THE EUROPEAN TRAVEL AGENTS' AND TOUR OPERATORS' ASSOCIATIONS

Ref: IL10-083/9413312 – 26/04/2010

Summary of judicial decisions on cases between Ryanair and intermediaries for the use of the airline's website

● Decision in favour of intermediaries ❍ Decision in favour of Ryanair

1. FRANCE

1.1 Ryanair v. Vivacances (Opodo)

a) Preliminary injunction ●

Ryanair filed a complaint against the French online travel agency "Vivacances". It requested from the French Tribunal an order to withdraw from the "Vivacances" website all information on Ryanair flights or reference to Ryanair and to stop the agent from selling Ryanair flights.

Considering that Ryanair asked for urgent interim measures, the Tribunal de Commerce de Paris issued an interlocutory order on 9 November 2007, which does not rule on the substance of the arguments but on the need to take any urgent measure.

The French Tribunal rejected Ryanair's request for urgent interim measures on the following grounds:

- on the travel agency website, the traveller has the choice between several airlines among which Ryanair;
- There is no contractual relationship between Ryanair and Vivacances. In this respect, Vivacances notified that it was willing to change the word "agent" into "intermediary" in its General terms and conditions;
- Concerning Ryanair's assertion that Vivacance violates Ryanair's terms and conditions on the use of the Ryanair website, the Tribunal indicates that this term is a unilateral Ryanair term, of which the legitimacy would have to be analysed by judges adopting a full ruling on the case.
- the sale of Ryanair flights by Vivacances causes no dammage to Ryanair. In addition Ryanair does not justify of a dammage caused by the link between the Vivancance website and the Ryanair website. On the contrary, it is interesting for Ryanair to be able to sell flights to the clients of Vivacances.
- there is no legislation that prohibits the sale of air tickets by an online travel agency.

The Tribunal decided to reject the requests of Ryanair and ordered the agency to replace the word "agent" by "intermediary" in its general terms and conditions.

The text of the decision was sent to the Members in French on 6 February 2008 and in English on 9 May 2008. Further details on the case are available in the letter IL08-042/941331 sent on 6 February 2009 and IL08-230/941331 sent on 9 May 2008.

b) Decision on the substance of the case ●

The Tribunal de Grande Instance de Paris rejected all the claims of Ryanair in a decision of 9 April 2010:

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- Contractual liability: Ryanair's general conditions are not applicable to intermediaries. Moreover, the term prohibiting the sale of Ryanair's tickets by other websites is not infringed because the transactions are confirmed through the Ryanair website.
- Rights as a database maker: Ryanair has not demonstrated that it has made substantial investments to obtain, verify or present the database contents, therefore it cannot benefit from the sui generis rights of database makers under French law transposing Article 7 the Directive 96/9 on databases.
- Trademark counterfeit: Opodo has not used Ryanair's trademark to sell by itself Ryanair's products and has not caused any harm to Ryanair. Opodo follows the legal obligation of indicating the identity of the carrier to the customer.
- Unfair competition: The only legal restriction to on-line sale/marketing of air tickets is the obligation to have a travel agent licence. Opodo has such licence. Moreover, Opodo's activity drives new customers to Ryanair.

In addition, the Tribunal sentenced Ryanair to pay compensation to Opodo for the damage caused by a press release in which it denigrated Opodo's activities.

Further details on the decision were circulated in the letter IL10-082/9413312 sent on 26 April 2010.

2. GERMANY

2.1 Ryanair v. Vtours

Ryanair introduced a legal action in Germany against Vtours.GmbH. Vtours is a tour operator that was booking Ryanair flights, through data obtained from a third party undertaking, to construct package travels offers.

a) Preliminary injunction ❍

Ryanair received on 7 July 2008 a decision banning VTours from making reservations in order to resell the flights to third parties and from making information on Ryanair flights available to third parties.

b) Appellant court following the interim proceedings ❍

The Court of Hamburg partly confirmed on 28 August 2008 the preliminary injunction. Some of the grounds on which the preliminary decision was based were not confirmed. However the order against Vtours was confirmed.

The confirmation decision is mainly based on the Virtual right of the householder, which enables Ryanair to restrict the use of its website like a brick and mortar provider can restrict access to its premises. This right enables Ryanair to deny access if the behaviour of the person who accesses to the website is different from the behaviour of normal customers. The Court considered that the behaviour of Vtours, which was using an Internet booking engine, is different from those of the "normal customers".

The court however considered that Ryanair is not entitled to deny access to the website to VTours for the purpose of viewing the flight schedules or booking per hand or via call center.

The Court did not answer the question whether the Terms of Use of the Ryanair website are legally binding.

The judges considered besides that there is no infringement of the carrier's obligation to conclude a contract of carriage with any person and that Vtours failed to demonstrate an abuse of dominant position.

Further details on the case are available in the letter IL08-418/941331 sent on 8 October 2008.

It appears that Vtours could be bringing the case to the next appellant court.

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c) Appeal Court of Hamburg ❍

The Court of Appeal of Hamburg ruled on the case on 28 May 2009 in favour of Ryanair. Ryanair had put forward that it does have not an issue with an intermediary making the booking, but with the fact that an intermediary provide such service for commercial purposes (Vtours was in particular constructing packages). The Court considered that Ryanair is entitled to determine whether its tickets should be distributed directly or via intermediaries, in accordance with freedom of enterprise.

Vtours had raised that Ryanair is abusing of its dominant position but the Court found that Vtours failed to substantiate its plea.

The full text of the decision was circulated on 13 October 2009.

2.2. CheapTickets v. Ryanair

a) Preliminary injunction ●

The travel portal "Cheaptickets.de" received on 25 August 2008 by interim relief a decision from the District Courts of Frankfurt ruling that Ryanair is not entitled to cancel the bookings of the clients who booked the tickets via Cheap Ticket.

This decision was ruled under an urgency procedure for interim relief and therefore does not examine questions of law. The Court of Frankfurt has ordered that Ryanair is prohibited from the following, otherwise it will be exposed to a fine of EUR 250,000 or 6 month prison:

- claim, or communicate in writing, or otherwise, that Ryanair tickets are not valid if they are not booked on the Ryanair website or through the Ryanair call center;

- claim, or communicate in writing, or otherwise, that Cheap Tickets has offered, issued or advertised tickets in an illegal manner, or has done so in the past;

- for passengers holding a ticket purchased on the Cheap Ticket web portal, refuse transport solely on the ground of the manner in which the ticket was purchased, via the website of Cheap Tickets BV.

The Court did not consider whether screen scraping is legally allowed or not.

Further details on the case are available in the letter IL08-372/941331 sent on 1st September 2008.

b) Appellant court following the interim proceedings ●

On 5 March 2009, the Court of Appeal in Frankfurt dismissed the appeal filed by Ryanair against the injunction granted in favour of CheapTickets.

During the hearing, the Court of Appeal made clear that screen scraping was to be regarded as legal and did not infringe data base rights in Ryanair's website.

Concerning the decision in the case Ryanair v. VTours where access was denied by use of screen scraping software, the judges explained that they did not consider this decision to be correct. The "virtual domestic right" of the owner of the website is – assumed that such right exists – not suitable to prevent companies from screen scraping.

Further details on the case are available in the letter IL09-119/941331 sent on 29 April 2009.

c) Regional court of Hamburg ●

Ryanair brought the case before the Regional court of Hamburg, which ruled on 26 February 2010 that is it not illegal for an intermediary to book on the Ryanair website tickets for consumers.

The judges considered that Cheapticket is not violating Ryanair's right on its database.

Cheapticket is neither violating the right of the owner of virtual premises to undisturbed possession.

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Ryanair has for the past a claim to compel Cheapticket to refrain from acting as a reseller of their tickets, as this constitutes illegal trade according to the German Unfair Competition Act.

However, Ryanair has no claim to compel Cheapticket to refrain from acting as an agent for the consumer.

The full text of the decision was distributed on 26 April 2010.

3. SPAIN

3.1. Ryanair v. Rumbo ●

The online travel agent Rumbo received on 1st October 2008 in Madrid an interim relief decision in its favour (Ryanair was not represented), as follows:

- Ryanair cannot cancel tickets booked by Rumbo;
- Ryanair must withdraw from its terms and conditions the term on cancellation of tickets booked otherwise than directly on the Ryanair website;
- Ryanair must stop threatening to cancel tickets;
- Ryanair cannot make statements denigrating travel agents' activities.

Similar decisions were reached in Spain in a couple of other cases between Ryanair and online travel agents. Those decisions are all interim and should be followed by the decisions of an appellant court.

3.2. Ryanair v. Atrapalo

Atrapalo is an online agent, which checks for availability of low cost airline flights through an IT screen scraping system.

Ryanair seeked to obtain an order on Atrapalo to cease the extraction of data and Ryanair flight information directly from its website through the process of screen scraping, on the following grounds:

- Breach of the conditions of use of the RYANAIR website;
- Illegitimate use of the RYANAIR database (EC Directive 96/9);
- Infringement of intellectual property rights on RYANAIR's computer programme (EC Directive 1991/250);
- Unfair competition by taking unjustified advantage of the reputation and efforts of RYANAIR

a) First instance decision ●

In a ruling of 20 January 2009, the Commercial Court of Barcelona dismissed the complaint of Ryanair.

1) The Court ruled that there is no breach of Ryanair's conditions of use because there is no contractual relationship between ATRAPALO and RYANAIR. There is no rule to cover the claim that the owner of a website may impose conditions on its use. RYANAIR, in order to sell its products, has decided to exploit the advantages of the Internet through a system of free access at no cost, so it must also bear its disadvantages, one of which being a certain loss of control over sales channels. RYANAIR cannot discriminate as to who may be a user of information made public. RYANAIR cannot impose its model, which blocks other business models such as those of travel agents.

ATRAPALO, as a legally accredited travel agent, is entitled to enter into the sale of tickets. The approval of RYANAIR is not required to carry out a mediation activity.

There is no proof that the intermediary activity conducted by ATRAPALO clearly causes damages to RYANAIR.

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2) Under EC Directive 96/9 on the legal protection of databases, RYANAIR cannot benefit from copyright protection, nor from sui generis rights for substantial investments in the database. Moreover, had RYANAIR benefited from rights on the database, the Court indicates that ATRAPALO would not have been considered as carrying out abnormal exploitation of the database.

3) The Court also rejected the arguments of RYANAIR based on the EC Directive 91/250 on the legal protection of computer programs. RYANAIR put forward the interface of its program, but the Court considered that this interface is not different from those employed by other airlines. Moreover, it noted that ATRAPALO uses its own software.

4) The Court rejected RYANAIR's pleas that ATRAPALO is creating a false association with RYANAIR, passing itself off as a travel agent authorised to sell its flights, thereby exploiting RYANAIR' reputation. ATRAPALO does no use the distinctive RYANAIR signs, so there can be no exploitation of RYANAIR's reputation.

Finally, the Court noted that ATRAPALO's activity favours competition, insofar as it allows customers to compare offers from different operators.

Ryanair appealed against the decision.

A translation of the decision in English and further details on the case were sent on 1 April 2009 (letter IL09-089/941331).

b) Confirmation in appeal ●

The Court of Appeal of Barcelona confirmed the first instance decision at the beginning of 2010. It seems that its reasoning was similar to that in the case Ryanair v eDreams (under point 3.3).

3.3. Ryanair v. eDreams

eDreams is an online agent, which checks for availability of low cost airline flights through an IT screen scraping system. Ryanair seeked to obtain an order on eDreams to cease the extraction of data and Ryanair flight information directly from its website through the process of screen scraping

a) First instance decision ●

The Commercial Court of Barcelona dismissed the complaint of Ryanair, apparently on the same basis as in the case Ryanair v. Atrapalo (point 3.2).

b) Confirmation in appeal ●

The Court of Barcelona upheld on 8 January 2010 the first instance decision.

We do not have access to the full decision. It appears on the basis of press reports that the Court considered that:

- eDream does not take advantage of the reputation and efforts of Ryanair when including Ryanair flights among the flights searched by its system;
- eDream's practice does not constitute an unfair competition practice and even fosters competition by allowing consumers to compare between offers of flights;
- the fares applied by eDreams are the same as in Ryanair's website. It is legitimate that the agent applies an additional fee for its services;
- the fact that some consumers opt for the travel agent's website rather than Ryanair's website is a normal consequence of free market competition.

4. IRELAND

4.1 Ryanair v. Billigfluege and Ryanair v. Ticket Point Reibüro

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Ryanair introduced proceedings in Ireland against two German online travel intermediaries, which screenscrape the Ryanair website and distribute Ryanair tickets, i.e. Billigfluege.de GmbH and Ticket Point Reisebüro GmbH.

Ryanair claims that the two online travel intermediaries breach its website's Terms of Use, its trademark, copyright and database rights.

Decision on the jurisdiction of Irish courts ❍

The Dublin High Court ruled on 26 February 2010 concerning its jurisdiction in the two cases on the basis of the EU Regulation 44/2001 on Jurisdiction, Recognition and Enforcement ("the Brussels Regulation").

The issue was whether the defendants should be sued in their own domicile, i.e. in Germany, according to Article 2 of the Brussels Regulation, or whether the exclusive jurisdiction clause providing jurisdiction of the Irish Courts in the Terms of Use of the Ryanair website constituted a valid agreement between the parties under Article 23 of the Brussels Regulation.

The Dublin High Court ruled that the Terms of Use of the Ryanair website constitute a contractual document entered into by the parties and that the defendants had the opportunity to take notice of the exclusive jurisdiction term. The Court thus considered that it has jurisdiction under Article 23 of the Brussels Regulation.

The full text of the decision and further details on the case were sent on 15 March 2010 (letter IL10-045/9413312).

The Dublin High Court will rule in another decision on the substance of the case.

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