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Search engines and databases in the search for a balance: the AG's Opinion in the 'CV-Online Latvia' case

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On 14 January 2021, Advocate General (AG) Szpunar delivered his Opinion in Case C?762/19, SIA 'CV-Online Latvia' v SIA 'Melons', a further case relating to the database *sui generis* right. The application of the *sui generis* right to the activity of search engines was the main question raised in this case. Specifically, a specialist search engine for job advertisements operated by Melons ('KurDarbs.lv') referred users by means of hyperlinks to the websites on which the information sought was initially published, including CV-Online's website. In this context, CV-Online brought proceedings against Melons for infringement of its *sui generis* right over its database.

In an inspiring Opinion, the AG, having scrutinised the details of the functioning of Melons' search engine, proposed a thoughtful recalibration of the conditions of application of the *sui generis* right on the grounds of its justification as a legal mechanism against the creation of parasitical competing products (par. 40 of the Opinion).

CV-Online Latvia and Innoweb: different functionalities, different cases?

The facts were a priori comparable to the facts of the CJEU's ruling in the Innoweb case C?202/12 which concerned the breach of the database *sui generis* right by a meta search engine that

specialised in advertisements for used cars. In that case, the CJEU affirmed the infringement on the basis of three criteria which have been heavily influenced by unfair competition law concerns: the use of a search form which essentially offers the same range of functionality as the search form on the database; the 'translation' of queries from users into the search engine for the database site 'in real time', so that all the information on that database is searched through; and the presentation of the results to the end user in an order similar to that used by the database for presenting results.

For the AG, it was critical then to check whether the Innoweb precedent could also be applicable in the present case. First, the AG analysed the different functionalities of a specialist search engine compared to those of a dedicated meta search engine, as in the Innoweb case. The specialist search engine in the present case indexes websites (databases), keeps a copy on its own servers and then, by using its own search form, enables users to carry out searches according to the criteria which it offers, such searches being carried out among the data that have been indexed. On the contrary, the way the dedicated meta search engine in the Innoweb case functions is much more intrusive in the sense that it uses the search forms of the websites on which it allows searches to be carried out and translates in real time its users' requests into criteria used by those forms (par. 33 of the Opinion).

These technicalities, however, do not have an impact on the legal analysis, since in both cases an equivalent result is produced: both search engines make it possible to explore the entire contents of those databases and to reutilise those contents. Additionally, by indexing and copying the contents of the website to its own server the search engine in question also extracts the contents of the databases of which those websites consist.

CV-Online Latvia and Innoweb: the same line of reasoning?

However, according to the AG, the affirmation of the breach of the *sui generis* right should not depend solely on the fact that extraction and/or reutilisation of the website's contents has taken place. A more holistic appreciation of the context of the breach is required, focusing on the damage that has been inflicted on the *raison d'etre* of the *sui generis* right – the substantial investment made by the database producer.

The acknowledgement of the hybrid nature of the *sui generis* right (which is a legal Janus sharing characteristics of both an intellectual property right and the law of unfair competition) appears to prevail in the AG's interpretation of the operation of this right. The AG opts for a teleological interpretation of Article 7 of the Database Directive, which aims to balance the objective of protection of information assets in the form of a database and the development of innovative products, such as content aggregators, which have added value for end users and a significant role in the functioning of the internet. In his opinion, the criterion of an adverse effect on the investment, in the sense of the risk to the possibility of recouping that investment, as a condition of the grant of protection by the *sui generis* right would make it possible to attain the objective of this right, and thus the protection of the investment (see par. 39 of the Opinion), without disproportionately limiting innovation in the market for information (par. 43 of the Opinion). Therefore, the protection conferred by the *sui generis* right should be granted only when the extraction or reutilisation adversely affects the investment in the creation or functioning of the database for which protection is sought, in the sense that it constitutes a risk to the possibility of recouping that investment, notably by threatening the revenue from the exploitation of the database in question (par. 46 of the Opinion).

By ascribing the database *sui generis* right to the philosophy of the law of unfair competition, the

AG opens the door for more flexibility. Indeed, under a classic proprietary approach, the mere activity of offering the public the possibility to conduct research in the entire contents of a third party's database could suffice for the affirmation of the infringement of the database right. In this context, the AG's line of reasoning appears a priori subversive. However, it is an approach which is carefully built on interpretation lines followed by the CJEU in previous cases and particularly on the Fixtures Marketing (C?338/02) and Innoweb cases. Both the Fixtures Marketing and Innoweb decisions delimited the conditions of application of the *sui generis* right by taking into account competition law concerns (the avoidance of creation of monopolies over databases which are the only source of the information they include in the first case, and the protection only against meta search engines which function as parasitical products in the second). It could be argued that such logic is somehow inherent in the conceptual construction of the *sui generis* right, which, in contrast to classic neighbouring rights and also the recently adopted press publishers' right[1], is based on abstract notions entailing quantitative and qualitative evaluations regarding the threshold and the object of protection ("substantial investment", "substantial part"). The Opinion, however, advances a big step further, since, contrary to these notions which are officially established in the Database Directive as criteria for the granting of protection, the prerequisite of damage to the substantial investment derives from teleological interpretation.

It remains to be seen whether this approach will be followed by the CJEU, since the emergence of such a criterion will significantly weaken the position of database producers, whereas the CJEU has often proved to be protective of database makers' interests (see for instance cases C-304/07 and C-490/14). The latter, in addition to proof of substantial investment in the making of the database, would have to prove that the activity in question constitutes a risk to the possibility of recouping their investment, notably by threatening the revenue from the exploitation of their database.

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[1] Article 15 of Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

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