

# Kluwer Copyright Blog

## Germany: The Pixelio Stock photo case and the District Court of Cologne...again

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*“According to Art. 13 of the German Copyright Act (“CA”) the author has the right to be identified as the author of the work. He may determine whether the work shall bear a designation of authorship and which designation is to be used.”*

The District Court of Cologne (Landgericht Köln) apparently never sleeps. After its somewhat questionable role in a surge of so called Redtube warning letters which infested some 10.000 unsuspecting German internet users in December 2013, the Court surprises both internet users as well as the legal community with a judgment (LG Köln, judgment of 30.1.2014, [14 O 427/13](#)) on the moral right of recognition of authorship (Art. 13 [Copyright Act](#)) and its compatibility with stock photo websites and their business model. The Court’s opinion may either proof influential as to how images ought to be shared and linked or Cologne’s Carneval casts its shadows ahead (both views accepted...).

### Factual Background

The claimant applied for an injunction claiming that his right to be recognized as the author pursuant to Art. 13 CA had been violated. The claimant was an amateur photographer. He uploaded the photo that eventually became the subject of the dispute and offered it for download on <http://www.pixelio.de/>, a German-based database website for royalty free stock images. Pixelio’s terms and conditions contained inter alia the following clause:

*The User shall be obligated to name PIXELIO and the Author (with his/her photographer’s name as stipulated during the upload of the Image from PIXELIO), in such a way as is usual for the corresponding utilisation and – as far as this is technically possible – in close proximity to the Image itself or at the end of the page, in the following form: ‘© Photographer’s name / PIXELIO’. Furthermore, if Photos are used on the Internet or in digital media, a reference (link) to PIXELIO’s website must be placed on the website.*

The defendant operates a website and used the photo in dispute to illustrate an article which was published on his website. At the bottom of that page the claimant was identified as the author of the photo.

On the main page, however, where article and photo were teased, as well as under the direct URL under which the full resolution image was accessible, a copyright notice acknowledging the claimant's authorship was missing.

The claimant sent a cease and desist letter to the defendant who refused to accept it. Thereupon the claimant applied for a preliminary injunction prohibiting the defendant from making the photo in dispute publicly available without a copyright notice that recognized the claimant's authorship. After the Court indicated that the claimant's application might be unfounded as far as the teaserpage was concerned, the claimant sustained his application only in relation to the direct URL.

On 8th of October 2013, the Court issued a preliminary injunction, which the defendant appealed immediately. The claimant asked to uphold the preliminary injunction, whereas the defendant asked to suspend her, arguing that he had not infringed the claimant's rights, since these were recognized according to Pixelio's terms and conditions. Additionally it was not technically feasible to affix a copyright notice under the image URL.

### **Judgment of the court**

The court sustained the preliminary injunction and proposed to the claimant to request that the photo in dispute should not be made publicly available as a full resolution image via a direct link without a copyright notice. The image was protected by copyright and for this purpose it did not matter much if it was protected as a work according to Art. 2(1) Nr. 5 CA or as a related right according to Art. 72 CA.

The Court held that by making the photo in dispute publicly available under a direct link the claimant's right to being named as the author (Art. 13 CA) had been violated. The defendant could not validly rely on Pixelio's license terms in this respect, since the license expressly required the author of the work to be identified. As a moral right, the right of recognition of authorship belonged to the creator of the work, who could decide if the work should or should not be published under his name. However, the right might, outside its core value, be relinquished by contract. Pixelio's license term to which, according to the findings of the Court, both parties subscribed, stipulated in clause 4:

*The User shall be obligated to name PIXELIO and the Author (with his/her photographer's name as stipulated during the upload of the Image from PIXELIO), in such a way as is usual for the corresponding utilisation and - as far as this is technically possible - in close proximity to the Image itself or at the end of the page, in the following form: '© Photographer's name / PIXELIO'. Furthermore, if Photos are used on the Internet or in digital media, a reference (link) to PIXELIO's website must be placed on the website.*

It was undisputed between the parties that the defendant had made the photograph

available under the direct link without a designation of authorship. Hence and according to the findings of the Court it had not complied with clause 4 of Pixelio's license terms. Consequence of this was that the author could prohibit the use of the photograph without his authorship being properly acknowledged.

### **Each URL constitutes a separate publication**

Furthermore, the defendant could not rely on having acknowledged the claimant's authorship in connection with the article in which the photo was presented. The Court held that when the photograph was made publicly available under different URLs (regardless of whether those URLs were entirely different or one of them was a subpage) each URL constituted a separate publication and thus had to be dealt with separately.

It was made clear by Pixelio's license terms that in a case where a photograph was used several times, the license terms had to be fully complied with in every case. This was to apply regardless of whether those URLs were entirely different or appeared in a mainpage-subpage context, because all that mattered was that every URL could be found and accessed separately via internet search engines. Again the fact that the claimant's authorship was recognized on the article's main page could not make up for omitting the designation of authorship under a different URL. In particular, the right of recognition of authorship was not comparable to the service providers obligation to provide for an imprint, as both rights and requirements were of a different legal nature.

### **Relying on business practices**

Furthermore and because of the clear and unambiguous license terms, the defendant could not rely on business practices under which photographs that could be accessed separately did not need to be recognized individually. It might be true that in a large number of cases where only the photograph was accessible under a separate URL, a designation of authorship was omitted. In the present case, however, the Court held that based on the evidence the claimant had provided, it could be established that it was technically feasible as well practicable (as occurring in practice) to properly designate such photos.

A different interpretation could not be based on a statement of Pixelio, which the defendant supplied to the court in the course of the proceedings.

There it was stated that the source of the photo did not have to be provided in the photo itself, yet it was recommended to indicate the source on webpages that were generated automatically, e.g. when the photo was shrunk on the main webpage, but might, upon clicking on it, be displayed in a bigger size on a separate subpage. It was, however, not stated that under certain circumstances designating the author might be omitted altogether.

### **An essential moral right**

On the contrary, to waive the right to be identified as the author had, since it is an

essential moral right and therefore subject to strict conditions, to be made explicitly. Pixelio's statement might at most be restricted to an indicative significance, which could not be invoked in support of the defendant, whenever by means of a literal interpretation the result would not be reflected in the contractual wording. But the user would have to take technical measures to either prevent that the photograph without copyright notice might be found through search engines, or to affix a designation of authorship to the photograph itself, which according to the Court's findings might be attached by an average person using a common image editing software.

The ruling is not yet final and the defendant has already lodged an appeal with the Higher Regional Court of Cologne (OLG Köln).

### **Annotation**

The judgment was not well received in the internet community and the legal community and one may wonder if it shall be dismissed as another example where the judiciary or even worse politics at large seemingly does not comprehend the web and the business models burgeoning around it.

From a purely formal point of view the court certainly has a point as it tested the facts brought before it against the applicable law. The court came to the well founded solution that a waiver of moral rights such as the right to recognition of authorship must be made explicitly and thus cannot be based on implicit consent.

What appears a little over-formalistic is how the court established that there were two (or more) separate cases of use. It merely relied on the fact that the photograph was accessible under different URLs, regardless of whether such URLs were a main and a subpage or in any way connected or linked to each other. Importance was solely ascribed to the question whether the photograph alone was accessible through a search engine. It would have made sense to have a closer look at the context and connections in which the two URLs were placed. Do both websites bear an individual significance when considered separately or are they connected with or built upon each other? It is not a contradiction to hold that the right of recognition of authorship is not comparable to the service provider's obligation to provide for an imprint, as both rights are of a different legal nature. Yet in the case at hand it is the context between the webpages displaying the photograph that should carry some relevance.

Meanwhile Pixelio found an easy way out and amended its terms and condition as follows: " *If the photo is accessed directly via the image URL recognition of authorship is not required.*"

Well then. Viva Colonia!

BS

A full summary of this case will be added to the Kluwer IP Cases Database (<http://www.kluweriplaw.com>).

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