

Thumbnails: French proposal for payment of royalties by search engines

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In France, search engines using thumbnails are likely to infringe on copyright. On 8 April 2014, a French Senator proposed a Bill to establish compulsory collective management for the reproduction of photographs and images by search engine services.

Thumbnails are reduced-size versions of photographs and images, used by search engines such as Google Images in order to facilitate their recognition and organisation, with links to the websites where the photographs and images are published.

Such reproduction of photographs and other works is likely to constitute fair use under the US Copyright Act of 1976 (see Meng Ding, *Perfect 10 v Amazon.com: A Step Toward Copyright's Tort Law Roots*, Berkeley Technology Law Journal, Volume 23, Issue 1, 16, February 2014), but is likely to infringe on copyright under French law, since the search engines cannot rely on any copyright exceptions.

However, the Court of Appeal of Paris (in *SAIF c/ Stés Google France et Google INC*, 26 January 2011, 08/13423) held that Google's services do not exceed the limits of an 'intermediary service' and that the mere fact that Google is 'aware that automatic indexing is likely to infringe on copyrighted works is not sufficient to engage its liability insofar as the services are ready to de-index upon notification'. In a more precise way, the French Supreme Court, in a judgement of 12 July 2012 (No. 11-15165), applied to Google Images the liability limitation system set out in Article 6-1-2 of the 21 June 2004 Act, which implements Article 14 § 1 of the 2000/31 Directive, and ruled that once Google, which is a 'provider of referencing services', has de-indexed a photograph after being notified that it was infringing, it has no general obligation to prevent further postings (Articles 6-1-7 of the French 21 June 2004 Act and 15 of the 2000/31 Directive).

This means that the indexing systems using thumbnails are likely to infringe copyright law in France, and that the search engines using the system must therefore promptly remove the images that are duly notified to them as infringing, even though they do not have any general obligation to monitor the information.

On 8 April 2014, a French Senator proposed a Bill to establish compulsory collective management for the reproduction and communication to the public of plastic, graphic and photographic works, by search engine services. The draft Bill explains that search engines bypass the remuneration that authors can expect from photographs and image databases that offer a paid service to users, individuals or professionals.

This draft Bill would impose an automatic assignment of the rightholders' rights to approved collecting societies, which would be in charge of negotiating agreements with search engine services in order to authorise the reproduction and representation of plastic, graphic and photographic works and the payment of royalties. In the event that parties do not manage to find an agreement, a joint commission would render a decision on these issues. The agreements or the decisions of the joint commission will have to describe the information and justifications that the search engine services must declare and provide to the collecting societies.

This new system would also be imposed on foreign companies whose search engine services target the French public. The draft Bill also explains that the Internet users would not be penalised since this new system, where compensation is based solely on the revenue that derives from the exploitation of the search engine, would maintain free and open access to images.

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