# Kluwer Copyright Blog

## In Defence of a Fair Use Defence

Lucie Guibault (Schulich School of Law ) · Thursday, March 10th, 2011

Discussions around a fair use defence are not new in The Netherlands. Already in the years immediately following the adoption of the EU Copyright Directive, the idea of introducing a fair use defence in the Dutch Copyright Act had given rise to heated debate, at least in the literature. The debate recently resurged when the Labour Party (PvDA) took the Dutch Government up on its promise to start discussions at the European level around the introduction of a 'fair use' defence for user created content, as it had said it would in its reaction to the European Digital Agenda. A 'fair use' exception would bring more flexibility than the existing exhaustive list of exceptions in the Copyright Directive and would allow copyright to cope with rapid technological changes on the Internet, particularly in relation to user created content.

User created content is not the only area, however, where more flexibility would be welcome! There can be no clearer illustration of the need for a flexible regime of exceptions and limitations in the digital environment than the recent German and French cases involving the Google Image Search service. In both cases, photos had been uploaded to the rights owner's website and subsequently displayed in resized form (thumbnails) as part of the Google image search results. While the display of the images constitutes an act of making available to the public pursuant to the German Copyright Act and the French Code de la propriété intellectuelle, no exception or limitation contained in the law directly covers Google's situation. For instance, the exception of quotation does not apply in this case, because the images in the Google search results are not used as part of a new work in which the second author explains, criticizes, or comments on the original work, as required by law.

Essentially, both the German Federal Supreme Court and the Court of Appeal of Paris decided, however, that there is no infringement of copyright where the use is authorized by the author herself. Website owners have the possibility to use commands in their website that can instruct search engines not to index all or part of their site or files. Google's crawling programme, Googlebot, is designed to ignore the images disallowed by webowners. Since the artist made no use of this possibility, the Googlebot did not ignore the images in dispute. The Court decided that by showing these images, Google was not in breach of copyright because, although the artist had not explicitly consented to the use of the images, she had not blocked her website from being indexed by search engines, thus giving an implicit permission to any search engine to display the thumbnail images. Both courts ruled in favour of Google, on the basis of the exemption of liability for service providers flowing form the national implementation of the Electronic Commerce Directive.

These two decisions guarantee that showing thumbnail images within search results is legitimate so as to allow millions of users in Germany and France to benefit from being able to discover visual information at the click of a mouse. While this is probably the most desirable result in terms of the public's interest in ensuring access to information, the legal reasoning on which it is based puts the integrity of the copyright regime under strain. The idea that by failing to technically prevent the reproduction and/or communication to the public of his work the rights owner gives implicit permission to others to do so puts the copyright rule on its head. It is the equivalent of making the application of technological protection measures mandatory for rights owners as a pre-requisite to copyright protection. This is a formality in disguise, which is contrary to Article 5(2) of the Berne Convention. That the German Copyright Act or the French Code de la propriété intellectuelle did not foresee this type of activity under the list of exceptions and limitations is not surprising: technology evolves at a too rapid pace for the law to keep track. This reinforces the argument that a list of exceptions and limitations on copyright should not be set in stone but should rather be built so as to ensure some flexibility in its application, for example by introducing a "fair use" type of defence to a copyright infringement claim. Indeed, the display of photo's in resized form (thumbnails) as part of the Google image search results has long been declared to fall under the fair use defence according to the US Court of Appeals for the Ninth Circuit in the Perfect 10 case.

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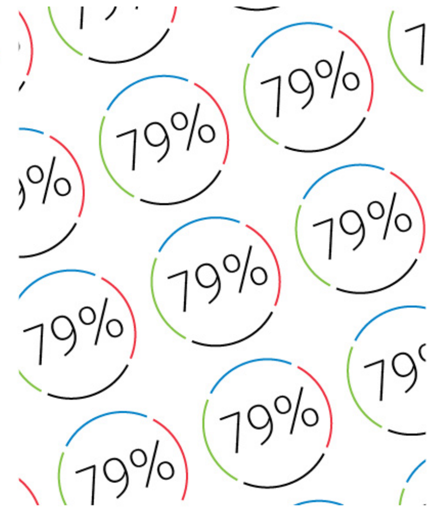

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