Kluwer Copyright Blog

New French Act: Google Images will have to pay royalties

Brad Spitz (REALEX) · Monday, October 17th, 2016

A new French Law provides that search engines using thumbnails will have to pay royalties via a compulsory collective management for the reproduction of photographs and images.

The French Act No. 2016-925 of 7 July 2016 on freedom of creation, architecture and cultural heritage contains several provisions on copyright that modify the intellectual property Code ('IPC'). In particular this Act:

- authorises the author to transfer his/her resale right ('droit de suite') in a testament (Article L.123-7 IPC),
- creates new copyright exceptions for disabled users (Articles 122-5-1 and L.122-5-2 IPC),
- extends the scope of the exception for private copying to certain online remote digital recording services (Article L.311-4 IPC),
- extends the compulsory licence for broadcasting of phonograms to simulcasting and webradios (Article L.214-1 IPC).

But the most notable novelty concerns the creation of a compulsory collective management system for the reproduction and communication to the public by search engine services, of plastic, graphic and photographic works. In other words, Google Images, and other similar services, will soon have to pay royalties in France.

Google Images: what is the (legal) problem?

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. However, French collecting societies claim that the images presented by the search engines are presented in such a way (in terms of size, quality and presentation) that the user can consult the images directly from the search engine, without having to visit the website where the image is actually published.

Under US law, 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).

French rightholders have unsuccessfully brought cases against Google for allegedly infringing copyright via its Google Images service. The Court of Appeal of Paris (in *SAIF c/ Stés Google France et Google INC, 26 January 2011*) 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'. More precisely the French Supreme Court, in a judgment of 12 July 2012 (No. 11-15165), applied the liability limitation system set out in Article 6-I-2 of the 21 June 2004 Act (which implements Article 14 § 1 of the 2000/31 Directive), ruling that once Google, which is a 'provider of SEO services', has de-indexed a photograph after being notified that it was infringing, it has no general obligation to prevent further postings (Articles 6-I-7 of the French 21 June 2004 Act and 15 of the 2000/31 Directive).

This means that even if the indexing systems using images are likely to infringe copyright law in France, as long as the search engines promptly remove the images that are duly notified to them as infringing, they cannot be held liable for copyright infringement. The cases mentioned above have been criticised, especially by the collecting societies that consider that the liability limitation system should not apply, since the images are collected by the search engines without any direct intervention by the websites that present the images.

On 8 April 2014, after a few years of lobbying from the French collecting societies, 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 (see Thumbnails: French proposal for payment of royalties by search engines). These are the provisions that were passed in the Act No. 2016-925 of 7 July 2016.

The new provisions, set out in the French intellectual property Code at Articles L.136-1 to L.136-4, will enter into effect when the decree of the Conseil d'Etat ('Council of State') mentioned in the last paragraph of Article L.136-3 is published, or at the latest, six months after the enactment of this law (i.e. 7 January 2017).

The services that will be obliged to pay royalties

The new provisions will apply to 'automated image search services', which Article L.136-1 IPC defines as any online public communication service that reproduces and makes available to the public for purposes of indexing and SEO, plastic, graphic or photographic works, collected in an automated way from online public communication services (i.e. internet websites). In other words, these provisions target search engine services like Google Images.

Interestingly, Article L.136-1 IPC specifies that the images have to be 'reproduced and made available' by the image search services. Otherwise, the new French statutory provisions would probably be in breach of Article 3(1) of Directive 2001/29/EC, which 'must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an "act of communication to the public", as referred to in that provision' (Case C-466/12 (2014),

Svensson). Maybe by changing the way in which the image search services function, these services would be able to escape from the obligation to pay royalties…

Collecting and redistributing royalties: how and how much?

Royalties are often erroneously referred to as 'taxes' when the money paid goes into the system, but it is difficult to know or understand exactly how the royalties have to be redistributed and to whom. Needless to say that billions of photographs and other images are continuously indexed by search engine services, which makes it difficult to organise a fair redistribution of royalties.

The French Act first provides that the authors and rightholders are subject to a compulsory management system. Article L.136-2-I IPC states that the publication on an internet website open to the public of a plastic, graphic or photographic work confers to a collecting society the management of the right to reproduce the work in the framework of image search services. If the author or rightholder does not designate a collecting society, one of the collecting societies will be automatically designated.

The collecting societies governed by the IPC must negotiate agreements with the image search services in order to collect the royalties. These agreements will have to specify the manner in which the image search services will provide to the collecting societies the information that they need in order to redistribute the royalties collected to the rightholders (Article L.136-2-II IPC). In others words, the parties will have to determine how the image search services will gather information as to: the images that are used, the types of use, the relevant rightholders, etc.

Article L.136-4 IPC provides that the collecting societies and the image search services will also have to negotiate agreements that will set the amount of royalties that the image search services will have to pay, and the conditions of payment. The IPC specifies that the royalties will be based on the revenues of the image search services or otherwise will consist of a fixed fee. If the parties do not manage to find an agreement within a certain timeframe, or if an agreement terminates without being replaced by a new agreement, a joint commission with representatives of the image search services and the collecting societies, chaired by a government representative, will render a decision on these issues.

The best is yet to come

There will be long discussions and probably lawsuits before some royalties result from these new provisions. Therefore, perhaps the collecting societies have not yet entirely won the battle. And whatever will be put into place, there is little doubt as to the fact that the important/famous authors (or their heirs or assigns) will receive most of the royalties, with very little left for the others.

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