



Why Article 13b Copyright Directive is urgently needed!

Article 13b is needed to rectify a business model, where image search engines make profits based on unauthorized use of images, while the authors of these images receive no remuneration for their work.

It was introduced into the legislative process by the European Parliament:

Article 13b (new)

Use of protected content by information society services providing automated image referencing

Member States shall ensure that information society services providers that automatically reproduce or refer to significant amounts of copyright protected visual works and make them available to the public for the purpose of indexing and referencing conclude fair and balanced licensing agreements with any requesting rightholders in order to ensure their fair remuneration. Such remuneration may be managed by the collective management organization of the rightholders concerned.

1

Economic scope of the visual sector

In 2012 the visual sector provided 1,2 million jobs and 127 bn € turnover¹ and was ranking in the top positions of the European cultural industries

The authors of visual works create high economic values in the cultural economy but receive very little in return. Efficient legal protection is needed to maintain the sector as creative as it is and to equip authors and other rightholders with the means to control the use of their works and to receive proportionate and fair remuneration, also in the case of search engines.

A broken business model

In relation to image search, the business model of search engines is simple and profitable. Their service (referred to as “Image search engines”) is increasingly comparable to those provided by picture agencies. However, the search engine companies make their profits from advertisements instead of requiring payments from the users of the images, and, most importantly, they do not pay

¹ Creating growth, measuring cultural and creative markets in the EU, EY, December 2014, page 10

a share of the profits they make with the use of images. The authors of the images are left entirely without remuneration for their work – for whose use they did not give permission in the first place.

Internet search engines are important services that help us to find what we are looking for among the huge amount and diversity of information available on the internet. The image search engines are an equally important section of these services. There is, however, no excuse for using for profit the images owned by someone else, if there is no agreement on this use. In addition to agreeing on the use of the images with the authors and rightholders, the details of how the images are presented shown on the web site should be agreed upon. Doing this would also let the search engines benefit from the expertise of the representatives of the authors and rightholders on such matters.

The scope of exploitation of images

Image search engines store large amounts of entire images, such as photography, art works, illustrations, design, graphic-design: estimated **tens of billions** of images² with constantly growing numbers – not all but many under copyright.

The way this exploitation works is not acceptable:

1. The images are not available in the search engines with the explicit consent and according to the will of the authors. Instead they are taken from freely accessible websites, for instance from sharing platforms, without the visual authors even knowing what has happened.
2. The next step is adding information to the images, which permits to search for them by keywords (indexing). In reply to keyword searches the image search engine provides preview images and not just a list of URL and links.
3. With one or two clicks search engine users can take a number of actions with these preview images, e.g. increase the resolution and size of the image, enhance the match, replace the image with the same image in higher resolution, and perhaps most importantly, copy, download or share the image or publish it directly on social media.
4. The business model is created not only to use without agreement material owned by someone else, but also to invite the users to stay on the search engine's web site, using the images directly there, instead of moving on to the source of the image.

2

While the way search engines operate is very **convenient for internet users**, visual authors endure that in the business model used by the search engines the **business models of the picture industry with their value chain are circumvented** and copied to attract more visitors on the search engine **but yet without paying authors and rightholders**.

Images are valuable – but to whom?

Search engines are commercial entities making profits with advertisement income. **Offering an attractive service to internet users who search images the search engines' website becomes very attractive which in turn increases the value of the entire site.** Image matches are also found on the general search or "all" section where advertisement takes place.

² In 2010, the number of images was already over 10 billions (see <https://techcrunch.com/2010/07/20/google-image-search/>)

Towards changing the unbearable situation

There are some movements to improve the unfair situation of visual authors and rightholders from different players.

In France such right has already been adopted on national level in 2016 (articles L. 136-1 to L. 136-4 of the French Intellectual Property Code). The specific use by image search engines - which is addressed also by article 13b EU Copyright Directive - has been defined by the French legislator as follows:

“...automated image referencing service” shall mean any online public communication service within the framework of which plastic, graphic or photographic works of art collected automatically from online public communication services are reproduced and made available to the public for indexing and referencing purposes.

The original text in French can be found [here](#) and in the annex an English translation is added.

While the French law has not been applied so far, the European Parliament was certainly inspired and has adopted with Article 13b a version that will work on European level and will strike a fair balance between the internet users, the image search engines and the visual authors and rightholders.

Support comes also from the CJEU³ which reaffirmed that the reposting of **protected content freely available with the rightholder's consent on a third-party website is a new act of communication to the public. The authorisation and the remuneration of rightholders is therefore necessary.**

3

Isn't Article 13 (Transfer of Value) solving the problem?

No, because Article 13 only covers platforms with user-uploaded-content as it is the case with social media and sharing platforms. Image search engines are automatically collecting images with robots crawling accessible websites and systematically harvesting images. The works are then indexed for the referencing service of the search engine.

Nota bene: Article 13 b has no impact on digitization projects of cultural heritage institutions and other collections.

...and if the metadata in photos are disclosed by the search engine?

³<http://curia.europa.eu/juris/document/document.jsf?text=&docid=204738&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=308708%20>

Recently⁴ Google announced to include metadata of photographs in their search results. Metadata associated with an image can provide information about copyright and other rights associated with the image, contact information of copyright holders and licensors, rights restrictions for use of the image, rights granted under a licence to use etc.

This step is welcome as a move to the right direction. It will **raise the awareness** of users about existing copyrights instead of leaving them in uncertainty with the usual mentioning that “images may be subject to copyright”.

However, it does not provide a solution for the unremunerated exploitation of images by a search engine.

The possibility of inclusion of metadata shows that search engines will be able to **provide necessary information to redistribute collected remuneration to authors and rights holders**. On their side, **European collective management organisations have created AIR, Automated Image Recognition, a specific identification tool tailored for the individual work- and author-oriented distribution of remuneration for digital uses to authors and rights holders of visual work repertoire.**

These elements are already available and what is still needed is **a structure to be put in place**. Article 13b gives Member States the legal basis to do it and to develop a functioning management model based on licenses.

But search engines are necessary to make the Internet functional!

4

Sharing profits is not only indispensable but also simple in practice. Licensing of images by the authors and other rightholders must not complicate the business because it will also lead to a better understanding.

[Licensing of images on the search engines](#)

Licensing such a huge number of images, made by a large number of authors, is of course a challenge. In addition to direct licensing, i.e. agreements between the authors and other rightholders and the search engine companies, collective licensing should be available as a good alternative.

Collective management schemes have the advantage of being cost-efficient, and they are run smoothly by experienced organisations representing and controlled by authors and rightholders.

Any license-based solution is flexible enough to adapt the dynamic of the market and allows the conclusion of sustainable agreements addressing both users and rightholders concerns.

Article 13b – remuneration for image search engines will simply make the Internet a fairer place!

⁴ 27 September 2018

Kind regards,

CIAGP - The International Council of Creators of Graphic, Plastic and Photographic Arts provides a forum for exchange of information, experience and new tools on the administration and promotion of visual authors' rights. www.ciagp.org

CISAC - The International Confederation of Societies of Authors and Composers – is the world's leading network of authors' societies (also referred to as Collective Management Organisations, or CMOs). With 238 member societies in 121 countries, CISAC represents over four million creators from all geographic regions and artistic repertoires including music, audio-visual, drama, literature and visual arts. <http://www.cisac.org>

EFJ - The **European Federation of Journalists (EFJ)** is the largest organisation of journalists in Europe, representing over **320,000** journalists in **70** journalists' organisations across **44** countries. It fights for social and professional rights of journalists working in all sectors of the media across Europe through strong trade unions and associations. It promotes and defends the rights to freedom of expression and information as guaranteed by Article 10 of the European convention on human rights. The EFJ supports its affiliates to foster trade union development, to recruit new members, and to maintain or create environments in which quality, journalistic independence, pluralism, public service values, and decent work in the media exist. <http://europeanjournalists.org>

EVA - (European Visual Authors) gathers 27 European collective management organisations which are managing authors' rights for 100 000 painters, sculptors, photographers, illustrators, designers, street artists, architects and other visual authors. <http://www.evartists.org>

GESAC – The European Grouping of Societies of Authors and Composers comprises 32 authors' societies from across the European Union, Norway, and Switzerland. As such, we represent over 1 million creators and rights holders in the areas of musical, audio-visual, visual, and literary and dramatic works. More information www.authorsocieties.eu

PYRAMIDE EUROPE - Pyramide Europe is the organization representing mainly groups of professional photographers, but some of the members represent also graphic designers, illustrators and other visual artists in the European Union. The Pyramide Europe members represent over 20000 photographers and other visual authors. Pyramide's name comes from the site of its first meeting in 1989, the Pyramide of the Louvre in Paris, where the founding members signed a declaration of ten items of fundamental legislative importance to photographers and artists - the Manifesto of the Pyramide. This manifesto binds Pyramide and encompasses the rights of creators with regard to their copyright and moral rights. As a European Economic Interest Group, Pyramide Europe represents many of the member states and is establishing contacts with the new group of nations. <http://pyramidenorden.eu/pyramide-europe/>

Excerpt from French copyright act translated:

Article 30

I. – Title III of Book I of Part One of the Intellectual Property Code shall be supplemented by a Chapter VI worded as follows:

“CHAPTER VI

Provisions applicable to searching and referencing plastic, graphic or photographic works of art

Art. L. 136-1. – For the purposes of this Chapter, “automated image referencing service” shall mean any online public communication service within the framework of which plastic, graphic or photographic works of art collected automatically from online public communication services are reproduced and made available to the public for indexing and referencing purposes.

Art. L. 136-2. – I. – Publication of a plastic, graphic or photographic work of art through an online public communication service shall give rise to the right to reproduce and represent that work within the framework of automated image referencing services being placed in the management of one or more societies governed by Title II of Book III of this Part and approved for that purpose by the minister in charge of culture. In the absence of any designation by the author or the author’s successor in title at the date of the work’s publication, one of the approved societies shall be deemed to be the manager of that right.

II. – Only approved societies may conclude agreements with the operators of automated image referencing services for the purpose of authorising the reproduction and representation of plastic, graphic or photographic works of art within the framework of those services and of collecting the corresponding remuneration determined in the manner provided for in article L. 136-4. The agreements concluded with those operators shall set out the manner in which they shall fulfil their obligations to provide the approved societies with a statement reporting the uses of the works and any information required for the distribution of the collected amounts to authors or their successors in title.

Art. L. 136-3. – The approval provided for in paragraph I of article L. 136-2 shall be issued in consideration of:

1° The diversity of the members;

2° The professional qualification of the managers;

3° The human and material means that they propose to employ to carry out the management of the rights relating to the reproduction and representation of plastic, graphic or photographic works of art by automated image referencing services.

A Council of State decree shall determine the conditions for issuing and withdrawing such approval.

Art. L. 136-4. – I. – The remuneration due for the reproduction and representation of plastic, graphic or photographic works of art by automated image referencing services shall be based on the revenues from exploitation or, in their absence, shall be calculated as a lump sum in the cases provided for in article L. 131-4.

The scale and the manner of payment of the remuneration shall be determined by agreement between the approved societies for the management of the rights in plastic, graphic or photographic works of art and the organisations representing the operators of automated image referencing services.

The duration of such agreements shall be limited to five years.

II. – Failing the conclusion of an agreement within six months from the publication of the Council of State decree provided for in article L. 136-3, or if no agreement has been reached by the date on which an earlier agreement expires, the scale and manner of payment of the remuneration shall be set by a commission chaired by a representative of the State and comprising, in equal numbers, representatives of the societies approved in accordance with the same article L. 136-3, on the one part, and representatives of the operators of automated image referencing services, on the other part.

The organisations called upon to appoint representatives on the commission and the number of persons that each one is entitled to appoint shall be determined by order of the minister in charge of culture.

The commission shall take its decisions by a majority of the members present. In the event of a tied vote, the chairperson shall have a casting vote.

The Commission’s decisions shall be published in the *Official Journal*.”

II. – Section I shall apply with effect from the publication of the Council of State decree mentioned in the last paragraph of article L. 136-3 of the Intellectual Property Code and no later than six months after the enactment of this law.
