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ECJ clarifies Database Directive scope in screen scraping case

Ryanair's screen scraping lawsuit has implications for a wide range of data users including comparison websites.

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The Irish airline challenged screen scrapping in the European Court

On January 15, 2015 the Court of Justice of the European Union (ECJ) handed down a decision concerning the interpretation of Directive 96/9/EC on the legal protection of databases (Database Directive) in a case concerning the extraction of data from a third party's website by means of automated systems or software for commercial purposes (so called 'screen scraping').

Flight data extracted

*T*he case, *Ryanair Ltd vs. PR Aviation BV, C-30/14,* is of interest to a range of companies such as price comparison websites. It stemmed from Dutch company PR Aviation operation of a website where consumers can search through flight data of low-cost airlines (including Ryanair), compare prices and, on payment of a commission, book a flight. The relevant flight data is extracted from third-parties' websites by means of 'screen scraping' practices.

Ryanair claimed that PR Aviation's activity:

• amounted to infringement of copyright (relating to the structure and architecture of the database) and of the so-called sui generis database right (i.e. the right granted to the 'maker' of the database where certain investments have been made to obtain, verify, or present the contents of a database) under the Netherlands law implementing the Database Directive;
• constituted breach of contract. In this respect, Ryanair claimed that a contract existed with PR Aviation for the use of its website. Access to the latter requires acceptance, by clicking a box, of the airline's general terms and conditions which, amongst others, prohibit unauthorized 'screen scraping' practices for commercial purposes.

Ryanair asked Dutch courts to prohibit the infringement and order damages. In recent years the company has been engaged in several legal cases against web scrapers across Europe.

The Local Court, Utrecht, and the Court of Appeals of Amsterdam dismissed Ryanair's claims on different grounds. The Court of Appeals, in particular, cited PR Aviation's screen scraping of Ryanair's website as amounting to a "normal use" of said website within the meaning of the lawful user exceptions under Sections 6 and 8 of the Database Directive, which cannot be derogated by contract (Section 15).

Ryanair appealed

Ryanair appealed the decision before the Netherlands Supreme Court (Hoge Raad der Nederlanden), which decided to refer the following question to the ECJ for a preliminary ruling: "Does the application of [Directive 96/9] also extend to online databases which are not protected by copyright on the basis of Chapter II of said directive or by a sui generis right on the basis of Chapter III, in the sense that the freedom to use such databases through the (whether or not analogous) application of Article[s] 6(1) and 8, in conjunction with Article 15 [of Directive 96/9] may not be limited contractually?."

The ECJ's ruling

The ECJ (without the need of the opinion of the advocate general) ruled that the Database Directive is not applicable to databases which are not protected either by copyright or by the sui generis database right. Therefore, exceptions to restricted acts set forth by Sections 6 and 8 of the Directive do not prevent the database owner from establishing contractual limitations on its use by third parties. In other words, restrictions to the freedom to contract set forth by the Database Directive do not apply in cases of unprotected databases. Whether Ryanair's website may be entitled to copyright or sui generis database right protection needs to be determined by the competent national court.

The ECJ's decision is not particularly striking from a legal standpoint. Yet, it could have a significant impact on the business model of price comparison websites, aggregators, and similar businesses. Owners of databases that could not rely on intellectual property protection may contractually prevent extraction and use ("scraping") of content from their online databases. Thus, unprotected databases could receive greater protection than the one granted by IP law.

Antitrust implications

However, the lawfulness of contractual restrictions prohibiting access and reuse of data through screen scraping practices should be assessed under an antitrust perspective. In this respect, in 2013 the Court of Milan ruled that Ryanair's refusal to grant access to its database to the online travel agency Viaggiare S.r.l. amounted to an abuse of dominant position in the downstream market of information and intermediation on flights (decision of June 4, 2013 Viaggiare S.r.l. vs Ryanair Ltd). Indeed, a balance should be struck between the need to compensate the efforts and investments made by the creator of the database with the interest of third parties to be granted with access to information (especially in those cases where the latter are not entitled to copyright protection).

Additionally, web scraping triggers other issues which have not been considered by the ECJ's ruling. These include, but are not limited to trademark law (i.e., whether the use of a company's names/logos by the web scraper without consent may amount to trademark infringement), data protection (e.g., in case the scraping involves personal data), or unfair competition.