CEPIC’s campaign for a better protection of images online

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Thomas Höppner, Berlin
Agenda

Challenges of the image industry

Shortcomings of the existing legal framework

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Disparity between demand and revenues for images

In particular: (New) Google Image Search

Unauthorized use of third party content as a new global business model
Disparity Between Demand and Revenues

High demand for images..

• 45% of Google’s search traffic relates to the search for images
• 1.8 billion photos were shared daily on Flickr, Snapchat, Instagram and Facebook in May 2014 (260% annual increase)
• More photos are consumed than ever before

..yet declining revenues for the image providers

• 85% of images found online by visual search systems online are unlawful copies
• Declining prices for images
• Declining traffic to websites with original images
In particular: (New) Google Image Search (1)

- Google controls more than **90 % of the image search market** in the EU
- Google **Images** generates 519 million unique visitors per month
- Google is now the **largest distributor of third party images** (for free)
In particular: (New) Google Image Search (2)

**Effects of new search design on users:**

- more clicks to get to the final image
- no correct image descriptions in lack of display of EXIF-information
- risk of unconscious copyright infringements

**Effects of new search design on image providers:**

- facilitation of illegal copying
- less traffic and revenue
- omitting the name deprives authors of the credit they deserve
- framing increases the bandwidth use of hosting site
- images are viewed out of context
In particular: (New) Google Image Search (3)

Development of traffic to sources

Traffic from Google Image Search to image providers’ websites, by referring domain, Jan 2012 - Apr 2015

Implementation of new Google Image Search

No changes implemented on Google Images in Germany and France
Unauthorized Use of Third Party Images as a New Business Model (1)

Pinterest, search for “frog”
Unauthorized Use of Third Party Images as a New Business Model (2)

Tumblr, search for “frog”
Unauthorized Use of Third Party Images as a New Business Model (3)

Flickr, search for “frog”
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Challenges of the image industry

Shortcomings of the existing legal framework

- Framing
- Host provider privilege
- Implied consent

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Framing (1)
Position of the European Court of Justice (CJEU):

Hyperlinking and Framing are no communication to a “new public” that is subject to the right holders` consent pursuant to Article 3 Info-Soc-Directive

The authorisation of the copyright holders is not required “were the referring court to find [...] that when Internet users click on the link at issue, the work appears in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site.”

CJEU, judgment of 13 February 2014, Case C466/12, Svensson, para. 29
Framing (2)

Questions to be asked:

• Is it appropriate to treat hyperlinks and framing equally?
• What about the similarities between framing and the uploading of images?
• Wouldn’t the right to communication to the public be subject to exhaustion if understood this way?
Host Provider Privilege (1)

- Host providers are platforms that merely host third party content.
- Under Article 14 E-Commerce Directive host providers can only be held liable upon knowledge or awareness.
- Right holders depend on ineffective notice-and-takedown procedures to trigger knowledge or awareness.
- Most aggregators and social media platforms rely on this privilege.
- Consequence: even the worst cases of piracy cannot be effectively fought.
Host Provider Privilege (2)

Questions to be asked:

- Is it appropriate to privilege providers that **actively participate or intervene** in the organisation or presentation of (illegally uploaded) third party content?
- Are **notice-and-takedown procedures** sufficient to enforce copyrights?
- What about automated **filtering and monitoring tools** readily available to host providers to detect infringing content?
Implied Consent (1)

“Having uploaded images [...] onto the internet without protecting these from being found via search engines, the Claimant has agreed to images of her works being depicted as thumbnails in the Defendant’s search engine.”

From the search engine’s point of view this “could objectively be understood as an agreement for the images of the Claimant’s works to be used to the extent usual for image searches.”

German Federal Court of Justice, judgment of 29 April 2010, I ZR 69/08, Vorschaubilder I, para. 36
Questions to be asked:

- Is communication via `robots.txt` really sufficient / effective?
- Which exploitations are “common”?
- What about explicit disapprovals?
- Doesn’t the inconsistent application of the implied consent doctrine on national level trigger uncertainty among right holders on EU level?
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- Challenges of the image industry
- Shortcomings of the existing legal framework
- Unique opportunity for improvement of legal framework
- Recommendations to European Legislator
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Unique Opportunity for Improvement of Legal Framework

- Several EU institutions are assessing and evaluating EU copyright at the moment:
  - **European Parliament** will vote on Julia Reda’s report on the implementation of the InfoSoc-Directive 8/9 July 2015
  - **Commissioner for Digital Economy & Society Günter Oettinger** is currently working on a reform of copyright on EU level
  - European Commission has announced the **first legislative proposal** to be presented by the **end of 2015**
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Recommendations to European Legislator

**Framing:**
Amendment of Article 3 and Recitals of InfoSoc Directive
- Inclusion of framing into the right of communication to the public

**Host provider privilege:**
Amendment of Article 14 and Recitals of E-Commerce Directive
- Exclusion of providers that actively participate or intervene in the organisation or presentation of third party content from privilege

**Implied consent:**
Amendment of Article 5 and Recitals of InfoSoc Directive
- Clarification that there is no implied consent in lack of adequate technical tools

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Thank you for your attention!

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