

## THE END OF (META) SEARCH ENGINES IN EUROPE?

MARTIN HUSOVEC<sup>1</sup>

### I. INTRODUCTION

Most of us know the Internet as presented in our web-browsers such as Firefox. We often even think of what we see in our browsers as ‘the Internet’. However, there is an entire ‘underground world’ that is also ‘the Internet’, in which users of browsers never set foot. It is because the browser is designed for humans.<sup>2</sup> This parallel ‘Internet underground’ is inhabited by virtual robots, such as webbots, spiders and screen scrapers. Their ‘body’ is constituted by lines of computer code and they work for us in order to supply us with amazing services that improve our lives.

On a daily basis, we take advantage of them in order to read our fresh news before breakfast, to find a good connection to our office or a special diet lunch at a local restaurant, to check the availability of flights for our upcoming business trip or just to compare prices of different suppliers in the course of our work. Some of these services are based on what is called ‘data scraping’, a technique in which a computer program known as a robot extracts data from human-readable output coming from another program. Google, Bing or Yahoo, all use this technique daily. Meta search engines are no exception. Met search engines are services that enable search in multiple searchable databases, They also operate through the use of robots that visit third party websites, scrape data and present it to humans in a web-browser. All of this happens most of the time without first seeking a permission from the source of such data. This ‘consent-architecture’ thus strongly favors decentralized innovation.<sup>3</sup>

In Europe, many civil lawsuits have been filed against the operators of meta search engines over the past several years. Very recently, operation of many of these search engines was recently escalated to the Court of Justice of the European Union for further scrutiny. In December 2013, the Court handed down its *Innoweb* C-202/12 ruling,<sup>4</sup> where it held that the operation of meta search engines is likely to infringe database rights of indexed websites if the databases powering these sites constitute protectable subject matter. In order to assess the impact of this ruling on

1. IMPRS-CI Doctoral Research Fellow at the Max Planck Institute for Innovation and Competition in Munich; Visiting Researcher at the Center for Internet and Society at Stanford University; Author would like to thank to Arthur von Martels and Sandeep M. Hedge for their valuable assistance on this paper.

2. MICHAEL SCHRENK, *WEBBOTS, SPIDERS, AND SCREEN SCRAPERS* (Serena Yang et al. eds., 2d ed. 2012).

3. See BARBARA VAN SCHEWICK, *INTERNET ARCHITECTURE AND INNOVATION* (2012).

4. See Case C-202/12, *Innoweb BV v. Wegener ICT Media BV*, 2013 EUR-Lex CELEX LEXIS (Dec. 19, 2013).

different types of meta search engines, the broader legal and practical consequences of this ruling need to be examined.

The paper proceeds in the following parts. Part I outlines the societal and business context in which different meta search engines today operate. In part II, the reader is introduced to some key legal concepts of European *sui generis* database protection, including relevant investment and the scope of these rights. Part III provides a brief summary of the European national cases examining meta search engines and database protection. Part IV explores the *Innoweb* decision of the Court of Justice of the European Union. In the following part V, the findings of the paper are summarized and critically analyzed against the business realities in which the meta search engines operate. Part VI briefly concludes the investigation.

### A. Evolution

The first generation of meta search engines arose around 2000, when Sidestep and FareChase were launched as the first two vertical online search engines for the air travel industry.<sup>5</sup> Although, the then used screen-scraping technology often led to server traffic congestion, the industry was also realizing a decrease in the distribution costs this was leading to.<sup>6</sup> Some suppliers adjusted to the needs of screen-scraping technique, others started providing more convenient XML feeds<sup>7</sup> to meta search engines in order to avoid being screen-scraped. The launch of Kayak (2005) started the second generation of these services. Because it substantially improved the price transparency and enabled search based on the product characteristics, it soon became the market leader among the meta search engines. When Kayak acquired Sidestep, it gave Kayak the scale to break profitability<sup>8</sup> and meta search engines in general started expanding. Kayak was followed by Skyscanner, Momondo, Lilingo, Trivago, Tripadvisor and others from different fields (e.g. cars, insurance, bank fees, electricity, etc.).

The advent of meta search in the travel distribution market was a great example of disruptive innovation.<sup>9</sup> Services of meta search engines naturally started competing with an older form of travel distribution from late 1970s. Travel industry at the time was marked with high barrier-to-entry imposed by the complexity of distribution of the products.<sup>10</sup> Because the market structure of this older system was oligopolistic, it was also enjoying higher margins<sup>11</sup> and consumers were also

5. Nelson Granados et. al., *The Emerging Role of Vertical Search Engines in Travel Distribution: A Newly-Vulnerable Electronic Markets Perspective*, PROC. OF THE 41ST HAW. INT'L CONF. ON SYSTEM SCIENCES 5 (2008), available at [http://www.hicss.hawaii.edu/hicss\\_41/decisionbp/oscse11.pdf](http://www.hicss.hawaii.edu/hicss_41/decisionbp/oscse11.pdf).

6. *Id.*

7. Extensible Markup Language (XML) is a markup language that defines a set of rules for encoding documents in a format that is both human-readable and machine-readable.

8. Hugo Burge, *How Meta-Search Became Mainstream and Why it's Becoming Mega Important*, EYEFORTRAVEL (Jul. 16, 2013), available at <http://www.eyefortravel.com/distribution-strategies/how-meta-search-became-mainstream-and-why-it%E2%80%99s-becoming-mega-important>.

9. The term disruptive technologies was coined by Joseph L. Bower and Clayton M. Christensen in their article Joseph L. Bower & Clayton M. Christensen, *Disruptive Technologies: Catching the Wave*, 73 HAR. BUS. REV., no. 1, 1995, at 45, 47.

10. Granados, *supra* note 5, at 1.

11. *Id.* at 7.

paying correspondingly higher prices. Even though the old distribution system was never entirely replaced, the de-intermediation, the change of the market structure and the increased market transparency (price, quality and other good characteristics) all caused by meta search engines led to a decrease in the end prices for consumers.

Naturally, striking changes like these did not and will not necessarily follow in all the other industries, where meta search engines start operating. Their entrance in usually more competitive markets thus can have less dramatic consequences for the established players.<sup>12</sup> In these industries, however, legal objections to meta search arise only seldomly. As will be shown in the comparative part, most of the time it is less competitive monopolistic or oligopolistic market structures that lead to such objections and follow-on lawsuits.

### B. Business models

Meta search engines today operate with relatively low revenues per individual user.<sup>13</sup> They receive the revenue by either charging their users or their suppliers (e.g. airline companies). In addition, they earn by selling the advertising, complementary products, or collected information about behavior of their consumers. Kayak – a travel comparison website, for instance, does not charge its users. The booking is carried out by consulting the source website, but sometimes even directly<sup>14</sup> from Kayak’s website. It earns its revenue via referrals to travel suppliers and on-line travel agencies (airline ticket referrals – 27%, hotel referrals – 14%, and car rentals & cruise referrals – 3% of its total revenue), and from advertising placements on its websites and mobile applications (58% of the total revenue).<sup>15</sup>

Meta search engines sometimes charge as two sided markets, i.e. one side of the market (suppliers) would subsidize the service for the benefit of the other side (users) that is more valued. But sometimes they operate under a more regular merchant configuration,<sup>16</sup> charging buying users (not suppliers) for the convenience and the decrease in the transaction (search) costs they are provided with.

Recently, meta search engines increasingly try to improve their control of the booking processes<sup>17</sup> (e.g. direct booking) and squeeze additional revenue from it. Strong diffusion of mobile phones is only likely to increase this trend due to poorer user experience.<sup>18</sup> Greater integration of the booking processes into their business

12. This might be also one of the reasons why we generally see less litigation in this part of the market.

13. *Movers in Meta-Search: Path Breaking Innovation in The Quest for Bookings*, EYEFORTTRAVEL (Feb. 13, 2013). <http://www.eyefortravel.com/distribution-strategies/movers-meta-search-path-breaking-innovation-quest-bookings> [hereinafter *Movers*].

14. See Trefis Team, *How Kayak’s Business Model Creates Value*, TREFIS (Jan. 11, 2013), <http://www.trefis.com/stock/kyak/articles/162414/how-kayaks-business-model-creates-value/2013-01-11>.

15. *Id.*

16. For a discussion of merchant versus two sided-market configuration see Andrei Hagiu, *Merchant or Two-Sided Platform?*, 6 REV. NET. ECON. 2 (2007).

17. *Movers*, *supra* note 13.

18. *Movers*, *supra* note 13, where the director of Asia Pacific for SkyScanner says: “It makes a lot of sense on mobile devices where the downstream experience is often poor. We will see more of this.”

models, however, also leads to more significant resistance and legal problems from the indexed websites as it often tips the balance of mutual profitability.

## II. LEGAL SITUATION

Although this article will pay a special attention to the European *sui generis* right, this is not meant to suggest that the *modus operandi* of the meta search engines, and data scraping in general, operates in some form of legal vacuum outside of this special right. Copyright law, law of unfair competition and even contract law can all to a certain extent pose an obstacle to their operation. This, of course, greatly depends on the jurisdiction. Both very relaxed copyright thresholds<sup>19</sup> and/or a restrictive interpretation of unfair competition laws can lead to very strong protection of investment in the non-original databases. Due to a diversity between existing approaches, this paper examines only legal framework under the European *sui generis* database right, which is a unique approach in protecting investment in the non-original subject matter. By definition, the paper therefore only discusses those scenarios when meta search engines process non-original elements protected under this regime. Thus excluded here is any re-use of creative elements such as pictures or articles from its investigation and national protection regimes going beyond the European law.<sup>20</sup>

### A. Database right

Directive 96/9 on the legal protection of databases (Directive) is based on an assumption that because of the disproportion between the fixed costs needed to create a database<sup>21</sup> and the marginal costs needed to copy or access it,<sup>22</sup> the necessary investment of human, technical and financial resources can be only recouped<sup>23</sup> if artificial scarcity by means of a new intellectual property right is created on the market.<sup>24</sup> This newly acquired exclusive right would then enable

19. See *Ryanair Ltd. v. PR Aviation BV*, Case C-30/14 (pending case). For a discussion of an old Dutch copyright doctrine of 'Geschriftenbescherming,' see also Bernt Hugenholtz, *Goodbye, Geschriftenbescherming!* KLUWER COPYRIGHT BLOG (Mar. 6, 2013), <http://kluwercopyrightblog.com>.

20. Any extra national doctrines of misappropriation that go beyond the *sui generis* right are also outside of the scope of this article. These national extensions of *sui generis* protection, however, are not without limitations, because they must be justified against the basic freedoms of the European union under Article 37 of the Treaty about Functioning of the European Union (TFEU). See Annette Kur, *Nachahmungsschutz und Freiheit des Warenverkehrs - der wettbewerbsrechtliche Leistungsschutz aus der Perspektive des Gemeinschaftsrechts*, FESTSCHRIFT FÜR EIKE ULMANN (Hans J Ahrens & Joachim Bornkamm & Hans P Kunz-Hallenstein ed..2006).

21. See Council Directive 96/9, recital 40, 1996 O.J. (L 077) 20, 28 (EU) [hereinafter Directive 96/9] ("any investment in obtaining, verifying or presenting the contents of a database for the limited duration of the right; whereas such investment may consist in the deployment of financial resources and/or the expending of time, effort and energy").

22. See *id.* at recital 7.

23. See *id.* at recital 12 ("an investment in modern information storage and processing systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of makers of databases").

24. Thus relying on 'temporary monopoly' obtained by first-mover advantage. Suzanne Scotchmer notes that "In practice, there is little or no evidence that lack of protection has impeded the

producers of such databases, for a limited time, not only to charge the price above the marginal cost for use of its database, but also to select other market participants who can take advantage of it, and thus boost the database production.

Although, the empirical validity of this proposition is intensively debated,<sup>25</sup> the Court of Justice of the EU is more and more often asked to flesh out the different concepts behind this investment protection. Even though the Court on the surface reflects the utilitarian rationale behind such protection,<sup>26</sup> the latest decisions<sup>27</sup> show a certain disconnection between the incentive paradigm and the application of granted rights in the practice.

### B. (Ir)relevant investment

Metaphorically speaking, you don't only need to bring a sufficient amount of water (qualitatively and quantitatively substantial investment) to cultivate the right fields (subject matter), but you also have to put it in the rights buckets (types of investment). If you fail to do so, you will not harvest any *sui generis* protection.

The subject matter of the *sui generis* right is defined as a "collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means" (Art. 1(2) Directive). Or as English judge Laddie put it, a database is a "searchable collection of independent works."<sup>28</sup> The threshold triggering the protection is defined as the "qualitatively and/or quantitatively substantial investment in either the obtaining, verification or presentation of the contents" (Art. 7(1) Directive). Although the language of 'quality' and 'quantity' of an investment is alternative, the "deployment of financial resources and/or the expending of time, effort and energy" must at least be of some relation to value for the end-database.<sup>29</sup> Otherwise, the Directive would unjustifiably favor companies of bigger scale and the protection could be uncontrollably inflated by buying even valueless or otherwise cost-free parts of the database just to obtain the protection.<sup>30</sup> After all, the mere fact that people trade something

creation of new databases." SUZANNE SCOTCHMER, *INNOVATION AND INCENTIVES* 82 (MIT Press Books 2006).

25. See Matthias Leistner, *The Protection of Databases*, RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT (Estelle Derclaye ed., 2009) (discussing the methodology of the EU study on the effectiveness of the protection); ROBIN E. HERR, *IS THE SUI GENERIS RIGHT A FAILED EXPERIMENT?* (Djoef Publishing, 2008) (discussing justification in general); JOSEF KRÄHN, *DER RECHTSSCHUTZ VON ELEKTRONISCHEN DATENBANKEN UNTER BESONDERER BERÜCKSICHTIGUNG DES SUI-GENERIS-RECHTS* (Verlag, 2000) (discussing justifications in general).

26. See generally Case C-203/02, *The British Horseracing Board Ltd. and Others v. William Hill Org. Ltd.*, 2004 EUR-Lex CELEX LEXIS (Nov. 9, 2004), BB 21.5.2(a).

27. See generally Case C-202/12, *Innoweb BV v. Wegener ICT Media BV*, 2013 EUR-Lex CELEX LEXIS (Dec. 19, 2013). See also Case C-202/12, *Innoweb BV v. Wegener ICT Media BV*, 2013 EUR-Lex CELEX LEXIS (Dec. 19, 2013).

28. See *British Horseracing Board Ltd.*, Case C203-02, EUR-Lex CELEX LEXIS, ¶ 3.

29. *Id.* at ¶ 70. *Per analogiam* to assessing of the scope, where the investment "must be assessed in relation to the volume of the contents of the whole of that database." note 26.

30. One can especially imagine this type of transactions among subsidiaries or within other market transactions, where either the cost cannot be easily attributed to the exact goods exchanged or where transactions only serve the purpose of obtaining the protection. This latter case makes a commercial sense especially if the benefits of such protection offset the cost of paying for the data. The way to

for money does not automatically mean that it should be protected or treated as a relevant investment.

According to the CJEU, what matters is that “the *obtaining* of those materials, their *verification* or their *presentation* [...] required substantial investment in quantitative or qualitative terms, which was *independent of the resources used to create those materials*.”<sup>31</sup> The Court then uses the following criteria for investment (types of investments) to establish the extent of relevant investment:

- An investment in the obtaining content requires the maker to “seek out existing independent materials and collect them in the database;”<sup>32</sup>
- An investment in the verification of content requires “ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation;”<sup>33</sup>
- An investment in the presentation of content requires resources to be “used for the purpose of giving the database its function of processing information;”<sup>34</sup>
- Any other investments should not be taken into account;<sup>35</sup>

It must be noted that the party claiming protection has the burden of proving all the facts substantiating the relevant investment, including in which of types of investments it belongs.<sup>36</sup> This is an important design choice of this investment protection. Its grant can sometimes even lead to situations where two companies organizing the same data, but from different sources, could be treated differently for the purposes of granting protection. This is because measuring an investment is not objective, but rather subjective.<sup>37</sup> Therefore, from the user’s perspective, a database can sometimes appear as a black-box, preventing its user from determining with certainty whether it is protected or not. The reason for this is that many ‘investment decisions’ happen behind the scenes, and thus are not generally accessible otherwise. This situation is unlike copyright protection, which provides more transparency for such assessments.<sup>38</sup> This current lack of transparency should, in turn, create pressure to require stricter requirements on the disclosing and proving of actual investments. As the law currently stands, the chances of users of challenging the basis for the investments are very limited.

prevent this would be to test the importance of the investment for protected subject matter and to exclude also creation of the data when its merely outsourced to third parties (similar point raised by Herr, *supra* note 25, at 134, who notes that protecting such databases would be “wasteful and should be eliminated.”).

31. See *British Horseracing Board Ltd.*, Case C203-02, EUR-Lex CELEX LEXIS ¶ 35.

32. *Id.* at ¶ 31.

33. *Id.* at ¶ 34.

34. See Case C-46/02, *Fixtures Marketing Ltd. v. Oy Veikkaus Ab*, 2004 EUR-Lex CELEX LEXIS ¶ 37 (Nov. 9, 2004).

35. See *British Horseracing Board Ltd.*, Case C203-02, EUR-Lex CELEX LEXIS, ¶ 38.

36. See Directive 96/9, *supra* note 21, at recitals 53, 54.

37. The issues such as effectiveness or meaningfulness of the investment is not taken into account. See ANDREAS WIEBE & ANDREAS LEUPOLD, *RECHT DER ELEKTRONISCHEN DATENBANKEN* 15 (2004).

38. Similar point is raised by Herr, *supra* note 25, at 127.

As mentioned earlier, an investment is only protected if it is first directed into what qualifies as a database and then if the investment is spent on either obtaining, verifying or presenting content. So how is this reflected in case of meta search? The databases that serve as sources for meta search engines are of very different types. Sometimes they are a ‘by-product’<sup>39</sup> of the main commercial activity of the online indexed suppliers (e.g. flights databases). In other cases, they directly support the main activity of the indexed supplier (e.g. review websites). Sometimes the contents of the database are also internally created (e.g. real estate dealers ads). And sometimes third parties create them for the database maker (e.g. user ads).

Because the Directive aims to incentivize “the person who takes the initiative and the risk of investing,”<sup>40</sup> one needs to question if all such database makers really do take a risk of investing, as some of these individuals would create these databases anyway. And hence, one also wonders if individuals really do need the inducement of exclusive rights to create databases if the databases would be created even in the absence of these rights. It can be argued that supporting such databases with an exclusive right does not promote “the establishment of storage and processing systems for existing information,”<sup>41</sup> because the makers of a collection of data already need the database for their regular course of business. Based on a similar rationale, the Dutch courts in the past followed so-called spin-off theory and were rejecting protection to databases that were by-products of some non-database activity.<sup>42</sup>

This spin-off theory, however, also has its drawbacks when considered from an incentive perspective. One could argue that an airline such as Ryanair can be also induced by exclusivity to make additional or parallel investments in the organization of its database beyond some ‘operational minimum’ needed to run its business. Probably for these reasons the Court of Justice of the European Union tries to overcome the dilemma of induced vs. non-induced non-original databases by developing a test of relevant investments. The Court rejected spin-off theory as such in *BHB v. Hill*, where it noted that “the fact that the creation of a database is linked to the exercise of a principal activity in which the person creating the database is also the creator of the materials contained in the database does not, as such, preclude that person from claiming the protection of the *sui generis* right.”<sup>43</sup> At the same time, the Court, by re-calibrating the debate to another level also implicitly confirmed some of the rationale behind barring protection to many spin-offs. Namely, that a principal-activity effort spent on creation of the materials of the database, which would be probably performed anyway, does not qualify for a protection.

39. See Leistner, *supra* note 25, at n.26 (sometimes also referred to as a “spin-off”). See Stephen M. Maurer & Berndt Hugenholz & Harlan J. Onsrud, *Europe’s Database Experiment*, 294 SCIENCE 789 (2001). Or alternatively the term “synthetic data” has also been used in this context.

40. See Directive 96/9, *supra* note 21, at recital 41.

41. See *The British Horseracing Board Ltd. and Others v. William Hill Org. Ltd.*, 2004 EUR-Lex CELEX LEXIS ¶ 31 (Nov. 9, 2004).

42. See Maurer & Hugenholz, *supra* note 39, at 790.

43. See *British Horseracing Board Ltd.*, Case C203-02, EUR-Lex CELEX LEXIS, ¶ 35.

But even the presented distinction between relevant and irrelevant investment<sup>44</sup> is not as easy to apply as it seems.<sup>45</sup> Let's demonstrate this in the examples of meta search for a) airline tickets, b) used cars and c) user reviews.

- Meta search engines for airline tickets source databases that are a by-product of the main activity, which means that both the creation of the independent content—irrelevant investment—and also its organization (obtaining, verification, presentation) into a database—relevant investment—are done by the same entity perhaps in course of the same business. Airlines like Ryanair greatly need this kind of information for a proper operation of its flight business and, of course, its own resale of the tickets. What amount of investment goes beyond some 'operational minimum' necessary for the creation of data is difficult to say and also to estimate, even for Ryanair. How does one distinguish between an investment in the system that is used to type in or generate the flights connections, and an investment in the system that then organizes them into a structure, if both of them are developed as one computer system? In such case, the investments are mixed, and unless they can be separated, a single regime is needed.
- Meta search engines for used cars, on the other hand, source information that is posted by third parties on their platforms. This information could be either regular user-generated content, or submitted by contracted submitters. An example is when information is collected within car resale software that is licensed to car dealers for accounting purposes.<sup>46</sup> The question is whether the investment in creation of the software is still an investment in creating data, or if it is an investment in obtaining data. And does it matter if the software is licensed to these submitters for a fee? An argument can be made in support of either side. But if viewed through the incentive paradigm, the software-licensing context suggests that the granting of protection was not necessary to compile the database, if it was provided as software. On the other hand, if the software was provided free of charge or below value in order to collect the data for a platform, then the protection should be granted, as the investment risk is in the collection itself.
- Meta search engines for user reviews would usually source information posted by third party users on their respective rating or ecommerce platforms (e.g. Amazon). Such compilations of user reviews help to improve either sold services, or are a service in itself. In either case, reaching out

44. See Leistner, *supra* note 25, at 436.

45. See Leistner, *supra* note 25, at 436 n.31.

46. See *Digital Disruption on the Farm*, THE ECONOMIST, May 24, 2014, available at <http://www.economist.com/news/business/21602757-managers-most-traditional-industries-distrust-promising-new-technology-digital>. This example is in fact commonplace. An example is prescriptive planting, where farmers feed the predictive systems with data; *Digital disruption on the farm*, THE ECONOMIST, May 24, 2014; see also *Getting Personal*, THE ECONOMIST, Apr. 16, 2009, available at <http://www.economist.com/node/13437974> (personalized medicine, where data comes from patients or their doctors, THE ECONOMIST, Apr. 16, 2009).



to users to submit the reviews is more easily qualified as the obtaining data. However, the advertising expenditure *per se* can still in itself be an imperfect estimation of an investment, because unless specifically targeted, it primarily aids the sales, not reviews.

The three examples above pose, in one way or another, the problem in distinguishing between obtaining and creating of data, and subsequently the problem of what to do with mixed investments. Regarding the latter, the Court of Justice of the EU in its *Fixtures Marketing C-46/02* decision, endorses the view that investments “indivisibly linked to the creation of those data”<sup>47</sup> and “too closely linked”<sup>48</sup> investments are irrelevant. For the former, the Court did not yet develop any test that could be used. In the *Fixtures Marketing* decision, this distinction was arguably more obvious. This, however, should not mislead us into believing that this is the case most of the time. On the contrary, as the three examples of database sources above have shown, these distinctions need more than just linguistic factors in order to be predictably solved.

One solution is suggested by Leistner,<sup>49</sup> who proposes to read *BHB v. Hill* narrowly so that the grant or refusal of the protection should depend on whether granting rights creates some barriers to competition.<sup>50</sup> This approach, however, does not satisfy utilitarian grounds for granting protection—under the incentive paradigm that precedes post-grant effects on the competition. Instead, it would mean that even those databases which did not need the special inducement of exclusive rights will be granted protection as long as they are not what he refers to as ‘sole source databases,’ or created databases that cannot be obtained anywhere else (e.g. telephone listings, matches fixtures, etc.).<sup>51</sup> Leistner’s reading of *BHB v. Hill*’s seems to miss the point that the court based its rejection, not on the post-grant effects on competition, but rather on the absence of any need of inducement by some separate database right.<sup>52</sup> Self-creation of data helps to weed out the cases where the investment would be made even in the absence of protection, or in a completely different subject matter. In both of these cases, the lack of any market failure would prevent its deployment.

Let’s demonstrate this with an example. If meteorological stations create databases (collections of information) as their main activity (carrying out measurements),<sup>53</sup> the correct question is not whether the granting of such protection would

47. See Case C-46/02, *Fixtures Marketing Ltd. v. Oy Veikkaus Ab*, 2004 EUR-Lex CELEX LEXIS ¶ 44 (Nov. 9, 2004). *Fixtures Marketing*, 2004 I-10365, ¶ 44.

48. See *id.* at ¶ 46.

49. See Leistner, *supra* note 25, at 434-435, 446.

50. See SCHRENK, *supra* note 2, at 436-437 (noting that this ‘competition-oriented’ definition of relevant investment can avert most of the potential structural and typical dangers of the *sui generis* right).

51. *Id.* at 437.

52. See Maurer & Hugenholz, *supra* note 39, at 790.

53. Herr, *supra* note 25, at 133. If the measurements need to be supported by such an incentive, then the database protection would in fact protect the effort of measuring, and not of organization of that measuring in some database, similar in relation to “protection of data collected by satellites, *supra* note 24, at 133.” See Wiebe & Leupold, *supra* note 37, at 16. Wiebe et al. suggest to distinguish between measuring/observation of data on the one hand, and creation of the data on the other. Only the first, in their opinion, should qualify for protection.

lead to anti-competitive results, but whether society needs to induce the creation of these databases with exclusive rights in the first place.<sup>54</sup> And if, in their absence, the same amount of investment would be made. The fact that such a grant would not create problems for competition since such meteorological data can be obtained in parallel by competing stations does not, in itself, legitimize the grant on the utilitarian grounds upon which the Directive is based. After all, we do not grant protection over new subject matter *only* because it has no anti-competitive effects. Instead, we look for market failures.

Therefore the requirement of separable substantial investment in obtaining data should serve the following goals. First, the database maker must clearly be able to identify and estimate the part of the relevant investment that was made. General evidence, without the identification of exact categories is not enough. When in doubt, or when the maker fails to do so, the protection should not be granted. Secondly, the fact that irrelevant investments like creation of data are done at the same time, or even in course of same business, should not matter as long as identification and isolation are successful. Third, the division between obtaining and creating data should depend on the context of activity in which the investment was made and connection to the end-database. It is submitted that the case-law of the CJEU should in this last respect be read through the incentive paradigm. From this perspective, sorting out irrelevant investments serves to exclude databases whose creation are not incentivized by the grant of any database rights.<sup>55</sup>

Applying this perspective to these examples, we now arrive at the following results. If a database operator give a database additional functions to process the information, this and *only this* investment needs to be viewed as relevant. For airline databases like Ryanair, this means that their investment can be still protected even if they also produce their data, but only if they take and document any additional expenses required by the functionality of their databases. But protection will still extend only to this substantial relevant effort, not to the irrelevant efforts that are indivisibly linked to the creation of database entries (e.g. dates of flights, prices, etc.).<sup>56</sup> If applied to our car dealer's accounting software, protection would be granted only if exploitation of the software was not sufficient to recoup the investment. Hence, an artificial creation of a separate market for the exploitation of data is necessary. Lastly, if applied to user-generated reviews, the database housing the reviews would be protected as long as the platform operator can separate the investment from the collection of data itself.

In conclusion, an investor receives an exclusive right only over separable and provable substantial investment in obtaining, presenting and verifying the elements of a database. The operator will not receive protection for other investments in the database, even if they are inseparably linked to obtaining, presenting and verifying

54. See Leistner, *supra* note 25, at 438, 455 (discussing meteorological data). See also Maurer & Hugenholtz, *supra* note 39, at 790. Hugenholtz, on the other hand, classifies this as spin-off data that should not be protected.

55. See Herr, *supra* note 25, at 130, 198 (suggesting similar approach).

56. See ESTELLE DERCLAYE, DATABASES SUI GENERIS RIGHT: WHAT IS A SUBSTANTIAL INVESTMENT? A TENTATIVE DEFINITION (2005), *reprinted in* NEW DIRECTIONS IN COPYRIGHT LAW 3 (Fiona Macmillian ed. 2007); see also THE INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION 2, 4 (2005) (noting that these databases probably should not enjoy protection).

content. At the same time, obtaining contents of a database does not cover its creation. The division between obtaining content and creating content cannot be derived *semantics*, but only from the context in which data collection occurs. The CJEU, has yet to provide the ultimate test for this separation. The author suggests that the court examine the business context in which the investment was made to determine whether granting exclusive rights is necessary to recoup the investment.

### C. Scope of the right

When an investment effort is directed into relevant subject matter in a necessary scale, the investor is granted the following scope of exclusivity over his achievement:<sup>57</sup>:

- Protection against permanent or temporary *copying of the substantial part* of the contents of a database (Extraction),
- Protection against *making available to the public of the substantial part* of the contents of a database (Re-utilization),
- Protection against the *repeated and systematic copying and making available to the public of insubstantial parts* of the contents of the database, provided that such acts conflict with a normal exploitation of the database or unreasonably prejudice the legitimate interests of its maker.

As the Directive explains in one of its recitals, it “seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collection the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor.”<sup>58</sup> According to the Court, the *sui generis* regime aims at protecting the database maker against depriving him of revenue which should have enabled him to redeem the cost of the investment.<sup>59</sup> The Directive, however, does not prohibit any kind of taking of advantage from the protected investments, but only one that “go[es] beyond users legitimate rights and thereby harm[s] the investment.”<sup>60</sup> This should also include “the manufacture of a parasitic competing product” or acts causing “significant detriment, evaluated qualitatively or quantitatively, to the investment.”<sup>61</sup>

In other words, the scope of the rights also takes into account conflicting interests (other policy considerations), and thereby does not protect *any* kind of business model, which the maker of a database uses in order to recoup the investment. And even though the maker of a database is naturally free to choose such a business model, database law can reject its safeguarding entirely, or to some extent, provided protection as necessary in order to safeguard legitimate interests of the society. It is for these reasons that part V of this paper argues that incorporating

57. See Leistner, *supra* note 25, at 441. The elements are never a subject matter of the database, but an effort or achievement is.

58. See Directive 96/9, *supra* note 21, at recital 39.

59. See Case C-203/02, *The British Horseracing Board Ltd. and Others v. William Hill Org. Ltd.*, 2004 EUR-Lex CELEX LEXIS ¶ 51 (Nov. 9, 2004), *BHB v. Hill*, 2004 I-10415, ¶ 51.

60. See Directive 96/9, *supra* note 21, at recital 42.

61. See *id.*

policy considerations of market transparency should have already been addressed in the infringement analysis, and not in the context of possible exceptions.

Therefore, even though rights should be construed broadly,<sup>62</sup> and also cover use for non-commercial purposes,<sup>63</sup> the exact scope needs to be adjusted to address broader societal needs, and not only blindly follow business models used in certain cases.<sup>64</sup> Moreover, the basic structure of the scope needs to be read together with the preconditions of such protection.<sup>65</sup> This seems logical since it is difficult to assess what is a re-use of substantial part of an effort, if one does not know what is the relevant effort that serves as a benchmark for this qualitative or quantitative exercise.<sup>66</sup> For instance, if Ryanair, deserves protection for its additional investments efforts, its protection can not spill-over the parts of the database that are composed of the irrelevant subject matter.

More importantly, the protection of an effort does not extend to the mere elements of a database.<sup>67</sup> For this reason, the consultation of the protected database must never fall into the scope of the right.<sup>68</sup> However, if a mere consultation of the contents becomes systematic, so that cumulatively the obtained relevant investment is substantial, such use of the database starts falling into the scope of the right,<sup>69</sup> unless such acts do not conflict with a normal exploitation of the database or unreasonably prejudice the legitimate interests of its maker.

### III. NATIONAL CASE-LAW

Since the early days of the database right, various plaintiffs have tried to invoke this right to protect against data scraping carried out by the meta search engine operators. The most active one on the European continent was undoubtedly Ryanair, a low cost airline based in Ireland. Ryanair pursues strong business motifs with its litigation. It is intensively focused on building a corporate image of being the cheapest European airliner. It seeks to earn its revenue by selling complementary products to which consumers are exclusively channeled,<sup>70</sup> an effort that meta search engines could effectively undermine.<sup>71</sup>

62. See British Horseracing Board Ltd., Case C203-02, EUR-Lex CELEX LEXIS, ¶ 51; BHB v. Hill, 2004 I-10415, para 51, [2008] Case C-304/07, Directmedia Publishing GmbH v. Albert-Ludwigs-Universität Freiburg, 2008 EUR-Lex CELEX LEXIS ¶ 31 (Oct. 9, 2008).

63. See British Horseracing Board Ltd., Case C203-02, EUR-Lex CELEX LEXIS, ¶ 48., BHB v. Hill, 2004 I-10415, ¶ 48.

64. Bgh, Urteil, Flugvermittlung im Internet, [2004] I ZR 224/12 (Ger.). A similar argument was presented by the BGH in its latest screen-scraping decision (Case I ZR 224/12), where it rejected to protect the mere expression of business 'will' of the plaintiff.

65. See British Horseracing Board Ltd., Case C203-02, EUR-Lex CELEX LEXIS, ¶ 81. BHB v. Hill, 2004 I-10415, ¶ 81.

66. See *id.* at ¶ 69–71.

67. See Directive 96/9, *supra* note 21, at recital 45.

68. See British Horseracing Board Ltd., Case C203-02, EUR-Lex CELEX LEXIS, ¶ 55., BHB v. Hill, 2004 I-10415, ¶ 55.

69. See *id.* at ¶ 83; See also Leistner, *supra* note 25, at 430, n.13.

70. *The Next Big Thing?*, THE ECONOMIST, (May 21, 2014), available at <http://www.economist.com/blogs/gulliver/2014/05/google?fsrc=rss>. Ryanair seems to enter into a cooperation only with Google THE ECONOMIST, May 21, 2014; *Comparative Advantage*, THE ECONOMIST, (Jan. 30, 2014), available at <http://www.economist.com/blogs/gulliver/2014/01/flight->

### A. Ireland

Since 2008, Ryanair initiated several parallel lawsuits against meta search engines in Ireland. Until today, none of the following pending cases of *Ryanair v. Bravofly*,<sup>72</sup> *Ryanair v. Billigfluege.de*,<sup>73</sup> *Ryanair v. Onthebeach*,<sup>74</sup> *Ryanair v. Ticket Point Reisebüro*,<sup>75</sup> *Ryanair Ltd. v. Club Travel Limited*,<sup>76</sup> and *Ryanair Ltd v. Unister*,<sup>77</sup> none was/were decided on the merits. Some were already dismissed due to jurisdictional issues, and in others, the request for preliminary injunction was denied.

### B. Italy

In 2013, the Milan court found in *Ryanair v. Viaggiare*<sup>78</sup> that Viaggiare's activity of data scraping from Ryanair's website for the purposes of operating a flight meta search engine, did not affect its investment relevant for a database right.<sup>79</sup> Also since Ryanair holds a monopoly in the downstream market for the provision of information for its own flights (sole source), it abused its dominant position by rejecting access to an essential facility it owns by refusing the access to the database.<sup>80</sup>

### C. France

In 2007, Ryanair initiated proceedings against Opodo, a company operating a flight meta search engine. Opodo's business model was based on charging users an additional fee. The Grand Instance Court in Paris rejected (2010)<sup>81</sup> the action find-

comparison-websites. Google's CEO was recorded to say that: "It'll blow comparison sites like Skyscanner out of the water," Michael O'Leary, Ryanair's boss, told the Irish Independent in his first interview about the partnership. Given that European market leader Skyscanner cannot display Ryanair's prices, he could well be right.

71. Flugvermittlung im Internet, Case I ZR 224/12, 2004. BGH pronounced that this interest *per se* cannot be protected.

72. *Ryanair Ltd v. Bravofly and Anor* [2009] IEHC 41 (Jan. 29, 2009).

73. *Ryanair Ltd v. Billigfluege.de GMBH* [2010] IEHC 47 (Feb. 26, 2010).

74. *Ryanair Ltd v. On the Beach Ltd* [2013] IEHC 124 (Mar.22, 2013).

75. *Ryanair Ltd. v. Billigfluege.de GMBH* [2010] IEHC 47 (Feb. 26, 2010).

76. *Ryanair Limited v. Club Travel Limited* [2012] IEHC 165 (Mar. 23, 2012).

77. *Ryanair Ltd. v. Unister* [2013] IESC 14 (Mar. 13, 2013).

78. *Ryanair Ltd. v. Viaggiare*, Case 7825/2013, Trib. Di Milano, July 6, 2013 (It.).

79. See Gabrielle Accardo, *Milan Court Finds That Ryanair Abused its Dominant Position in the Market for Online Travel Agencies*, TTLF TECHNOLOGY LAW & POLICY NEWS (Jul. 10, 2013), <http://tlfnews.wordpress.com/2013/10/07/milan-court-finds-that-ryanair-abused-its-dominant-position-in-the-market-for-online-travel-agencies/>.

80. See, e.g., Case C-418/01, *IMS Health GmbH & Co. KG v. NDC Health GmbH & Co. KG*, 2004 EUR-Lex CELEX LEXIS (Oct. 2, 2003); see also Case C-241/91, *Radio Telefis Eireann and Indep. Television Publ'n. ltd. v. Comm'n of the European Comm.*, 2005 EUR-Lex CELEX LEXIS (Apr. 6, 1995).

81. See *Ryanair Ltd. v. Opodo*, Tribunal de Grande Instance de Paris, Apr. 9, 2010 (Fr.); see also Estelle Derclaye, *Recent French Decisions on Database Protection: Towards a More Consistent and Compliant Approach with the Court of Justice's Case Law?* 3 EUROPEAN JOURNAL OF LAW AND TECHNOLOGY 2, 4 (2012).

ing no infringement of a database right as Ryanair did not prove to have made substantial investments necessary to acquire such protection. Furthermore, the court found that Opodo was not bound by the terms of service on the website, and that the defendant's conduct did not constitute a tort of parasitic unfair competition as its operation in fact brought Ryanair new customers.

#### D. Spain

In 2012, the Spanish Supreme Court decided the case of *Ryanair v. Atrápalo*.<sup>82</sup> Atrápalo is a Spanish meta search engine that engages in screen scraping of the Ryanair's website in order to provide its comparison service to users. It adds a small fee to the flights. The court confirmed lower instance decisions and based on CJEU case law dismissed Ryanair's copyright, *sui generis* database right and unfair competition claims.<sup>83</sup> As to a possible infringement of a database right, the court concluded that Ryanair's substantial investment was not directed to the obtaining of the data, but towards a creation of the information.<sup>84</sup> Similar arguments and outcomes were encountered in *Ryanair v. eDreams*<sup>85</sup> that also ended with a dismissal of Ryanair's claims.

#### E. Denmark

In 2001, the first instance court in Copenhagen ruled in a dispute *Home v. Ofir* between a Danish real estate agency and *Ofir* a real estate aggregator/search engine. The latter was producing deep links to real estate advertisements on the Internet, including advertisements from the market leading estate agency chain *Home*. In the first instance judgment, the deep linking was found to infringe the database right of the plaintiff. In 2006, however, the second instance court, Danish Maritime and Commercial Court, took the exactly opposite position. The court accepted the use of deep links stressing that search engines and deep links are desirable for the functioning of the Internet.<sup>86</sup>

82. Ryanair Ltd. v. Atrápalo, Case 572/2012, Tribunal Supremo, Oct. 9, 2012 (Spain).

83. Roze Tailer, *RYANAIR: Screen Scrapers, Databases, Free-Riding and Unfair Competition in Spain*, SCREEN SCRAPING SERVICES (May 1, 2013), <http://screenscrapingservices.blogspot.de/2013/05/ryanair-screen-scrapers-databases-free.html>.

84. *Id.*

85. Ryanair Ltd. v. Vacaciones Edreams, Case 429/2009, Court of Appeal of Barcelona, Dec. 17, 2009 (Spain).

86. Home A/S v. Ofir, Maritime and Commercial Court, Feb. 24, 2006 (Den.) (holding "[d]ifferent kinds of search services which may be considered to be increasing in number on the Internet must be considered to be desirable as being necessary for the functioning of today's Internet as a medium for searching and exchanging an incredibly extensive and steadily increasing quantity of information. The database protection that is one purpose of the Database Directive also reflects these conditions. It must be considered that search services generally make available deep links whereby the user can efficiently directly arrive at the desired information which, as the Internet is established and functions, generally must be seen to comply with the interests followed by those who choose to use the Internet for the provision of information to the public.").

### F. Germany

In 2003, German Federal Supreme Court (BGH) rendered its *Paperboy*<sup>87</sup> decision, which concerned copyright, unfair competition, and *sui generis* claims put forward by newspaper publishers against a local search engine. The Court held that as long as deep links in the search results do not circumvent technical restrictions, they do not constitute a use of the copyrighted work or an act of unfair competition. On the database protection side, the Court held that even systematic deep linking from a search engine to the entries in a database of newspaper articles does not fall into the scope of the *sui generis* right.<sup>88</sup>

In 2008, the District Court in Frankfurt in case *Cheaptickets v. Ryanair* issued a preliminary injunction against Ryanair restraining it from canceling the bookings carried out via Cheaptickets.<sup>89</sup> The preliminary injunction was confirmed on the appeal (2009) before the Regional Court in Frankfurt am Main.<sup>90</sup> The court held that screen scraping *per se* does not constitute an act of unfair competition or an infringement of the database rights.<sup>91</sup>

In 2011, the BGH issued its influential ruling in a case *Automobil-Onlinebörse*,<sup>92</sup> where it took the position that a provider of software that enables comparison of different websites with car ads does not use<sup>93</sup> 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. This led the BGH to the conclusion that there was no infringement of database rights with regard to copying of a substantial part or with regard to systematic copying of insubstantial parts of a protected database. The Court also rejected a claim for unfair competition (the deliberate hindering of competitors).<sup>94</sup>

87. *Holtzbrinck v. Paperboy*, Case I ZR 259/00, Bundesgerichtshof [BGH] [Federal Court of Justice], July 17, 2003 (Ger.).

88. *Svensson*, Case C-466/12, Nils Svensson and Others v. Retriever Sverige AB, 2014 EUR-Lex CELEX LEXIS ¶ 41 (Feb. 13, 2014); *see also* Case C-202/12, *Innoweb BV v. Wegener ICT Media BV*, 2013 EUR-Lex CELEX LEXIS (Dec. 19, 2013). The BGH treated ‘communication to the public’ under both the copyright law and *sui generis* protection explicitly alike (“Die oben .. dargelegten Gründe, aus denen das Setzen eines Hyperlinks keine urheberrechtliche Nutzungshandlung ist, gelten hier entsprechend.”). CJEU on the other hand, did not seem to synchronize these two rights when it held that the idea of deeplinking is unacceptable in the *sui generis*, but not in the copyright context. The *sui generis* protection is thus broader and effectively undermines the policy considerations in *Svensson*. It is true that full synchronization is not a completely tenable position given that *sui generis* protection in fact aims to remedy also inadequacy of copyright protection for the subject matter of databases. However, it appears contradictory from the court when the same policy reasons lead to such diverging conclusions.

89. *Cheaptickets v. Ryanair Ltd.*, Case 2/6 O 478/08, Landericht Frankfurt [LG] [Regional Court], Sep. 24, 2008 (Ger.).

90. *Cheaptickets v. Ryanair Ltd.*, Case 6 U 221/08, Oberlandesgericht [OLG] [Higher Regional Court], Mar. 5, 2009 (Ger.).

91. *Id.* The existence of such right was not discussed.

92. *Automobil-Onlinebörse*, Case I ZR 159/10, Bundesgerichtshof [BGH] [Federal Court of Justice], June 22, 2011 (Ger.).

93. *Id.*; *Automobil-Onlinebörse*, at ¶ 20–21. The German term ‘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.

94. *Id.* Provision of § 4 Nr. 10 UWG legislates so called “gezielte Behinderung der Mitbewerber.”

Recently, the case *Ryanair v. Vtours [Flugvermittlung im Internet]*<sup>95</sup> was decided by the BGH. In a preceding second decision on the merits of the case, the Regional Court in Hamburg<sup>96</sup> accepted the protection of Ryanair's database, but rejected arguments about an infringement of the scope of the right relying partially<sup>97</sup> on the argumentation of *Automobil-Onlinebörse* case. The court, however, upheld the unfair competition claims arguing that if a reseller conceals his intent to resell to a supplier, he acts unfairly as the supplier has the right to freely choose either a direct or a selective distribution system. The decision, however, concerned an integrated booking system, where the meta search engine carries out a booking on behalf of the consumer.<sup>98</sup> The Hamburg Court explicitly opined that a non-integrated booking system (e.g. Skyscanner.net) can be legitimate.<sup>99</sup> The part that was eventually pending before the BGH did not concern infringement of the database right, but only this related claim for unfair competition. The Court rejected it, arguing that the operation of a meta search engine even with an integrated booking system does not constitute an act of unfair competition only because the source website did not allow this practice of screen scraping in its general terms and conditions. At the same time, however, the Court noted that if Ryanair would apply technical protection measures,<sup>100</sup> this could potentially be actionable.

### G. The Netherlands

In *Ryanair v. Wegolo*,<sup>101</sup> the Utrecht District Court held that Ryanair had failed to show that its database was protected under the Directive, but found for an infringement of an old provision of the Dutch Copyright Act predating the Directive protecting non-original writings.<sup>102</sup> The Amsterdam Court of Appeal confirmed the non-infringement of the database right, but revoked the decision on the infringement of Dutch protection of non-original writings arguing that Directive's 'lawful user' exception also applies to the Dutch specific protection of non-original writings. The applicability of Article 6 and Article 8 to screen scraping of meta search engines recently ended up before the Court of Justice of the European Union by referral from the Dutch Supreme Court (*Ryanair C-30/14* case).

95. *Ryanair Ltd. v. Vtours [Flugvermittlung im Internet]*, Case I ZR 224/12, Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 30, 2014 (Ger.).

96. *Ryanair Ltd. v. Vtours [Flugvermittlung im Internet]*, Case 5 U 38/10, Oberlandesgericht Hamburg [OLG] [Higher Regional Court], Oct. 24, 2012 (Ger.).

97. *Automobil-Onlinebörse*, Case I ZR 159/10.

98. In the past, the defendant was also buying tickets directly for itself, and only then reselling to its clients. After the lawsuit, however, it changed this business model.

99. See *Ryanair v. Vtours*, Case 5 U 38/10 ¶ 3.

100. So if Ryanair would for instance implement CAPTCHA to prevent robots from accessing its sub-pages, then it could possibly claim a violation.

101. See *Ryanair Case C-30/14 Ltd. v. PR Aviation BV*, Case C-30/14 (pending case); *Ryanair – Grounding a go Compare an Airfare Website*, EU LAW RADAR (Jan. 28, 2014), <http://eulawradar.com/case-c-3014-ryanair-grounding-a-go-compare-an-airfare-website/>.

102. Ben Hugenholtz, *Goodbye, Geschriftenbescherming!*, KLUWER COPYRIGHT BLOG (March 6, 2013), <http://kluwercopyrightblog.com/2013/03/06/goodbye-geschriftenbescherming/>. "Government published a draft bill that would remove a single word ('all') from the text of Article 10(1) of the Dutch Copyright, and thereby put this relic of a distant past finally to rest."



A second Dutch proceeding relates not to the meta search of flights, but to the search of car ads. In *AutoTrack v. Gaspedaal* (2007), in the first instance, the court found for the meta search engine.<sup>103</sup> On appeal, the Regional Court of Appeal in the Hague considered AutoTrack's database to be protected, and then referred questions on the scope of the right to the CJEU (*Innoweb* C-202/12 case).

#### IV. CJEU: INNOWEB

The previously mentioned Dutch proceedings in *AutoTrack v. Gaspedaal* gave rise to the decision of the Court of Justice of the European Union in *Innoweb* C-202/12 case.<sup>104</sup>

Innoweb is a company that operates a dedicated car meta search engine called '*GasPedaal*' (literally 'accelerator pedal'). This meta search engine enables users to simultaneously carry out searches in several collected 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. Through use of the GasPedaal service, it is possible to search through the AutoTrack collection using different criteria, including not only the make, the model, the mileage, year of manufacture, and price, but also other vehicle characteristics, such as the color, shape of chassis, type of carburant used, number of doors and transmission—and this all happens 'in real time', that is to say at the time when a GasPedaal user enters his query.

The results presented 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 that 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.

Before getting to the merits of the case, it is important to note that CJEU answered the reference questions "on the assumption that [the defendants] collection of advertisements constitutes a database"<sup>105</sup> protected under Article 7 of Directive. The decision therefore cannot be immediately presented as a clear confirmation of actual infringement being carried out by all the meta search engines in the Europe operating in the different fields of industry.

103. See Arnoud Engelfriet, *AutoTrack wint toch van Gaspedaal*, IUSMENTIS (Feb. 13, 2009), <http://blog.iusmentis.com/2009/02/13/autotrack-wint-toch-van-gaspedaal/>.

104. In the European Union, the system of preliminary rulings serves coherence in the interpretation of the Union law across the different Member States. The national courts are allowed, and in some cases even required, to ask for interpretative guidance from the CJEU. Its decisions are then binding in all the Members States as authoritative sources of the Union law.

105. *Innoweb*, Case C-202/12, EUR-Lex CELEX LEXIS ¶ 16.

First of all, Autotrack's database of ads is very different from others used, for instance, by travel comparison websites that usually scrape 'by-product databases'. Autotrack, unlike Ryanair, provides scraped information (collection of 200.000 car ads) as a its prime source of business. It makes relevant investment in collection and presentation of the car ads (database set-up, its advertisements to users), and subsequent verification of its contents (e.g. if the car in the ad was not stolen, or whether the indicated driven distance is still plausible). Autotrack does not make the entries itself, but the car ads are posted by its users.<sup>106</sup> It is therefore reasonable to expect that unlike Ryanair's databases, Autotrack's database was indeed protected.<sup>107</sup>

The referring Dutch court basically asked the CJEU 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 prohibit the meta search engine operation. After several remarks on how technologically dedicated real time meta search engines allegedly<sup>108</sup> differ from general search engines like Google or Bing,<sup>109</sup> the Court, relying mainly on contextual<sup>110</sup> and teleological arguments,<sup>111</sup> came to the conclusion that GasPedaal infringes Autotrack's database rights by re-utilizing substantial parts of its database (article 7(2)(b) of Directive).

According to the CJEU, GasPedaal is "depriving [Autotrack] of revenue which should have enabled him to redeem the cost of the investment"<sup>112</sup> because it "is not limited to indicating to the user databases providing information on a particular subject"<sup>113</sup> and orders duplications into one item.<sup>114</sup> This, the Court states, "creates a risk that the database maker will lose income,"<sup>115</sup> 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."<sup>116</sup>

106. Private individuals seem to post ads for free, whereas car dealers are only subject to subscription fees.

107. See also *Automobil-Onlinebörse*, Case I ZR 159/10, Bundesgerichtshof [BGH] [Federal Court of Justice], June 22, 2011 (Ger.).

108. The Court argues that the meta search engine at stake is different because (a) it makes use of the search engines on the websites covered by its service, (b) it offers advantages similar to those of the database itself in terms of the formulation of a query and the presentation of the results, and (c) are ranked, in a manner of the end user's choosing, so as to reflect certain criteria in increasing or decreasing order. In fact, all of this can be said also about the search engines. Firstly (a), virtually all the search engines would also take advantage of the local search engines in order to best map the indexed websites. Secondly (b), formulation of queries might be also identical with these websites in many cases. Thirdly (c), any advanced search enables the user to better refine its search according to criteria pre-set by him such as copyright status of pictures, time of publishing, etc. All these alleged differences are therefore only a chimera, because the difference between a search engine and meta search engine is more of a specialization or business model, than of any technical differences.

109. See *Innoweb*, Case C-202/12, EUR-Lex CELEX LEXIS ¶ 24–29.

110. *Id.* at ¶ 33–34.

111. *Id.* at ¶ 35–36.

112. *Id.* at ¶ 37.

113. *Id.* at ¶ 39.

114. *Id.* at ¶ 43.

115. See *id.* at ¶ 41.

116. See *id.* at ¶ 44.

The Fifth Chamber of the CJEU, deciding without a prior opinion from an Advocate General, seemed to be generally disturbed by the increased competition and transparency that producers of databases might face<sup>117</sup> and the changes in “the access route intended by the database maker.”<sup>118</sup> The Court even went on to conclude that this behavior “comes close to the manufacture of a parasitical competing product.”<sup>119</sup> The gist of the disturbance 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.”<sup>120</sup>

## V. ANALYSIS

The message behind the answers of the CJEU in *Innoweb* is clear, but a question that immediately springs to mind is whether other kinds of taking of advantage on the Internet such as deep linking aren’t necessarily so near to ‘nearly’ parasitical. The Court clearly was not able to resist the temptation to protect AutoTrack’s existing business model, without assessing whether all of its components are really indispensable for the recouping of the investment in its database.

GasPedaal was apparently not using a deeply integrated booking interface. Instead, it required all transactions to take place on the website of the indexed websites like AutoTrack. In this sense, GasPedaal was generating some additional traffic and referring new consumers to AutoTrack. At the same time, by pursuing its profit-generating motifs, GasPedaal was advancing transparency on the market, decreasing the transaction costs for the consumers, and therefore, also intensifying competition on the market with second hand cars. It is true that car ads were often cross-posted, which made mentioned effects weaker than in airline tickets market, for example, but the service nevertheless still contributed to a decrease of consumer search costs. The price paid by AutoTrack was at the same time very modest. It was losing only some new direct home page visits of its website and some possible visits of cross-posted advertisements, but still preserved the possibility to sell the complementary products.

And even this loss is not absolute. The courts decision does not rule out data scraping for comparative purposes altogether, but implicitly requires that referred users be directed to the homepage of the supplier, and not to a concrete offer. This, considering the impatience of Internet users, might in fact drive already referred users off of the supplier’s website. Consequently, it is possible that homepage linking from search results would cause the source website to earn even less than deep-linking.<sup>121</sup> In this light, it really seems that the owner of a database *de facto*

117. *See id.* at ¶ 45.

118. *See id.* at ¶ 47.

119. *See id.* at ¶ 48.

120. *See id.* at ¶ 49.

121. This speculation can be empirically tested, and it would have an interesting implications for the policy debate.

objects only to objective comparison *per se*, and not to any detriment to his investment due to the decline in the advertising revenue. The objection of to deep-linking then appears as a ‘parasitical mask’ of deeper ‘anti-transparency’ motifs.<sup>122</sup>

Moreover, the website would be losing the same kind of traffic as well if somebody sets up for example an email notification service based on AutoTrack database, with deep-links to its offers, or when newspapers refer to a specific location on the website instead of the homepage.<sup>123</sup> From the business perspective, it is of course understandable that an incumbent like AutoTrack was resisting this level of transparency and comparison of its services in the context of its competitors. From a policy perspective, however, making such comparisons dependent on the consent of market participants nears its practical prohibition. And if the established incumbents resist the addition of their services to comparison websites, small services start losing the benefits from meta search engines at a greater rate than before. This is because like comparative advertising,<sup>124</sup> they enable consumers to consider alternatives in light of objective criteria like price, quality, warranty, and other factors.. If a big player is missing in the comparison, so is the bigger picture of the market.

Furthermore, even if an investment protection is granted, the protection cannot serve to make the investor absolutely immune from any competition. As noted above, the Directive does not prohibit any kind of taking of advantage from the protected investments, but only one that “go[es] beyond users’ legitimate rights and thereby harm[s] the investment.” A comparison of the services based on objective criteria is such a legitimate interest of users. It cannot be said that permitting the comparison would significantly undermine the incentive behind creating such a database. On the contrary, it maximizes the public good by both preserving the economic incentives in investments, but also encouraging the exchange of information about prices and products, without which there can be little, if any, competition.<sup>125</sup> This kind of rationale is not alien to the European law as the Directive on misleading and comparative advertising tries to safeguard the very same balance. And the requirement that such transparency won’t be misused is also partially guaranteed by the European laws against misrepresentation<sup>126</sup>

The BGH, unlike CJEU, in its earlier *Paperboy* and *Automobil-Onlinebörse* rulings did not overlook these policy considerations. In fact, the BGH decided to

122. Recently, the German National Competition Authority raised objections against the vertical distribution agreements that prohibit on-line sales and inclusion in the price comparison websites. It labeled such clauses as anti-competitive. See *Bundeskartellamt takes a critical view of restriction of online distribution by ASICS*, BUNDESKARTELLAMT (Apr. 28, 2014), [http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/28\\_04\\_2014\\_Asics.html?nn=3591568](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/28_04_2014_Asics.html?nn=3591568) (noting “However, ASICS prohibits its dealers from selling on online market places and supporting price comparison engines. This is overshooting the mark.”).

123. Cf. The Decision Of The German Federal Supreme Court (BGH), Case I ZR 259/00, *Paperboy*, (holding this type of service not to fall into the scope of the right of the database maker).

124. See Council Directive 2006/114, 2006 O.J. (L 376/21) 114 (EC) [hereinafter Directive 2006/114] (concerning misleading and comparative advertising).

125. Brief for Bidder’s Edge, Inc. as Amici Curiae Supporting Respondents, *Ebay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058, 1072 (N.D. Cal. 2000) (No. C - 99 - 21200RMW).

126. Directive 2006/114 on Unfair Commercial Practices; see *Versandkosten bei Froogle*, I ZR 140/07, BGH, 2007 (Ger.) (application to the comparison websites).

stress them as still applicable even in its decision, *Flugvermittlung im Internet*, rendered after the *Innoweb* ruling when interpreting unfair competition law grounds. The Court rejected an act of unfair competition arguing that:

The underlying consideration is that an entrepreneur, who makes his offer publicly available on the Internet, must accept in the general interest of general functioning of the Internet that his information will be processed in the automated manner by the conventional search engines and will be provided to the users to satisfy their search-needs. Therefore, he must also accept that the loss of some income from the advertising due to the users, who will not search out his website. On the other hand, the general interest is not anymore affected, when the entrepreneur restricts by technical means the possibility of automated obtaining of the data of his Internet offer.<sup>127</sup>

These decisions of the BGH, driven by market transparency and pro-competition considerations<sup>128</sup> thus stand in the stark contrast to the ruling of the CJEU.

#### A. Doctrinal considerations

Doctrinally, a more compelling issue of the *Innoweb* decision is related to *the right-to-consult the database*.<sup>129</sup> If the database maker makes the contents of that database freely accessible to third parties, even if he does so for a consideration, his *sui generis* right does not enable him to prevent such third parties from consulting that database for informational purposes.<sup>130</sup> This right-to-consult is, however, of very little significance if the intermediaries cannot offer secondary services enabling such consulting for users. In such a case, the right-to-consult will always cover only the route intended and offered by the database maker, thus effectively guaranteeing its distribution channel. In a sense, even a provider of an Internet browser like Firefox, which would deviate from the intended route to the database contents (e.g. a plug-in switches off the advertising on the website), can find itself disfavored by the website owner, because it technically carries out a user's request to consult the contents of the database. Holding that any intermediary which performs such requests in a real time should be also cumulatively attributed use of

127. In original, the part reads: "Dem liegt die Erwägung zugrunde, dass sich ein Unternehmer, der sein Angebot im Internet öffentlich zugänglich macht, im Allgemeininteresse an der Funktionsfähigkeit des Internets daran festhalten lassen muss, dass die von ihm eingestellten Informationen durch übliche Suchdienste in einem automatisierten Verfahren aufgefunden und dem Nutzer entsprechend seinen Suchbedürfnissen aufbereitet zur Verfügung gestellt werden. Er muss deshalb auch hinnehmen, dass ihm Werbeeinnahmen verlorengehen, weil die Nutzer seine Internetseite nicht aufsuchen [...]. Dagegen ist das Allgemeininteresse an der Funktionsfähigkeit des Internets dann nicht mehr betroffen, wenn der Unternehmer durch technische Maßnahmen verhindert, dass eine automatisierte Abfrage der Daten seines Internetangebots möglich ist [...]."

128. See *Flugvermittlung im Internet*, I ZR 224/12, ¶41, BGH, 2012 (Ger.).

129. See *Innoweb BV v. Wegener ICT Media BV*, 2013 EUR-Lex CELEX LEXIS ¶ 46; C-203/02, *The British Horseracing Board Ltd. and Others v. William Hill Org. Ltd.*, 2004 EUR-Lex CELEX LEXIS ¶ 54; *Directmedia Publishing GmbH v. Albert-Ludwigs-Universität Freiburg*, 2008 EUR-Lex CELEX LEXIS ¶ 51.

130. See *Innoweb*, C-202/12, EUR-Lex CELEX LEXIS ¶ 46; *The British Horseracing Board Ltd.*, C-203/02, EUR-Lex CELEX LEXIS ¶ 55; *Directmedia*, C-304/07, EUR-Lex CELEX LEXIS ¶ 53.

parts of the database by its users, would mean exorbitantly expanding the scope of the rights. And the court surely does not want to achieve this. Because the use that would be allowed to end users, would then be prohibited for 'middle-men' to assist in. Thus, this prohibition would be socially ineffective since it would leave users alone and create a certain bottle neck effect.

A parallel to this phenomenon can be found in copyright law, specifically in the exception of private copying. If a user cannot take advantage of intermediary help in the course of making a private copy, the exception is rendered nearly useless. We all need to create such copies using intermediaries like print shops, libraries or even technical equipment manufactured by someone else. The Court in *Innoweb* metaphorically equates the sum of private copies of users to a library with a copying machine, which would makes libraries infringers. One should remember that even reel-to-reel tape recorder litigation in Germany<sup>131</sup> that eventually led to imposition of copyright levies began when users needed to pay license fees for use of their devices. Their original intent was only to address an inefficiency in the collection of the fees.<sup>132</sup> No one would likely suggest that buyers of reel-to-reel recorders should be equated with direct copying of the producers themselves. Also US courts hearing the disputes in similar scenarios considered the claims against the producers/providers on secondary liability theories.<sup>133</sup> Similarly, providers of software should not be attributed to acts of users, especially if those acts are permitted by the law.<sup>134</sup>

This aspect of attribution in *Innoweb* contrasts with the previously mentioned decision *Automobil-Onlinebörse* handed down by the German Federal Supreme Court (BGH). Unlike the CJEU, the BGH took the position that AutoBINGOOO, a provider of a software that enables the comparison of different websites with car ads, does not use the data of Autoscout24.de, a website with user generated car ads, and hence cannot be seen as a direct infringer. The Court notes:

The defendants themselves do not realize the elements of the § 87b(1) UrhG, because they don't copy, distribute or make available any data of a car ad collection of the plaintiff, but only offer, advertise and distribute a software, which enables third parties to find, process and display these data.<sup>135</sup>

131. Decisions of the German Federal Supreme Court (BGH), Cases I ZR 8/54, I ZR 41/58, I ZR 23/62, I ZR 127/62, I ZR 4/63.

132. The rate of licensing success was estimated at 0,5 % as less than 5000 private persons out of one million users licensed their recording devices (reported in GRUR 1965, 109).

133. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); MGM Studios, Inc. v. Grokster Ltd., 125 S. Ct. 2764, 2776 (2005); see Elektra Records Co. v. Gem Electronic Distributors, Inc., 360 F. Supp. 821, 824 (E.D.N.Y. 1973). On the other hand, in Princeton Univ. Press v. Michigan Document Services, Inc., 99 F.3d 1381, 1412 (6th Cir. 1996), the US court considered a photocopying service that reproduced substantial parts of copyrighted works of scholarship bound into 'coursepacks' and sold to students, to be liable for *direct* infringement.

134. This argument, however, is not conclusive. In the recent Am. Broad. Companies, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2502 (2014) decision, arguably the same situation happened. The users were able to claim permitted use, but this did not prevent the Supreme Court of the United States from holding that the provider of the service directly infringed.

135. *Automobil-Onlinebörse*, I ZR 159/10, ¶20, BGH, 2011 (Ger.), *Automobil-Onlinebörse*, para 20 reads: "Die Beklagten verwirklichen den Tatbestand des § 87b Abs. 1 UrhG nicht selbst, da sie keine Daten der Automobil-Onlinebörse der Klägerin vervielfältigen, verbreiten oder öffentlich wiedergeben,

Instead, the BGH then focused on the conduct of users and their possible violation of the database rights of scraped websites.<sup>136</sup> The Court found that individual users do not extract a substantial part of the database because their searches are specific enough.<sup>137</sup> As to possible infringement by systematic copying of insubstantial parts of a protected database, the BGH notes that copies made by users do not conflict with the normal exploitation of the database, and that the maker of a database cannot rely on his right against temporary copies made in the course of consulting the contents of the database.<sup>138</sup>

In contrast, the Regional Court in Hamburg in *Ryanair v. Vtours* came to the same result as BGH, but its line of argumentation is slightly different. The Court considered that a provider of a website (not of a software) himself uses the parts of the database, but only to the extent of each of the searches carried out by the users of a meta search engine. In other words, the Court rejected the cumulative attribution of all searches by users to the provider. Unlike BGH, however, it did consider them separately. Whether this different reasoning springs from the difference between the operation of a software application (BGH) and online service (OLG Hamburg) remains open.

As seen above, the CJEU, without putting forward 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 cumulatively to the operator of the website. One can only speculate about the underlying reasons 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 such a distinction is often only a matter of perspective and can have significant consequences for the policy.

### B. Practical consequences

Even more troubling than this doctrinal issue is the practical impact of the decision. This decision effectively seems to outlaw the operation of some of the socially beneficial websites that help consumers to compare prices or qualities of different goods offered on the Internet. It, however, does not outlaw all the meta search engines. Several limitations need to be mentioned.

First of all, as the discussion of the relevant investment and protectable subject matter has shown, not all databases will be necessarily protected in the first place. Where no rights are granted, of course no infringement can occur. Hence the infringement is more likely to occur in cases when the indexed databases contain user generated content (e.g. user feedback, user ads, etc.), which is often protected as a relevant investment, and less likely when the scraped database is created only

sondern eine Software anbieten, bewerben und in Verkehr bringen, die es Dritten ermöglicht, diese Daten aufzufinden, aufzubereiten und anzuzeigen.”

136. The Dutch court seemed to be also stressing this in the reference to the CJEU by using words “makes it possible for the public to search.”

137. See *Automobil-Onlinebörse*, I ZR 159/10, ¶ 51–55, BGH, 2011 (Ger.), *Automobil-Onlinebörse*, ¶ 51–55.

138. See *Automobil-Onlinebörse*, I ZR 159/10, ¶63–64, BGH, 2011 (Ger.), *Automobil-Onlinebörse*, ¶ 63–64.

to support some other business of the supplier and the data used are basic operational minimum (e.g. prices of electronics resellers, flight information). This has, of course, a direct bearing on the operation of the meta search engines.

Those working with unprotected databases will be able to integrate and control the booking process to a greater extent.<sup>139</sup> Those operating with protected databases will have a problem even with the basic comparison techniques, which refer users to the source websites with a deep link. These services might continue to try to invoke different exceptions for their activity,<sup>140</sup> but unless the CJEU reconsiders its overprotective approach, they would need to either license the database, or develop a mode of operation that renders the database right valueless. Another theoretical option is that they keep comparing the databases, but refrain from deep linking, since much of the *Innoweb* decision is based on losing the 'homepage-income' from the advertising.

The development of meta search engines into a two sided market by strengthening the interside network effects (e.g. by engaging the users in production of a user generated content such as user reviews, personal profiles, future plans, etc.) is yet another possible consequence of the decision.<sup>141</sup> As a consequence of this, suppliers that value the users more than the users value the suppliers, will still be charged for access to the consumers. The database right owned by these suppliers will be *de facto* licensed for free<sup>142</sup> The meta search engine operators would be therefore forced to two sided market configurations, pricing structures of which will render the exclusionary database right useless. The drawback will be however, that launching such a two-sided configuration will need to be done on a bigger scale in order to be profitable. This in turn, could increase the barriers-to-entry for newcomers, thus leading to a more oligopolistic structure on the meta search engine market.

This, again, will not apply to meta search engines that source non-protected databases. In industries such as airlines and the electronic resale, the markets of meta search engines are likely to be more competitive due to the absence of the 'chicken-egg' problem, or the problem of having enough suppliers affiliated when number of users is low, as the affiliation of new suppliers happens without their consent. In contrast, in the case of protected databases, the source database needs to be licensed<sup>143</sup> and serious possibilities of a 'consent hold-up' by bigger players might exist.

The most immediate outcome of the decision will probably be an attempt of incumbents to prevent competition in less competitive markets structures by shut-

139. Unfair competition law can limit this, however.

140. For instance Art. 6 and Art. 8 of the Directive on misleading and comparative advertising.

141. The trend of strengthening of these network effects is well-illustrated by the Tripadvisor and its use of consumer reviews, which help it significantly in operation of its meta search engine – See *How TripAdvisor Grows Scale and Network Effects: Expertise in Gathering UGC*, FORBES (Jun. 20, 2013), <http://www.forbes.com/sites/avaseave/2013/06/20/how-tripadvisor-grows-scale-and-network-effects-expertise-in-gathering-ugc/>.

142. One can see a very similar effect with newly passed IP-law for protection of publishers in Germany (§ 87f at seq. UrhG), who received the special right against the search engines.

143. Again, a very similar effect can be observed in respect to the search market in Germany after passing this new IP law.



ting down the meta search engines.<sup>144</sup> Unlike general search engines that generate more traffic than they could possibly take away, ‘comparison websites’ are very likely to be a nuisance for at least the bigger providers/sellers whose higher margins usually suffer from the market transparency. Making the operation of advanced market transparency subject to approval of big players, especially when their smaller competitors are possibly its greatest beneficiaries, does not benefit the innovation or competition policy of any country.

The impact of the *Innoweb* ruling will most likely be felt also outside of activity of meta search engines. As mentioned earlier, even some activities of general search engines can be threatened by this decision, since many times they technically do the same as their specialized peers.<sup>145</sup> Even the activities of data analyses used by commonplace smart phone applications can be easily affected if decisive parts of the extracted data are not the fractions used by a single individual user, but are instead the pool of all the data extracted by users of an application together. This would basically mean that any independent data analysis would be exclusively subject to the control of the platforms that collect them.<sup>146</sup> For instance, Facebook could prevent application developers from extracting profile data even in cases where users agree, only because it could claim *sui generis* protection over its cumulative data pool extracted by users of its application.

### C. Possible solutions

Given the position of the CJEU on interpretation of the Database Directive, it appears very unlikely that an internal solution to socially beneficial search engines will come from the wording of the Directive itself (*an internal solution*), such as provisions limiting the scope of the right.<sup>147</sup> The deficiency identified here also cannot be satisfactorily corrected by anti-trust law because this is either too slow for remedying structural problems of the intellectual property,<sup>148</sup> or is many times also unavailable.<sup>149</sup> One possibility worth exploring would be to use the Directive 2006/114/EC concerning misleading and comparative advertising as an *external limit*—an exception—to the *sui generis* protection.

Directive 2006/114/EC takes a horizontal approach in achieving market transparency. This means that it cuts through various national regulations and rights of others in order to guarantee possibility of an objective comparison of

144. This seems to be the case in Denmark in a dispute of eBay v. Autouncler. See *eBay Forhindrer Forbrugernes Overblik på Brugtbilmarkedet*, AUTOUNCLE (Jul. 2, 2014), <https://www.autouncler.dk/da/bilbasen-og-dba-dk-saetter-en-stopper-for-overblikket-paa-autouncler>.

145. See *Innoweb*, Case C-202/12, EUR-Lex CELEX LEXIS ¶ 24–29.

146. See De Wolf & Partners, *Study on the Legal Framework of Text and Data Mining*, EUROPEAN COMMISSION, 37 (2014), [http://ec.europa.eu/internal\\_market/copyright/docs/studies/1403\\_study2\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study2_en.pdf).

147. An attempt of this kind is presented in the preliminary reference before CJEU in *Ryanair Ltd. v. PR Aviation BV*, Case C-30/14 (pending case), where the referring court tries to see whether the ‘lawful user’ exception of Article 8 of the Directive could also cover the meta search engine.

148. See Leistner, *supra* note 25, at 433.

149. See Directive 96/9, *supra* note 21, at recital 47.

goods and services.<sup>150</sup> It does so by laying down the conditions under which comparative advertising is permitted. First, however, an activity must qualify as an ‘advertising’ (Article 2(a)), and then as a ‘comparative advertising’ (Article 2(c)). Because meta search engines are a form of representation “in connection with a trade, business, craft or profession in order to promote the supply of goods or services”, the first criterion is not a problem. The second one is, however, more difficult. Article 2(c) requires that the activity must “explicitly or by implication identifies a *competitor* or goods or services offered by a *competitor*”. The meta search engine operator, strictly speaking, does not compare its *own* offers with those of *own* competitors, but offers of *competitors among themselves*. So the meta search engine in fact needs to invoke the interest of the compared individual competitors to legitimize its service. But this should not matter, though.

This is because the Directive 2006/114/EC itself aims to “provide a *broad concept* of comparative advertising to cover all modes of comparative advertising.”<sup>151</sup> It is without a doubt that meta search engines do engage in comparative advertising for the benefit of included suppliers. And, because meta search engines operate as a separate business model, the positive effects of comparison are achieved without the need of suppliers to draft, prepare and pay for the advertising. It is probably even more effective and credible because such comparison is both systematic and carried out by an independent third party.<sup>152</sup> This position is in fact not that special. The organizations or companies carrying out consumer tests serve the same purpose, and only few would doubt that they should not also be beneficiaries of this regime.

Accepting this line of argument would mean that operating a meta search engine will be permitted provided that it complies with the cumulative requirements of Article 4 of the Directive 2006/114/EC. In particular that “it objectively compares one or more material, relevant, verifiable and representative features of those goods and services,” does not denigrate the competitors and does not take unfair advantage of their forms of representation.

150. For a suggestion that 2006 O.J. (L 376/21) 114 EC could serve as an external limit to the copyright law – See ANSGAR OHLY & OLAF SOSNITZA, GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB. UWG-KOMMENTAR 736 (5ST ED. 2010). Ohly argues that in the German context extended rule of exhaustion in the copyright law could serve to incorporate considerations of Directive 2006/114/EC under decision of the BGH, Case I ZR 256/97, Parfümflakon. In this respect, *see also* the commentary on the CJEU decision Dior v. Evora (Case C-337/95, Parfums Christian Dior v. Evora, 1997 I-06013, ¶ 3), which held that free movement of goods requires that “the proprietor of a *trade mark* or *holder of copyright* may not oppose their use by a reseller who habitually markets articles of the same kind, but not necessarily of the same quality, as the protected goods, in ways customary in the reseller’s sector of trade, *for the purpose of bringing to the public’s attention the further commercialization of those goods*, unless it is established that, having regard to the specific circumstances of the case, the use of those goods for that purpose seriously damages their reputation.” *See also see more* Annette Kur, *Händlerwerbung für Markenartikel aus urheberrechtlicher Sicht - Präsentationsrecht als neue Schutzschranke? - Bemerkungen zu i. S. Dior ./ Evora*, GRUR INTERNATIONAL, 24 (1999).

151. *See* Directive 2006/114, *supra* note 124, at recital 8.

152. These are all the considerations which should have lead the CJEU to permit the meta search engines already on the level of the scope of the right without need to resort to any exceptions. Such scope of rights would be a more appropriate balance between incentives on the one hand, and access on the other hand, than the current rule after *Innoweb* ruling.

## VI. CONCLUSIONS

People are often troubled with analogies that compare visits of robots to visits that humans pay to other's houses without getting permission. The work that robots undertake can then easily appear as trespassing. This analogy is, however, very misleading. Unlike the house owners, owners of websites often don't mind or even encourage such permission-less visits (e.g. Google, web archives, etc.). What they only mind, are some visits, that later lead to services that undermine their own. In this respect, these robots are more like bees coming to visit and pollinate the flowering crop than like human visitors. All owners of flower crops are keen to see bees on their land, unless their neighbors reap most of the benefit. At that point, coexistence is no longer attractive for one of the parties because it is not sustainable. And this is what the laws ought to prevent.

This article does not suggest that all forms of meta search engines should be allowed. On the contrary, some models of operation of meta search engines can be clearly parasitic in the sense that suppliers bleed away as no sustainable relationship is possible to set up and the margin is predominantly squeezed by the meta search engine. But such a configuration is unsustainable for the meta search engines themselves, unless they want to replace the suppliers. This can, for instance, happen in some cases of deeply integrated direct booking systems, when all the additional margin stemming from complementary services is reaped only by the meta search engine. If this is coupled with services, which are not directly sold by the scraped supplier (e.g. car ads of third parties), the example of an unsustainable (parasitic) relationship is born. But this is an extreme example.

The *Innoweb* decision, however, goes far beyond such parasitic competing products. It bans data-scraping of protected databases even in settings that enable complete symbiosis of source websites and meta search engines, with a result of societal benefits of increased market transparency, decreased transaction costs of consumers and more intensive competition on the market of supplied goods and services. It is submitted that although the Court of Justice of the European Union made a mistake by omitting this policy consideration, the regulatory framework of comparative advertising could still help to remedy this inconsistency by serving as an external limit (an exception) to the *sui generis* protection.

## REFERENCES

- ANDREAS WIEBE & ANDREAS LEUPOLD (ED.), RECHT DER ELEKTRONISCHEN DATENBANKEN (2004).
- ANSGAR OHLY & OLAF SOSNITZA, GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB. UWG-KOMMENTAR (5ST ED. 2010).
- BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION (2012).

- Estelle Derclaye, *Databases Sui Generis Right: What is a Substantial Investment? A Tentative Definition*, 36 THE INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION 2 (2005).
- Nelson Granados, Robert Kauffman & Bradley King, *The Emerging role of vertical search engines in travel distribution: a newly-vulnerable electronic markets perspective*, PROCEEDINGS OF THE 41ST HAWAII INTERNATIONAL CONFERENCE ON SYSTEM SCIENCES (2008).
- JOSEF KRÄHN, DER RECHTSSCHUTZ VON ELEKTRONISCHEN DATENBANKEN UNDER BESONDERER BERÜCKSICHTIGUNG DES SUI-GENERIS-RECHTS (2000).
- Matthias Leistner, *The Protection of Databases*, RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 449 (Estelle Derclaye, ed., 2009).
- MICHAEL SCHRENK, WEBBOTS, SPIDERS, AND SCREEN SCRAPERS (2d ed. 2012).
- Stephen M. Maurer, Berndt Hugenholtz & Harlan J. Onsrud, *Europe's Database Experiment*, 294 SCIENCE 789, 790 (2001).
- ROBIN E. HERR, IS THE SUI GENERIS RIGHT A FAILED EXPERIMENT? (2008).
- SUZANNE SCOTCHMER, INNOVATION AND INCENTIVES 82 (2006).