

Innoweb v Wegener: CJEU, *Sui Generis* database right and making available to the public – The war against the machines

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1. INTRODUCTION: THE FACTS AND THE PROCEDURE IN DOMESTIC COURTS

Wegener ICT Media BV and Wegener Mediaventions BV (collectively Wegener) provide in the Netherlands through the website www.autotrack.nl (Autotrack) an online access to daily updated 190-200,000 used car sales advertisements, of which 40,000 are available only via Autotrack. The website has its own search function and it displays also other advertisements as supplementary means of accruing income. Innoweb BV (Innoweb) has built a meta search engine “GasPedaal” providing a single-query access to several other websites displaying used cars sales advertisements Autotrack being one of the sites containing them. According to further search criteria such as price, make, model mileage, manufacturing year and others, one can make a further refined search with a single query yielding results from several other websites together with links to those other websites. As a result of GasPedaal’s popularity, the users’ searches cause GasPedaal web crawler carry out some 100,000 searches daily in Wegener’s Autotrack site, among other used car sales databases.

Wegener, upon finding this, sued successfully in the Dutch trial court Innoweb for database *sui generis* right infringement and on appeal lodged by the Innoweb the appellate court stayed the proceedings and referred the case for a preliminary ruling to the Court of Justice of the European Union (CJEU) concerning several aspects on the interpretation of the EC Database Directive 96/9 (the Directive or Database Directive).² The first 3 questions of the 9 altogether are repeated here:

- (1) Is Article 7(1) of Directive [96/9] to be interpreted as meaning that the whole or a qualitatively or quantitatively substantial part of the contents of a database offered on a website (online) is re-utilised (made available) by a third party if that third party makes it possible for the public to search the whole contents of the

¹ The author is solely responsible for any errors or omissions. All comments and corrections are welcome. The word “machine” used in the title is generally a device which converts any available form of energy into useful work while as engine is a device which converts thermal energy into useful work. Owing to the development of technology and applications like “search engines” the line has become blurred and machine is used inaccurately as a synonym for a (search) engine to enable the reference to popular culture in this context.

² *Innoweb BV v Wegener ICT Media BV, Wegener Mediaventions BV*, C-202/12, ECJ 19 December 2013 (*Innoweb v Wegener*).

database or a substantial part thereof in real time with the aid of a dedicated meta search engine provided by that third party, by means of a query entered by a user in “translated” form into the search engine of the website on which the database is offered?

(2) If not, is the situation different if, after receiving the results of the query, the third party sends to or displays for each user a very small part of the contents of the database in the format of his own website?

(3) Is it relevant to the answers to Questions 1 and 2 that the third party undertakes those activities continuously and, with the aid of its search engine, responds daily to a total of 100 000 queries received from users in “translated” form and makes available the results thereof to various users in a manner such as that described above?

2. THE PRELIMINARY RULING OF THE CJEU

First, looking into technology underlying the dispute, the CJEU held that the essential features of a dedicated meta search engine and its operation clearly distinguish it from a general search engine like Google or Yahoo. A dedicated meta search engine does not have its own search engine scanning other websites. Instead, the meta search engine makes use of the search engines on the websites covered by its service. The dedicated meta search engine enters its users’ queries into other search engines to have the data on those databases searched through.³ A dedicated meta search engine offers advantages in the formulation of a query and the presentation of the results, whilst making it possible to use a single query to search several databases. Often a more refined or targeted search is available and/or the subsequent result list can be modified to better suit the needs of a user.

Second, in legal appraisal of Database Directive Article 7(1) the characterisation, concerning the activity of the operator of a dedicated meta search engine first concerns the offer, made to the public by that operator, to make it possible – by means of a dedicated meta search engine – to search the entire contents of a database or a substantial part thereof ‘in real time’, by entering an end user’s query, in ‘translated’ form, in the search engine of the database. The search undertaken by the dedicated meta search engine in response to a query together with the presentation of the results to the end user takes place automatically, in accordance with the way in which the meta search engine has been programmed without any intervention on the part of the operator at that stage. Then the only person carrying out an activity is the end user who enters his query. The operations of meta search engine maker or operator consist of making a dedicated meta search engine available on the Internet for ‘translating’ queries typed into that meta search engine by end user subsequently into the search engines of the databases covered by the service of the meta search engine in question.⁴

Third, decisive is whether that activity falls within the scope of Article 7(1) of the Directive. Accordingly, it must constitute ‘re-utilisation’ for the purposes of Article 7(2)(b) and must involve all or a substantial part of the contents of the database concerned. Re-utilisation for the purposes of Article 7(2)(b) of the database directive is defined as ‘any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by online or other forms of transmission’. The phrase ‘any form of making available to the public’ indicates that

³ *Innoweb v Wegener*, para 25 of the judgment.

⁴ Para 29 of the judgment.

the Community legislature attributed a broad meaning to re-utilisation supported by the objective pursued by the Community legislature through the establishment of a *sui generis* right, namely to stimulate the establishment of data storage and processing systems which contribute to the development of an information market. *Sui generis* right under database directive intends to ensure that the maker of a substantial investment in the setting up and operation of a database receives a return for investment by protecting him against the unauthorised appropriation of the results of that investment. The second part of the definition given in Article 7(2)(b) of the directive 'by the distribution of copies, by renting, by on-line or other forms of transmission' – in particular, the alternative 'or other forms' also make it possible to construe that definition broadly.⁵

If one makes available on the Internet a dedicated meta search engine, such as that in present issue, it translates queries into the search engines of the databases covered by the service of the meta search engine in question. Accordingly such an activity would not be limited to indicating to the user databases providing information on a particular subject. The purpose of a meta search engine is to provide an end user with a means of searching all the data in a protected database and to provide access to the contents of that database by a means other than that intended by the maker of that database, whilst using the database's search engine and offering the same advantages as the database itself in terms of searches. The end user no longer has any need, when researching data, to go to the website of the database concerned, or to its homepage, or its search form, in order to consult that database. The activity on the part of the operator of a dedicated meta search engine, such as that at issue in the main proceedings, creates a risk that the database maker will lose income, in particular the income from advertising on his website, thereby depriving that maker of revenue which should have enabled him to redeem the cost of the investment in setting up and operating the database. Since the end user no longer has any need to proceed via the database site's homepage and search form, it is possible that the maker of that database will generate less income from the advertising displayed on that homepage or on the search form, especially to the extent that it might seem more profitable for operators wishing to place advertisements online to do so on the website of the dedicated meta search engine, rather than on one of the database sites covered by that meta engine.⁶

The protection under Article 7 of Database Directive does not cover consultation of a database. However, the activity of the operator of a dedicated meta search engine does not constitute consultation of the database concerned. The operator of meta search engine is not at all interested in the information stored in the database, but he or she provides the end user with an access to that database information which is different from the access route intended by the database maker. It is the end user keying in a query in the dedicated meta search engine who consults the database via meta search engine. The relevant aspect of the activity of the operator of a dedicated meta search engine comes close to the manufacture of a parasitical competing product, albeit without copying the information stored in the database concerned. A dedicated meta search engine, taking into account its search options, resembles a database, but without having any data itself.

It follows from the foregoing considerations that the act on the part of the operator of making available on the Internet a dedicated meta search engine such as that at issue in the main proceedings, into which it is intended that end users will key in queries for 'translation' into the search engine of a protected database, constitutes 'making available' the contents of that database for the purposes of Article 7(2)(b) of Directive 96/9. The

⁵ Para 38 of the judgment.

⁶ Para 42 of the judgment.

‘making available’ is for ‘the public’, since anyone at all can use a dedicated meta search engine and the number of persons thus targeted is indeterminate, the question of how many persons actually use the dedicated meta engine being a separate issue. In the light of the answers to first 3 questions the CJEU found it not necessary to reply to subsequent questions 4 to 9.⁷

3. ANALYSIS

As the CJEU itself put it aptly:

The questions are essentially intended to ascertain whether the operator of a dedicated meta search engine such as that at issue in the main proceedings engages in an activity covered by Article 7(1) or Article 7(5) of Directive 96/9, with the consequence that the maker of a database which meets the criteria laid down in Article 7(1) may prevent that database from being included, for no consideration, in the service of the dedicated meta search engine.⁸

To sum the answer up, the CJEU concluded: An operator who makes available on the Internet a dedicated meta search engine such as that at issue in the main proceedings re-utilises the whole or a substantial part of the contents of a database protected under Article 7, where that dedicated meta engine:

- provides the end user with a search form which essentially offers the same range of functionality as the search form on the database site;
- ‘translates’ queries from end users into the search engine for the database site ‘in real time’, so that all the information on that database is searched through and
- presents the results to the end user using the format of its website, grouping duplications together into a single block item but in an order that reflects criteria comparable to those used by the search engine of the database site concerned for presenting results.⁹

In other words, the meta search engine, in the opinion of the CJEU, makes available to the public the whole or substantial parts of the database openly accessible in the website of the rightholder through its own search facility. Perhaps the main part of the Court’s reasoning for finding the factual basis for infringement goes:

It is sufficient for the end user to go to the website of the dedicated meta search engine in order to gain simultaneous access to the contents of all the databases covered by the service of that meta engine, as a search carried out by that meta engine throws up the same list of results as would have been obtained if separate searches had been carried out in each of those databases which, however, are presented using the format of the dedicated meta engine’s website. 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.¹⁰

⁷ Para 54 of the judgment.

⁸ Para 19 of the judgment.

⁹ Judgment, conclusion.

¹⁰ Para 49 of the judgment.

The underlying reasons are then that its functions come close to parasitical competition, to be found from recital 42, which may make database maker lose income particularly in the form of income accrued through navigation in the form of adverts posted in the homepage and search form. It may very well be so that an individual website with its underlying database may face competition from meta search engines and other competing websites, amongst others. However, competition is generally regarded as a good thing. Only if it is parasitical, it may be frowned upon by primarily competition law, understood broadly, involving what in some countries is categorized as unfair business practices or unfair trading. Naturally, it has to be parasitical, coming close does not qualify and the same can be derived from the recital mentioned. In the initial proposal for the Database Directive it was exactly unfair extraction, or re-utilization for commercial purposes, that was infringing the *sui generis* right but that was dropped during the legislative passage.¹¹ The reasoning given is not convincing in this part and does not rhyme with the law as it stands. Consequently, losing income in the face of competition is not forbidden provided the competitor does not infringe the relevant law in question, this time the database *sui generis* right.

And the claim of directly only losing income in the presence of meta search engines is not necessarily valid in its entirety either: may people navigate to these specific services and underlying databases such as Autotrack in this case only after finding them by means of a general *or* dedicated meta search engine or after skimming their search results, using then also their start sites and dedicated search facilities. *E contrario*, the services like the one provided by the claimant in the case, may and often also actually benefit from dedicated meta search engines, since they also help users locate the relevant services and give initial results as to whether a specific search by means of that particular service is interesting or useful for their purposes. Both general and dedicated search engines, including meta search facilities, can be a mixed curse or blessing and their impact eventually depends on many factual circumstances tied to the individual case. Thus, in the real world of web usage this kind of statement found from the reasoning is too general and vague to have any real power in actual circumstances of the case.

As such there is little wrong with grounds mentioned as part of the reasoning provided they stand the factual scrutiny mentioned above. However, a pivotal point is that in order to be infringing, the activity has to not only to go against the circumstances and motivations mentioned in the recitals but rather directly satisfy the criteria set out in the articles for instituting infringement. Other than that, the reasoning confuses the ends mentioned in the recitals and the means provided by the effective articles. Accordingly, in order to infringe the meta search engine provider's activity has to violate the exclusive right of re-utilisation in question, further described as the right of making available to the public. And the further criterion for making available to the public pursuant to Database Directive is found indeed in Article 7 (2)(b): you make the database or substantial part thereof available to the public by the distribution of copies, by renting or by on-line or other forms of transmission. This formulation alone suffices to convey that the exclusive right is fashioned broadly. How the Court found an infringement in this respect, will be reflected below.

For purposes of further legal analysis, a quick look deeper into the technology underlying the dispute would be useful. A meta search engine (MSE) is a search tool that sends user requests to several other search engines and/or databases and aggregates the results into a single list or alternatively displays them according to their source,

¹¹ Proposal for a Council Directive on the legal protection of databases COM(92) 24 final-SYN 393 (92/C 156/03) , Article 2(5).

sometimes providing further information on search results together with links to original databases or search facilities.¹² Thus, it enables users to enter search criteria once and access several search engines simultaneously. MSEs were devised because the extraordinary growth of the amount of information available both in stored form as well as in real-time via Internet and the ever-increasing number of users necessitated a broader variety and more efficient search technologies for differing purposes. Accordingly, an enhanced information retrieval has become indispensable and meta search engines are, together with search engines, web directories and deep-web search portals, researched and developed to address the challenges posed by the volume of information and needs of users.¹³ The data provided by an individual specific search engine or its underlying database may be initially limited by design parameters while a general search engine, however good, often provides amongst the search results hits that are not relevant for a subject-specific search or it displays the results in a form not so informative or comparable with results from other search engines. The features provided by a meta search engine may save the user from having to use multiple search engines separately. MSEs create a so-called virtual database since they don't use their own web crawlers and index the data, thus compiling a physical database of the information collected from the web. Instead, they take a user request, submit it to several other search engines and databases making a federated search and then compile the results in a homogeneous format.

This, like other operations of the MSEs, are based on a specific algorithm/s which may require intense investment both in labour and skills of developers and then further work and development in implementation into executable code. The first meta search engines were introduced in mid-1990's and their usage has increased in popularity, thanks to the benefits they potentially bestow on users, *for example* in the form of more up-to-date, broader or alternatively better directed searches. Some MSEs are actually dedicated to specific searches as in the current case. Further, they may present results often in a more user-friendly or informative format than individual sites' search engines or general search engines yield. Rather than being one homogenous group of search engines, meta search is thus one of the relatively new technologies facilitating better searches over the Internet and also "general" search engines may use it as their search technology.¹⁴ Accordingly, making the binary distinction between them and general search engines is artificial and partly incorrect. Rather it is the extent and format of how the data is used and presented from original sources with referencing method thereto that is crucial in appraising the conformity with *sui generis* right that could be the pivotal criterion instead, it is suggested. And this, in the main, applies to both general and more specific search engines, whether they employ or provide meta search as part of their functionality or not.

Given their popularity and diverse usage, usually no two meta search engines are alike but they differ broadly in functionality and their further development is consequently one of the subjects of further research and development in computer science and software engineering, facilitating the production and commerce in these information products and services. While this is the global tendency, the current CJEU ruling appears to suggest that better information search tools like meta search engines possibly as a

¹² A useful and concise but yet generally accurate definition for meta search engines can be found readily e.g. from Wikipedia. A good further introduction can be found from W. Meng: *Metasearch Engines*, in L. Liu – M.T. Özsu (eds): *Encyclopaedia of Database Systems*, Springer US, 2009, p. 1730-1734.

¹³ M. Manoj – E. Jacob: *Information retrieval on Internet using meta-search engines: A review* [2008] 67 *Journal of Scientific & Industrial Research*, p. 739-40.

¹⁴ Dogpile meta search engine serves as an example of this: <http://www.dogpile.com/>

genus are illegal in Europe provided they can be characterized as CJEU did in its conclusion.¹⁵ Perhaps this is the practical realization of the fostering of research and innovation that is supposed to be so central in the IP policy of the European Union? As mentioned above and as a matter of course, given the variety of the approaches and methods employed by MSEs, some may utilize the data provided by results to queries from other search engines and databases in a manner that may be close or amount to parasitical competition or close to the act of unlicensed making available to the public. However it is upon the individual circumstances of the case to determine this rather than make a generalized conclusion based on search facility tagged as a meta search engine.

As mentioned *supra*, the court found the MSE making a substantial part of the database available for the public. The act on the part of the operator of making available on the Internet a dedicated meta search engine such as that at issue in the main proceedings, into which it is intended that end users will key in queries for 'translation' into the search engine of a protected database, constitutes 'making available' the contents of that database for the purposes of Database Directive. The making available is for the public, since anyone at all can use a dedicated meta search engine and the number of persons thus targeted is indeterminate, the question of how many persons actually use the dedicated meta engine being a separate issue. Consequently, the operator of a dedicated meta search engine such as that at issue in the main proceedings re-utilises part of the contents of a database for the purposes of Database Directive.¹⁶

Besides the case-by-case based approach, another even more unconventional train of thought is yet open for debate to counterbalance the reasoning in this respect. Much of the legal assessment on the operation of a MSE may depend on the initial terms and technological constraints imposed by another search engine or underlying database that the federated search uses as its source. This is the freedom of rightholder of a database and it is her/his liberty to choose whether and how he makes the database open for public "consultation". Provided the initial database owner has granted an unrestricted access for queries made by users through a search engine, a MSE does not make the initial database available to any new public. The database is already available to that same public by same means of transmission, Internet,¹⁷ and the MSE is by no means channeling or disseminating the same database or a substantial part thereof to anyone constituting a new public in reality.

Instead, it provides via a website to individual web users the software tool to make initial queries on the same subject through an alternative, often more efficient search engine *not limited* to that particular website claiming infringement and, absent any further extraction or utilisation of information from the database other than assented by the rightholder initially¹⁸, works for the same purposes as a general search engine using

¹⁵ The issue pivots on how extensive reading is given on threefold criteria in the judgment that are broad and potentially cover the majority of MSEs. In the light of domestic courts previously applying the criteria laid out broadly by the ECJ in the area of Database Directive interpretation, the prospects for further possible confusion are extant. See e.g. P. Virtanen: Poem title list III – A little database outro [2011] 2 European Journal of Law and Technology 2, at: <http://ejlt.org/article/view/73>

¹⁶ Judgment paras 50-52.

¹⁷ There is a string of ECJ cases touching on the "new public" in the context of Copyright Directive 2001/29 and communication to the public, including references to earlier case-law; See e.g. *ITV & others v TV Catchup* C-607/11 7 March 2013, concerning streaming of broadcasts.

¹⁸ A separate but yet useful parallel discourse on implied license as a legal construct for assent in hyperlinking context can be found in: e.g. T. Pihlajarinne: Setting the limits for Implied license in Copyright and Linking Discourse – The European Perspective [2012] 43 IIC international review of intellectual property and competition law, p.700-710.

crawlers but without extracting the data, providing also access to initial databases and this is what users predominantly do. A user, after a query and receiving the search results, may then, upon finding the relevant websites and a varying degree of data from information available in that website to judge their relevance, refer to a particular website and its own search engine or not, depending on how relevant the initial search results by the MSE appear. And a MSE faces often the competition from other dedicated and general search engines or dedicated websites with their search facilities, depending on a number of factors affecting the web users preferences which may all vary. A parallel reasoning of non-existence of new public for the communication to the public right and consequently non-infringement was employed only recently by the CJEU concerning copyright context in *Svensson* case concerning hyperlinks,¹⁹ and one may ask whether there are sufficient grounds to distinguish the making available to the public right in *sui generis* context from communication to the public in the area of copyright and treat it differently there, bearing in mind that in EU copyright making available to the public is one subcategory of communication to the public while Database Directive operates with making available to the public as the broad overall concept lending substance to right of re-utilisation.²⁰ Interestingly, the underlying arguments for finding infringement in Internet hyperlinking cases in several Member States Court decisions have been parallel to losing revenue by going directly to relevant sites instead of rightholder's start sites as the case was partly in recent dispute.²¹

In recent case, the court was quick to note that the activity of the operator of a dedicated meta search engine such as that at issue in the main proceedings does not constitute consultation of the database concerned. That operator is not at all interested in the information stored in that database, but he provides the end user with a form of access to that database and to that information which is different from the access route intended by the database maker, whilst providing the same advantages in terms of searches. By contrast, it is the end user keying in a query in the dedicated meta search engine who consults the database by means of that meta search engine.²² Indeed, as it was mentioned above, it is exactly and still the end user that consults the database and *not* the operator of a MSE, while the database right holder made the information available over the Internet for users. Maybe the website operators have never heard of search engines used for finding the relevant websites and the information therein in the first place? They rather would prefer to keep hidden in the web, users not finding them?

E contrario, should one find for infringement for MSE categorically, the reasons given for potential infringement apply, in the main, with equal force to "general", or rather web

¹⁹ *Svensson et al v Retriever Sverige AB*, C-466/12, ECJ 13 February 2014, paras 24-32 referring to previous case-law; It remains to be seen whether this approach will be revisited or not. At the time of writing there are cases pending before the ECJ, C-279/13 *C More Entertainment AB B v Linus Sandberg* and C-348/13 *BestWater*. See also: E. Arezzo: Hyperlinks and Making Available Right in the European Union: What Future for the Internet after *Svensson*? 4 March 2014, at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404250 (working paper series).

²⁰ The making available appears as a subcategory for communication to the public in WCT 1996 Article 8 and Copyright Directive 2001/29 Article 3. Recitals 23 and 24 of the Copyright Directive further clarify the relation while the Database Directive operates only with making available right, rendering the comparison somewhat problematic.

²¹ Amongst several cases perhaps a prominent and apposite one is the *Paperboy* judgment from Federal Court of Justice of Germany (Bundesgerichtshof), since the case concerned *inter alia* the alleged infringement of database rights by means of deep linking: BGH 17 July 2003, Az. I ZR 259/00. Further references to domestic case-law and literature on the subject can be found from Arezzo's paper mentioned in footnote 17. See also P. Virtanen: Evolution, Practice and Theory of European Database IP Law, *Acta Universitatis Lappeenrantaensis* 303, 2008, p.231-243.

²² Judgment, para 47.

crawler and indexing-based, data-storing search engines as for utilization or making available to the public of information. Maybe, in the reasoning extant in the recent judgment, germinates the seeds of making a well argued case against all search engines? Making the distinction between a MSE and a general search engine is apples to oranges, while the apposite technological couples, if one prefers simplified dichotomies, are either general or specific search engines on one hand and meta search technology or crawler based, indexing searches on the other. As suggested, such binary distinctions may work generally but can be oversimplifications in individual cases. If the underlying technological solutions present are not accurately presented in a given case, the consequent legal analysis faces the risk of being concomitantly off-center.

4. CONCLUSION

The remaining and valid issue is what to do with the case where a competing service is indeed running a similar service using the resources from the initial website and underlying database, disguised as a (meta) search engine. The answer is twofold and already suggested above. First, there is the possibility available for resorting to relevant competition law, understood broadly as described *supra*. If the EU as a body politic has chosen not to harmonise the now relevant aspects of unfair competition law, it does not mean that the Member States' domestic provisions are not available.²³ The owner of a database and operator of a website is not left without a remedy in a business dispute like this, and unfair competition law is best suited to address the intricacies and minutiae of each given case, the profit making nature of activities concerned belonging inherently to this domain.

Second, there exists the possibility of the unavoidably difficult determination on possible *sui generis* infringement based on individual circumstances. The need for such a remedy is accentuated in occurrences when the case does not, to put it broadly, concern a business dispute. If it is obvious that the MSE emulates the database in question and provides exactly the same data without any meaningful reduction in the amount, there could exist an infringement of Article 7(5), tailored initially to prevent circumvention of article 7(2) by repeated and systematic extraction/re-utilisation of insubstantial parts of the database, provided the other requirements thereof are met, discussed also *supra*. Importantly, Article 7(5) provides that mere repeated or systematic re-utilisation does not suffice alone, but it has to *unreasonably prejudice* the legitimate interests of the maker of the database. Instead of routinely adding these further requirements as part of reasoning, they could be applied as it was initially projected and apply paragraph 5 in circumstances described above, and only when the acts in question unreasonably prejudice the interests of the database maker.

As one can appreciate, the case is a showcase for several complex and critical IP issues existing in the Internet and there are many alternative approaches as to how the law should treat them. Perhaps even more importantly, rather than finding the sole right solution that does not necessarily exist, at least a clarification that is transparent in reasoning with regard to actual technological environment and also in harmony with

²³ On development of unfair competition law in the EU, see e.g. C. Wadlow: Unfair Competition in Community Law, Parts 1 and 2, in [2006] E.I.P.R 8 and 9, p. 443-444 and 469-473 respectively. The *Paperboy* case mentioned in footnote 19 is again useful as an instance, since the case concerned also the alleged infringement of German unfair competition law provisions besides (both) database rights. It is of course possible that a Member State has not adopted measures to this effect or a remedy is otherwise absent. This may reinvigorate the issue either in broader, domestic or EU context.

other CJEU solutions on the matter is desirable.²⁴ One can easily claim that this is a system failure since there should be specific provisions for search engines as for copyright and related rights like *sui generis* right.²⁵ It is problematic to say whether in individual cases the decision-making would be easier although at least such provisions at general level would make it clear that while protecting the investment in databases is a worthwhile goal as such, so is the investment and effort in creating better and more efficient web technologies such as ones improving searches, and neither should be protected at the expense of other without solid grounds for it. Recognizing the importance and difficulties related to these cases, it is slightly surprising that the Advocate General (AG) did not deliver his opinion in this case and the *Svensson* case was also decided without the opinion of the AG. While the CJEU does not give reasons as to why there was no need to have a separate AG's opinion, they would arguably have been potentially quite useful for the further clarification and development of law in the field.

²⁴ Another underlying and related but broader question is whether the right of making available to the public is infringed merely by offering the work to the public or does it require the subsequent accessing the work as well, particularly in copyright context. While neither the WCT nor Copyright Directive expressly provide for what is the correct understanding, several copyright and related rights organizations strongly lobby for the first, broader option for understandable reasons: It does grant a vastly broader right and as a corollary the possibility to seek injunction for mere uploading a probably infringing work or material covered by the right and possible takedown/blocking measures. ECJ has taken a stance that appears to be parallel to this, *exempli gratia* in *Rafael Hoteles*, C-306/05, 7 December 2006. The question on the reach of the right does transpire merely European borders since the debate in 2013-4 on amending the U.S. Copyright Act revolves heatedly around the point whether to grant expressly a making available to the public right in the form of making mere offering to the public infringing without subsequent transmission; many experts find that such provision has not been necessary to protect the works and other related materials online while there is a strong support for the opposite view too. See e.g. The Copyright Office hosting on 5 May 2014 a public roundtable discussion on the state of U.S. law recognizing and protecting "making available" and "communication to the public" rights for copyright holders, at: http://www.copyright.gov/docs/making_available/; see also: T. Sydnor: The U.S. Making-Available-Right: Preserving the Rights "To Publish" and to "Perform Publicly", 25 April 2014, at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2421724, (a published draft).

²⁵ The debate on this caught on early, see e.g. A. Cruquenaire: Electronic Agents as Search Engines: Copyright related aspects [2001] *International Journal of Law and Information Technology* 3, p. 327-343.