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EU: Does Innoweb hinder innovation on the web?

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"The activity of the operator of a dedicated meta search engine (…) comes close to the manufacture of a parasitical competing product."

Christmas somewhat overshadowed the publication of a particularly interesting CJEU decision: case C-202/12 (Innoweb), dealing with the legal protection of databases in relation to meta search engines. The judgment was published on 19 december 2013.

The preliminary questions referred to the CJEU arose in Dutch civil proceedings against Innoweb, a company that operates the dedicated car meta search engine 'GasPedaal' (literally 'accelerator pedal'), which enables users to simultaneously carry out searches in several collections (databases) of car ads that are listed on third party sites. Plaintiff AutoTrack is the owner of one of the websites used by Gaspedaal as a "source" for its meta search engine.

By means of the GasPedaal service it is possible to search through the AutoTrack collection on the basis of different criteria, including not only the make, the model, the mileage, the year of manufacture and the price, but also other vehicle characteristics, such as the colour, the shape of the chassis, the type of carburant used, the number of doors and the transmission and, second, 'in real time', that is to say at the time when a GasPedaal user enters his query.

The results thrown up by the AutoTrack website – cars meeting the criteria chosen by the end user – which are also to be found on the results pages of other sites are merged into one item with links to all the sources where that car was found. A webpage with the list of the results shows essential information relating to each car, including the year of manufacture, the price, the mileage and a thumbnail picture. That webpage is stored on the GasPedaal server for approximately 30 minutes and sent to the user or shown to him on the GasPedaal website, using the format of that site.

Every day, GasPedaal carries out approximately 100.000 searches on the AutoTrack website in response to queries. Thus, approximately 80% of the various combinations of makes or models listed in the AutoTrack collection are the object of a search by GasPedaal each day.

The referring Dutch court basically asked whether an owner of a website with used car ads that were uploaded by users, can prevent a third party from 'scraping' its database of ads and thus effectively can prohibit the meta search engine operation. After several remarks on how

technologically dedicated (real time) meta search engines differ from general search engines like Google or Bing (§ 24-29), the Court, relying mainly on contextual (§ 33-34) and teleological arguments (§ 35-36), comes to the conclusion that GasPedaal infringes Autotracks database rights by re-utilizing parts of the content of its database (article 7(2)(b) of Directive 96/9).

According to the CJEU, GasPedaal is "depriving him of revenue which should have enabled him to redeem the cost of the investment" (§ 37) because it "is not limited to indicating to the user databases providing information on a particular subject" (§ 39) and orders duplications into one item (§ 43). This, the Court states, "creates a risk that the database maker will lose income" (§ 41), a risk that "cannot be ruled out by force of the argument that it is still necessary, as a rule, to follow the hyperlink to the original page on which the result was displayed." (§ 44).

The Fifth Chamber of the CJEU, deciding without a prior opinion of an Advocate General, seemed generally disturbed by the increased competition that producers of databases have to face (§ 45) and the changes in "the access route intended by the database maker" (§ 47). It even went on to conclude that this behavior "comes close to the manufacture of a parasitical competing product" (§ 48). The entire atmosphere of the case is probably best disclosed in the part, where the Court writes: "the end user no longer has to go to the website of the database, unless he finds amongst the results displayed an advertisement about which he wishes to know the details. However, in that case, he is directly routed to the advertisement itself and, because duplicate results are grouped together, it is even entirely possible that he will consult that advertisement on another database site" (§ 49).

The logic behind this answer is clear, but a question that immediately springs to mind is whether deeplinking isn't also parasitical then.

Personally, I can't stop wondering why the Court considers the societal benefits of meta search engines (§ 49) to be their "killing characteristics". One can understand the business motifs of Ryanair when it was suing 'screen scraping' websites', as it was trying to build the image of being the cheapest European airliner, an image that meta search engines could effectively undermine, but database rights should not protect any kind of business model that is built around the compilation and the subsequent provision of databases.

Considering that the rapporteur judge was German (Thomas von Danwitz), it is striking how Innoweb C 202/12 ruling contrasts with decision Automobil-Onlinebörse I ZR 159/10 handed down by the German Federal Supreme Court (BGH) in 2011. Unlike the CJEU, the BGH took the position (§ 26) that a provider of a software that enables comparison of different websites with car ads does not use [1] that data himself and hence cannot be a direct infringer. Instead, the BGH focused on the conduct of the users and their possible violation of the database rights of scraped websites (so did Dutch court in the reference by saying "makes it possible for the public to search").

This led the BGH to the conclusion that there was no infringement of database rights with regard to copying a substantial part or with regard to systematic copying of insubstantial parts of a protected database. As seen above, the CJEU, without any arguments, considers that similar real time scraping is an act that is carried out directly by the meta search engine operator. Implicitly, the Court basically attributes all the searches to the operator of the website. One can only speculate about the underlying motif for this decision. However, it does show how thin the line can be between primary and secondary liability under different intellectual property rights. And that it is

often only a matter of perspective.

Even more troubling than this doctrinal issue is the practical impact of the decision. This decision effectively outlaws the operation of most of socially beneficial websites that help consumers to compare prices or qualities of different goods offered on the Internet. Unlike general search engines, that generate more traffic than they could possibly take away, ‘comparison websites’ are very likely to a be nuisance for at least the bigger providers/sellers. I am not sure if it is beneficial for the innovation policy of the EU to make the operation of such websites dependent on the mere tolerance by the big players, especially when smaller competitors are possibly the greatest beneficiaries of these comparison websites.

Although it isn’t said that all forms of meta search engines should be allowed, this decision of the CJEU is likely to have far-reaching, unwanted implications and doesn’t serve the EU policies on innovation.

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[1] German “öffentliche Wiedergabe” (§ 87(1) UrhG) corresponds to “making available to the public by on-line or other forms of transmission” (Art. 7(2)(b) Directive) as a type of re-utilization.

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