

Vorschaubilder II. The second case on image search thumbnails

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The German Federal Court of Justice rejects liability for image search thumbnails even if they are indexed on websites showing the images without permission as long as other websites did so with the rights holder's consent.

The first landmark case involving thumbnail previews of Google's image search function in Germany (*Vorschaubilder I*, 2010) had dealt with indexation of images put online by the rights holder herself with no robots.txt file telling search bots not to index these images. Criticised by many, the Federal Court of Justice in that first case in effect established an opt-out rule where the rights holder has to actively indicate not to allow indexing in order to get injunctive relief against thumbnails of own works found in image search results. This was seen as a quite unusual construct for German copyright law, and the way the Court got there - by seeing implied plain consent - was regarded as one that couldn't possibly work for cases where the images were made available without or against the rights holder's intention.

That is why the following decision *Vorschaubilder II* was eagerly awaited, for in this second thumbnail case Google's image search bot had indexed websites on which the images in question were published without permission. The plaintiff had claimed that he had not granted any usage rights to the providers of the specific websites from which the Google search bot generated the preview thumbnails. The Court affirmed its previous ruling that the thumbnail results pages of an image search do in fact constitute an act of publicly making available in the meaning of Art. 19a of the German Copyright Act (Urheberrechtsgesetz), and thus require the rights holder's consent if copyright-protected works are shown or another ground for justification. It went on to say that the mere fact that images are made available on a specific website without being excluded from indexing by means of a robots.txt entry or similar provisions does not give a search engine provider a sufficient usage right to show thumbnails, neither based on an inferred contractual nor an in-rem right derived from the owner of that specific website, if the website owner himself was not previously granted any rights by the creator.

But again, the Federal Court of Justice found justification for the violation it sees in making available miniaturized versions of works in image search. This time, though, the Court couldn't find an implied plain consent flowing from the act of permitted publication lacking robots.txt commands, at least not regarding the indexed websites in question. But apart from these sites publishing the images without permission, it was undisputed between the parties that the rights holder, a photographer, had allowed other third parties to make his images available online. In the eyes of the Federal Court of Justice this is sufficient to exonerate a search engine provider from liability, as it is a well-known fact, said the Court, that search engines are automated systems unable to differentiate whether images have been put online by someone with or without authority to do so. Therefore, the consent given by the rights holder to any third party to publish images online without technical measures against search engine indexation, also extends to indexation of the same images on other websites where they are published without the rights holder's expressed consent.

The Court concluded by saying that the rights holder is free to take action against such third party website providers who put images online against his will. The decision cannot be appealed, but what remains to be decided is a case where images are indexed even though nobody had the right to make them available online.

A full summary of this case by Till Kreutzer & John Weitzmann has been added to the Kluwer IP Cases Database (www.kluwerIPcases.com).