New French Act: Google Images will have to pay royalties

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

The French Act No. 2016-925 of 8 April 2016 on the promotion of creation, architecture and cultural heritage contains several provisions on royalty that modify the intellectual property Code (IPC) in particular this Act:

- Authorises the sector to transfer how images right (droit de suite) in a ‘balancier’ Article L.136-1 IPC,
- Clarifies the scope of the exception for personal copying to images of plastic, graphic and photographic works,
- Extends, the compulsory licence for broadcasting of phonograms to broadcasting and webcasting Articles L.136-5 IPC.

But the most notable novelty concerns the creation of a compulsory collection management system for the reproduction and communication to the public by search engines 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?

Photographers are reproduction owners of photographs and other works in the context of image search engines in order to facilitate their recognition and organization, with links to websites where the images and videos 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 Art. 1, such reproduction of photographs and other works in the context of image search engines is allowed if the search engines do not exceed the limits of an ‘intermediary service’ and if the images are not ‘reproduced and made available’. It is not sufficient to engage in liability instead of the images to be delivered upon request. More precisely, the French Supreme Court, in a judgment of 8 April 2014, applied the liability limitation system set in Article L.136-4 IPC (‘reproduction and communication to the public of phonograms and phonograms’), ruling that those images, which are in the provision of such services, have not violated a phonogram after being notified that it was infringed. It has in general obligation to prevent the posteries (of the author or rightholder) if it is French or not.

This means that even if the indexing systems using images are likely to infringe copyright laws in France, as long as the search engines properly display the images that are only related to them as infringing, they cannot be held liable for copyright infringement. The cases mentioned above have been decided, especially by the collecting societies that consider that the liability limitation system does not apply, since the images are collected by the search engines without any direct intervention by the websites that publish the images.

On 8 April 2014, after a few years of lobbying from the French collecting societies, a French Senator asked to establish compulsory collection management for the reproduction and communication to the public of graphic, photographic and photographic works, by search engine services (new Article L.136-1 IPC).

The new provision, set out in the French intellectual property Code at Article L.136-1 IPC, will enter into force when the decree of the Conseil d’Etat (‘Council of State’) determining how and how much royalty is redistributed will be published. As of the date of the use of this law (i.e., 7 January 2015),

The services that will be affected by pay royalties

The new provision 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 reproduction and communication to the public of plastic, graphic or photographic works. In other words, these provisions target search engine services like Google Images, by the collecting societies governed by the IPC.

Interestingly, Article L.136-5 IPC specifies that the images have to be ‘integral and not made available’ by the image search services. Otherwise, the new-french statutory provisions would probably be in breach of Articles 3 and 4 of Directive 2001/29/EC, which ‘must be interpreted as meaning that the provision of a website of images or other works by means of automated search services available on another website or not constituting an integral part of the website performs the function of a collective management organization’. In other words, the image search services function, some 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 those of photographs and other images are continuously raised by search engine services, which render it difficult to make a fair redistribution of royalties.

The French Act No. 2016-925 makes it clear that the collecting societies subject to a compulsory management system (new Article L.136-1 IPC) are those that ‘authorize the making and distribution of reproductions of phonograms or phonograms. The payment is a fee based on the revenues of the image search services. The IPC specifies that the royalties will be based on the revenues of the image search services. The conditions of payment. The revenues collected by the collecting societies will be negotiated with the image search services. Otherwise, the new French statutory provisions would probably be in breach of Articles 3 and 4 of Directive 2001/29/EC.

The best is yet to come

There will be long discussions and probably lawsuits before some royalties must be paid. In addition, the conditions of payment will be negotiated with the image search services. In other words, the collecting societies will receive most of the royalties, with very little left for the others.