subject matter of the data could be of particular interest to members of the public in that Member State. In this case, it was relevant that data on Sportradar’s server related to English and Scottish football league matches which the CJEU considered might show an intention to attract members of the public in the UK.

• Whether it is known by the defendant website operator that its data is likely to be accessed by members of the public in that Member State. Here, Sportradar’s customers included a UK-based betting agency who it charged for the right to access its data on English and Scottish football league matches. The CJEU considered that this was a material factor that might show its awareness that end-users accessing its data were likely to be from the UK.

• Whether the circumstances in which the online data is accessed, such as the language of the website, suggest an intention to target a particular Member State. Here, Sportradar was a German company but it provided access to its football data in English.
It will be for the national court to assess in each case whether there is sufficient evidence to establish an intention to target members of the public in its jurisdiction.

Although the Dataco case relates to database right, many practitioners consider that the CJEU’s above approach to where the acts of infringement take place are likely to apply more broadly to copyright infringement claims. One now needs to consider whether the infringing act of “making available to the public” under copyright law takes place in at least the Member State(s) where members of the public are targeted by the defendant party, which will ultimately be a question of fact in each case for the national court to decide. Where the circumstances indicate that recipients in multiple jurisdictions are targeted, this raises the possibility of so-called ‘forum shopping’ to bring claims in the most claimant-friendly jurisdiction.

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**New EU Directive on Orphan Works**

**Tom Ohta and Claire Davies**

The new ‘Orphan Works Directive’ aims to provide for the digitisation and dissemination throughout the EU of so-called ‘orphan works’ such as books, art, audio recordings and films, where the copyright owners are unknown or untraceable. It is one of several EU initiatives relating to copyright, implemented as part of a broader policy objective of creating a digital single market. This article explores the likely impact of the Directive and the issue of commercial exploitation of orphan works.

Orphan works are works such as books, art, audio recordings and films that are protected by copyright but whose copyright owners are unknown or untraceable. As a result of the potential copyright infringement concerns in relation to making them publically available, many orphan works remain in storage in public institutions such as libraries.[1] The so-called “Orphan Works Directive” (Directive 2012/28/EU)[2] entered into force on 28 October 2012 and aims to facilitate the digitisation and dissemination throughout the EU of orphan works.[3] Member States have until 29 October 2014 to incorporate its provisions into national law.

The Directive is broad in its application, including books, journals, newspapers, magazines or other writings, cinematographic or audiovisual works and phonograms.[4] A notable exception is stand-alone photographs and other images.[5]

The Directive applies to certain public institutions: publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organisations (the “Beneficiaries”). The Beneficiaries may use orphan works without risking copyright infringement when pursuing aims...
related to their “public-interest missions”, particularly in the context of preserving, restoring and providing cultural and educational access to their collections. Beneficiaries are permitted to generate revenue by using orphan works, provided that it is for the exclusive purpose of covering their costs of digitising content and making them available online. The focus of the Directive on non-commercial use is further highlighted by its preclusion of a Beneficiary granting a commercial partner (in a public-private partnership contract) any rights to use, or control the use of, the orphan works.

By only applying to certain public institutions in pursuit of their public-interest missions, the Directive therefore leaves unresolved the question of lawful commercial use of orphan works. It is therefore noteworthy that the Enterprise and Regulatory Reform Bill (which, at the time of writing, has entered the Committee stage in the House of Lords having passed through the Commons) contains a clause which, if enacted, gives powers to Ministers to make regulations for the licensing of orphan works for commercial and non-commercial use. The proposed clause would in effect provide the ability to reform copyright law by regulation – and therefore without Parliamentary scrutiny. It will be interesting to see how this clause is addressed during the remaining passage of the Bill.

In order to be classified as an orphan work, a “diligent search” must be carried out in good faith by the Beneficiary or by other organisations (presumably at the Beneficiary’s behest) in the Member State where the work was first published or broadcast. The Directive requires that a diligent search is carried out “by consulting the appropriate sources for the category of works in question” which are listed in the Annex to the Directive (including the Accessible Registry of Rights Information and Orphan Works (ARROW))[6]. Member States may also refer to the diligent search guidelines agreed in the context of the High Level Working Group on Digital Libraries, established as part of the i2010 digital library initiative.[7]

Where a diligent search fails to establish the identity or location of any rightholder(s)[8], the work will be recognised as an orphan work in all Member States. The central, publicly accessible database entrusted with collecting and maintaining records of diligent searches provided by the Member States is the Office for Harmonisation in the Internal Market ("OHIM").

The Directive enables rightholders to put an end to the orphan status of their work, but makes clear that this is only in respect of rights that they hold. It will be interesting to see what mechanisms Member States introduce in this respect and the degree of evidence that will be required of rightholders to show chain of title.

Member States must also ensure that such rightholders are awarded “fair compensation” for the use that has been made of their work, with discretion afforded to the Member States as to how to determine the level of compensation payable. Differences between Member States in relation to the level of compensation could potentially lead to ‘forum shopping’, whereby parties choose to bring or defend claims in the jurisdiction most favourable to them.

Furthermore, where a work has been wrongly found to be an orphan work as a result of a search that was “not diligent”, remedies for copyright infringement remain available for rightholders under national law. As it is for each Member State to judge whether or not a search is “diligent”, there is potential scope for differences to emerge not only between Member States, but also within different categories of work.

In recent years, the European Commission has encouraged initiatives designed to preserve and disseminate Europe’s cultural heritage, including the digitisation of collections and archives in order to make them publicly accessible online. However, orphan works present a major obstacle to such efforts; authorisation must be obtained from rightholders prior to making copyright works available to the public, but this is not possible where the rightholders cannot be identified or located. The creation of a legal framework to “facilitate the cross-border digitisation and dissemination of orphan works within the single market” was one of the key actions identified in the Commission’s “Digital Agenda for Europe” in 2010 (part of its Europe 2020 Strategy). However, this failed to yield the results the Commission had hoped for. On 24 May 2011, it adopted a proposal to establish common rules on the digitisation and online display of orphan works and the Orphan Works Directive entered into force on 28 October 2012.

Works and other protected subject-matter embedded or incorporated in, or which constitute an integral part of, the above are also included.

However, the Directive contains a “review clause”, and the Commission will consider including these, along with other subject matter, within the scope of the Directive in the future.

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It is important to note that whilst there can be several rightholders in a particular work, if at least one rightholder has been identified and located, that work should not be considered an orphan work.