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Search-Spider makes lawful use of the web

by Jörg von Felten

The Case

The Swiss Federal Supreme Court has recently had to deal with the issue of unfair competition on the web. In this regard the Court not only discussed how much effort somebody has to make on his own when reproducing the work results of a competitor, but also raised the topic of the relationship between the Unfair Competition Act (UCA) and intellectual property rights.

The four Claimants in the case at hand operate internet online-platforms on which they publish real estate advertisements.

Respondent systematically scans these platforms for advertisements that are of interest to it by using a search-spider. Subsequently Respondent places the advertisements found in this way on its own internet platform.

Unfair Competition Aspects

Claimants alleged that Respondent's behaviour was unfair and therefore unlawful under Art. 2 and Art. 5 lit. c UCA. Pursuant to the blanket clause of Art. 2 UCA, any behaviour or business practice that is deceptive or that in any other way infringes the principle of good faith and which affects the relationship between competitors or between suppliers and customers shall be deemed unfair and unlawful. Beside this blanket clause, the UCA enumerates a variety of examples of what constitutes unfair and therefore unlawful behaviour.

One of these specific instances is described in Art. 5 lit. c UCA. According to this provision, anyone who, by means of technological reproduction processes and without a corresponding effort of his own, takes the marketable results of work of another person and exploits them as such shall be deemed to have committed an act of unfair competition. In the light of the blanket clause, the breach of good faith lies in the reproduction and utilisation of a third party's result without effort of its own.

According to the Court the specific facts generally prevail over the blanket clause of Art. 2 UCA. For this reason the Court first examined whether Respondent's behaviour is unlawful under Art. 5 lit. c UCA. One requirement of said provision is that the reproduced work result is marketable. This requirement is met if the work result can

be commercially realised without further investments. The Court found that one single advertisement is of little interest to a potential customer that wishes to get a general idea of the market. Anyhow, it regarded the single advertisement as part of Claimant's work result, a part that can be commercially realised and therefore it considered the single advertisement marketable.

The core question in the case at hand, however, was whether Respondent reproduced the advertisements without corresponding effort of its own.

In this regard the complete effort for the reproduction, possible further developments and variations is to be examined. In this context, the Court regarded the programming of Respondent's software for the scanning of Claimant's online-platforms as effort of its own.

The effort for the preparation of the transferred data is also regarded as effort of the Respondent. Further the Court took into account Respondent's effort to control and update its search software and reasoned that Respondent's own effort is not to such an extent inadequate that it takes and exploits Claimant's work results as such without corresponding effort. Hence the Court came to the conclusion that Respondent's behaviour was not unlawful according to Art. 5 lit. c UCA.

Unfair Competition and Intellectual Property Rights

The Court pointed out that the Unfair Competition Act does not create a new form of intellectual property right. With regard to the blanket clause of Art. 2 UCA it stressed that the mere reproduction of results is not per se a breach of good faith according to Art. 2 UCA.

The purpose of the Unfair Competition Act is to guarantee the fairness of competition while the purpose of the intellectual property rights is to protect the work result as such. In other words: work results as such are not protected by the provisions of the Unfair Competition Act, however, the Unfair Competition Act does protect such results against unfair reproduction and copy.

Quotable decision of the Supreme Court

by Maureen Meyer

The Swiss Federal Supreme Court has recently issued an important decision for copyright lawyers and newspaper editors. The case deals with the rights and restrictions on quotation. The facts centre on two articles originally published in a Swiss daily newspaper. The first, written by M, a university professor and politician, dealt with foreigner crime levels and advocated a hard line against criminality among non-Swiss nationals. The second article, written by another professor, K, was published a week later in answer to the points raised by M.

Some time later, the two articles were reproduced in their entirety on one page of a weekly newspaper. The two articles were supplemented by an editorial giving further information on the background and context to the issues raised. A third author, S, commented on the articles in a short text at the bottom of the same page. K, unlike M, had not given his consent to the publication of his work. He brought a court action against the weekly newspaper, claiming infringement of copyright and of his moral rights.

K's article qualifies as a literary work according to the Swiss Federal Act on Copyright and Neighbouring Rights (Copyright Act). The Copyright Act gives the author of a literary work the exclusive right to decide whether, when and how his work may be used. In order to justify a reproduction of an article without consent, the publisher may rely on the defence of quotation (Art. 25 Copyright Act). The defence (or right) of quotation is a limitation on the scope of protection given to an author's work. This provision allows a disseminated work to be reproduced on the condition that the quotation is designated as such and the source is indicated. Moreover, the quotation must serve as an explanation, a reference or an illustration, and the length of the quotation must be justified by such purpose. The Court further specified this condition in the context of application to a literary work by adding that there must be a material link between the quoting text and the quoted text. This material link will determinate the admissible length of the quotation. The quotation should not have disproportionate significance relative to the quoting text, nor when considered on its own.

In the present case, the quotation sources were given correctly. The main question was whether the article really had the purpose described above. In other words, was the material link sufficient to justify the reproduction. With regard to the editorial, it could certainly not be argued that the text was used as an explanation, reference or illustration in the above-mentioned sense, as the quoted articles and their provenance were barely mentioned. The short additional article by S, on the other hand, was clearly related to the articles and referred several times to the content of K's text. Notwithstanding this, the Court considered that there was an infringement, as the literal and full publication of the text was not necessary in the circumstances; it would have been sufficient to publish an excerpt of the article to illustrate and expound on the debate.

The publication illustrates a topical political debate leading to public discussions. In these circumstances, should the interests of freedom of information and opinion allow the quote despite the restrictions of copyright law? This is what the lower instance had held. The Court, however, answered this question by pointing out that the legislator had already balanced the two opposing interests at stake, namely property rights on one hand and rights of information and opinion on the other hand. It is therefore not the Court's role to interpret this provision by giving greater importance to freedom of information. The newspaper could have provided information and expressed its opinion by reproducing only excerpts of the article.

Moreover, it is to be noted that in Switzerland, unlike other countries such as Germany and Austria, there is no particular clause providing that politicians expressing their opinions publicly have to tolerate their works being reproduced by third parties.

Finally, with regard to moral rights, the Court ruled that K risked being criticised by choosing to publicise his political opinion on a platform where opinions are debated at times in an aggressive way. K could therefore not claim that the fact his article was also published in a newspaper with a different political bias to his own infringed the integrity of his work and his moral rights under Art. 11 Copyright Act.

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