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Court provides guidance on balancing interests of database owners and content aggregators

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Introduction

Content aggregation is becoming increasingly important. Consumers are showing a preference for content that is carefully selected and curated as opposed to having multiple sources of information clogging up their mailbox. This dynamic is not lost on entrepreneurs and innovators, who are sensing an opportunity to create value for users and perhaps give rise to a unicorn in the process.

Digital aggregation often involves the use of different datasets, including the use of data protected as databases. The makers of databases often want to protect their own investment against aggregators' perceived free-riding. However, what one person may perceive as an entrepreneurial aggregator may be perceived by someone else as a parasitical competitor. Therefore, balancing these interests can be difficult for the national courts. An interesting decision from the Patent and Market Court exemplifies this issue.[(1)]

Background

Advocate General Szpunar described the competing interests at stake when database rights collide with content aggregation in the following way in his opinion in *CV-Online Latvia*:[(2)]

> *While the sui generis right provided for in Article 7 of Directive 96/9 has as its objective to protect database makers against the creation of parasitical competing products, it must not at the same time have the effect of preventing the creation of innovative products which have added value. However, it may prove difficult to distinguish those two categories of products. What may seem to be parasitical to the maker of a database will represent considerable added value for users.*

According to the Court of Justice of the European Union (CJEU) in *CV-Online Latvia*, the key to balancing these interests fairly lies in ensuring that the makers of databases can redeem their investment. Content aggregators should be free to create and market new products and services based on the information in publicly available databases, as long as the database maker can still redeem the investment.

On the one hand, this enables innovation to flourish while reigning in some content aggregators' wilder tendencies. On the other hand, the CJEU's decision emphasises that there may be circumstances in which content aggregators may extract or reutilise all or substantial parts of a database, without adversely affecting the database maker's investment. Database makers will likely not welcome this development.

Facts

The PMC had the opportunity to apply these principles for the first time in Sweden in litigation between the makers of two competing parking mobile apps.

The claimant operated the most widely used mobile parking app in Sweden. The information available through the app consisted of geographical data about parking spaces, parking zones and rates. This information was collected, coded, stored and continuously updated in a database. The claimant showed that it had made substantial investments in obtaining, verifying and presenting the content of the database, which was found to qualify for database protection under chapter 5(49) of the Swedish Copyright Act.[(3)]

The defendant operated a so-called "parking app aggregator". The aggregator was a free-to-use mobile app that:

- showed users which parking apps supplied parking spots in a particular geographical location;
- enabled users to compare the different parking apps on offer; and
- used the parking app chosen by the user to pay for the parking.

The defendant had not entered into an agreement with the claimant at the time the aggregator app was launched. This is sometimes the case when firms develop innovative new digital solutions that challenge established business models and take such solutions to market. Companies associated with the defendant had discussed such a collaboration previously, but the claimant had rejected the idea.

Decision

A main issue in the case was whether the use of the aggregator app involved any relevant uses of the claimant's database (ie, any extraction and/or re-utilisation of the whole or a substantial part of the content of the database). The defendant claimed that the aggregator app worked based on crowdsourced information – that is, information supplied by the user through the use of the parking

apps, which was communicated to the aggregator app. To the contrary, the claimant argued that the aggregator app included all or significant parts of the claimant's database, resulting from a prohibited extraction and reutilisation of virtually the whole database, and did not rely on crowdsourced information to work.

How could the claimant show that the aggregator app included all or significant parts of the database? The claimant constructed a dummy version of its parking app (a version of the software with no information about parking rates or zones in it). If the aggregator app worked solely based on information from the user's parking app, using the empty dummy app with the aggregator app would lead the aggregator app not to work. By showing that the aggregator app worked even with only the dummy app installed on the user's phone, the claimant could argue persuasively that the aggregator app had to have access to the information in the claimant's database in some other way than by crowdsourcing.

How could the claimant show that the company behind the aggregator app had extracted and reutilised all or significant parts of the database? The claimant showed how the defendant had scraped data from the database at the time of developing the aggregator app. The data scraping:

- concerned virtually all of the defendant's database;
- had been carried out systematically over months; and
- could be traced back to internet protocol addresses belonging to companies and persons associated with the defendant.

The defendant failed to explain why it had carried out such a significant data scraping of the claimant's database just before the launch of the aggregator app. If the aggregator app worked solely based on the user's crowdsourced information, such data scraping would seem unnecessary. The Court found that the defendant had extracted and reutilised substantial parts of the claimant's database in order to acquire and use the information in the database in the operation of the aggregator app.

As to the balancing of interests between the maker of the database and the content aggregator, taking the service's added value to the user into account, the Court found that the defendant's actions had negatively affected the claimant's ability to redeem its investments. Therefore, the defendant had committed an infringement under the principles set out *in CV-Online Latvia*. The Court found that when the parking app's users used the aggregator app to park and pay, they interacted with the claimant only through the aggregator app. This meant that the claimant "lost direct contact with the customers", which it would have had if the users had interacted with the parking app directly.

Put another way, the operation of the aggregator app created an additional layer between the claimant and its customers. This additional layer was considered to damage the claimant's ability to redeem its investment. The Court also found that the operation of the aggregator app made it more difficult for the claimant to sell additional services to its customers through the parking app. The customers viewed only the aggregator app, which was considered to further damage the claimant's ability to redeem its investment. Finally, the Court found that the defendant's actions could not be excused by the added value that the aggregator app gave its users, by simplifying its use of many competing parking apps.

Comment

The argument that the aggregator app created an additional layer between the claimant and its customers seems, in principle, to be applicable to most disputes between a database maker and a content or service aggregator – whether it is a parking app, an online curriculum vitae database[(4)] or a meta search engine.[(5)] It is not clear how a litigant can quantify the adverse effect of this "additional layer" on the database maker's ability to recoup its investment. Therefore, it is not obvious that this circumstance by itself motivates a finding of infringement under the principles set out in *CV-Online Latvia*.

The Court's conclusion that the aggregator app resulted in the claimant selling less additional services to its customers through its parking app, on the other hand, seems to be a stronger argument and one that can, in practice, more easily be substantiated by evidence. It will be interesting to see whether this balancing of interests between makers of databases and content and service aggregators is confirmed on appeal or by other national courts in future litigation.

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Endnotes

(1) PMT 11815-20.

(2) C-762/19, paragraph 40.

(3) Implementing article 7 of the EU Database Directive (96/9/EC).

(4) *CV-Online Latvia*.

(5) C-202/12 *Innoweb*.