

CIVIL COURT OF PARIS

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Docket no: 05/12117

Attorney Neri

Courtroom mailbox: J 25

JUDGMENT

Rendered on May 20, 2008

COMPLAINANT:

Société des Auteurs des Arts Visuels et de l'Image Fixe – SAIF

3 rue Cassini

75014 Paris

Represented by Attorney Gilles Vercken – SELARL Gilles Vercken, member of the Paris Bar, courtroom mailbox: P 414

DEFENDANTS:

SARL Google France

54 Avenue Hoche

75008 Paris

Google Inc.

1600 Amphitheatre Parkway, Mountain View

California 94043

United States of America

Represented by Attorney Alexandra Neri, Herbert Smith LLP, member of the Paris bar, courtroom mailbox J 25.

COMPOSITION OF THE COURT

Marie Courboulay, Vice-President

Cécile Viton, Judge

Sylvie Lafaix, Judge assigned to the Civil Court of Paris by order of the 1st president of the Court of Appeal of Paris dated March 31, 2008, and to the 3rd division by order of the president of the Civil Court of Paris dated March 31, 2008.

Assisted by Léoncia Bellon, Court Clerk.

DEBATES

At the hearing on April 1, 2008 held in open court.

JUDGMENT

Pronounced by delivery to the Clerk's Office following adversarial proceedings in the first instance.

FACTS AND PROCEEDINGS

By service of process on August 17, 2005, Société des Auteurs des Arts Visuels et de l'Image ("SAIF") sued Google Inc. and Google France, seeking to have them found guilty of infringement on the basis of display and reproduction by offering the users of Google Images search engine to view thousands of works belonging to its repertory without SAIF's authorization.

In its latest brief of March 19, 2008, SAIF requested the Court to:

Concerning admissibility:

- ascertain that SAIF communicated its repertory to the defendant companies under conditions that were in line with the requirements under section L. 321-7 of the Intellectual Property Code.

In the alternative:

- acknowledge that SAIF is willing to make its entire repertory and the membership documents of its members available to the Google companies for consultation on its premises.

Accordingly:

- declare SAIF's claims to be admissible;
- dismiss the claims by the Google companies, including their motions for the non-suiting of Google France.

Concerning the merits

- Find that by reproducing and displaying the works of its members, without SAIF's prior express authorization, Google Inc. and Google France committed acts of infringement within the meaning of sections L. 122-4 and L. 335-2 of the Intellectual Property Code.
- Find that by reproducing and displaying the works of its members, without SAIF's prior express authorization, Google Inc. and Google France harmed the collective interest of the professional authors whose interests SAIF defends;
- Order Google Inc. and Google France to be jointly and severally liable to pay SAIF the amount of EUR 80,000,000 as damages for the economic loss caused to the authors members of SAIF;
- Order Google Inc. and Google France to be jointly and severally liable to pay SAIF the amount of EUR 50,000 as damages for the harm sustained by it due to the harm caused to the collective interest of the professions it represents;
- Issue an injunction against continued use by Google Inc. and Google France of the works of SAIF's members, subject to a penalty of EUR 1,000 per event of infringement ascertained as of the date of the judgment to be entered, or else to conclude with SAIF a general display agreement authorizing them to use the works in its repertory within the time periods and subject to the penalties the Court deems appropriate;
- Order Google Inc. and Google France to be jointly and severally liable to pay SAIF the amount of EUR 60,000, including the search and attorney fees incurred, on the basis of section 700 of the Code of Civil Procedure;
- Order Google Inc. and Google France to be jointly and severally liable to pay all costs, with payment to be made to the benefit of SELARL Gilles Vercken in accordance with section 600 of the Code of Civil Procedure;
- Order interim enforcement of the judgment to be entered.

In their recapitulative briefs dated March 26, 2008, Google Inc. and Google France sought to have this Court:

Concerning admissibility:

- Ascertain that SAIF has only justified the extent of the rights assigned for ten of its members of which it has produced the membership documents;

Accordingly:

- Find inadmissible, in application of section 32 of the Code of Civil Procedure, except for the ten members for whom it has produced the membership documents, SAIF's lawsuit, absent proof of SAIF's standing;
- Find SAIF's lawsuit to defend the collective interest of the professions it represents to be inadmissible;

- Ascertain that SAIF is requesting general injunctive relief against the Google companies;
- Find that the purpose of SAIF's lawsuit is not sufficiently defined and accordingly declare the claims formulated by it to be inadmissible;
- Ascertain that Google France is extraneous to the acts which are at the origin of this lawsuit and accordingly find that the claims against it are ill-directed;
- Dismiss all of SAIF's claims directed against Google France.

Concerning the merits:

- Find that US federal law and in particular sections 106 *et seq.* of the US Copyright Act apply to this lawsuit;
- Find that in application of US law the use by Google Images search engine responds to the requirements set by the "fair use" exception and does not infringe the copyright of the authors members of SAIF;

In the alternative:

- Find that the operation of Google Images search engine is not contrary to fair use of the works of the authors or cause them any harm;
- Find that a system of liability analogous to that of text search engines or of other technical intermediaries should be applied to Google Inc. in the framework of its operation of its Google Images search engine;

Accordingly:

- Find that by operating Google Images search engine, Google Inc. has not committed any act of infringement of the copyright of the authors members of SAIF or infringed the interests of the professions represented by SAIF;
- Acknowledge that Google Inc. has committed to delisting from the search results of Google Images search engine the photographs and other images which, according to SAIF, infringe the rights of its members once SAIF has provided it with the url addresses of the websites containing the litigious images and photographs;

In the alternative:

- Find that in application of section L. 122-5 (3) of the Intellectual Property Code the indexing in the form of thumbnails by Google Images search engine of the photographs and other images contained in the third-party websites satisfy the short citation requirements;
- Find inadmissible and at the very least unsubstantiated SAIF's claims in damages;

Accordingly:

- Dismiss all of SAIF's claims;
- Order SAIF to pay Google Inc. and Google France EUR 60,000 on the basis of section 700 of the Code of Civil Procedure;
- Order SAIF to pay the costs, with payment to be made to the benefit of Herbert Smith LLP in application of section 699 of the Code of Civil Procedure.

The proceedings were closed on March 26, 2008.

RATIONALE

Google Inc., founded in September 1998, is the developer of a search engine designed to offer a simple and quick way of searching for information on the Internet.

All of the websites are hosted by Google Inc. out of its premises at Mountain View, California.

The search service is proposed on the home page of the website as well as many other more specialized services on secondary pages: image searches (Google Image), video searches (Google Video), book searches (Google Book Search), news searches (Google News). The search method is always the same: the Internet user types in a keyword in the box provided for that purpose and the search engine comes up with one or more pages of natural results corresponding to the choice made, based on selected references it has collected from the entire Web; the search engines do not store images, videos or news but only the addresses of the websites that can provide an answer to the query asked by the Internet user and direct him to the website containing the answer to his query.

For Google Image, the Internet user searches for an image by typing in the name of the author, a title or a topic, the results page comes up which mentions the sites but also reproduces many images in a standard format called a thumbnail displaying the search results.

Under each of the images is an indication of the website where the image was viewed, the image resolution, its weight as well as the access path to the initial source.

SAIF had a descriptive search report drawn up by APP on July 20, 2004.

By letter dated November 24, 2004, SAIF served Google Inc. official notice requesting that the latter inform it of the measures it intended taking to bring the use of the works appearing in its repertoire into compliance or else cease and desist from any use of the works.

On a preliminary basis, it should be ascertained that SAIF does not contest the very legitimacy of the search engine but seeks to obtain, by the execution of a general display agreement, flat compensation for the display of the works of its members.

Concerning the nonsuiting of Google France

It appears from the documents produced at court and from the explanations given by the parties that Google France, a French company created in 2002, is a subsidiary of Google Inc. from which it has not received any authority to manage the search engine in France, or to represent the US corporation in France; Google Inc. is the entity that controls, directs and takes all decisions concerning the operation of the search engine, which represents its core activity, including that of the French-language version of Google Images, which can be accessed from the address www.google.fr.

Accordingly, the acts of infringement of which SAIF accuses Google France concerning the activity of Google Inc.'s search engine, including from the www.google.fr website, by users in France or abroad, including for the acts ascertained in France, SAIF's lawsuit is improperly directed against Google France, which should be nonsuited.

Concerning the admissibility of SAIF's lawsuit

SAIF submits that it is a collective rights management society which as such is authorized to take legal action to defend the economic rights of authors who have contributed their works to its repertory. It claims that it is unable to establish all of the acts of infringement having occurred; to ask it to do so is to place it under an absurd burden of proof. It produces certain memberships (Raymond Depardon, Jacques de Loustal, Gérard Lauzier, Martin Veyron, Jane Atwood, Jean-Claude Mézières, Auguste Perret, Dominique Isserman, Yan Arthus-Bertrand, Sebastiao Salgado) and certain examples of infringement against its member such as Doisneau, Henri Cartier-Bresson, William Klein, Yan Arthus-Bertrand, Sebastiao Salgado and Frédéric Buxin.

Google Inc. retorts that to be admissible SAIF is required to specify for what authors it is acting, in respect of what acts of infringement and what amounts are sought for each of them.

In accordance with the provisions of section L.321-1 of the Intellectual Property Code, SAIF is authorized to take legal action to defend the individual and personal interests of its photographers, provided they are members of SAIF and have contributed their works to it; by so doing, it acts in the framework of its mission which is to collect royalties or damages to which they are eligible so as to then distribute such royalties or damages among them; capacity to act for authors who are not members of SAIF is only recognized by its constituent documents as regards the defense of the collective interest of the profession.

Accordingly, SAIF is required, when it acts in defense of the interests of its members, to name them in its complaint and in its pleadings and to specify what amount is claimed in the name of each of them as damages compensating the loss sustained (which must also be explicated in its briefs) since the court, in such case, does not grant compensation, but sets damages to be paid to each of them based on the assessment made of the loss sustained by each of them.

Yet, it can only be ascertained that SAIF, both in its complaint and in its latest brief, cites some ten members but primarily as examples and without providing a figure, for each of them, of the loss sustained and the damages sought for each of them; the complainant company only formulates overall claims for all of its member authors, which is contrary to the very principle of the personal interest of its members and renders its claims strictly inadmissible in the name of each of its members, as not allowing the court to assess each infringement and each redress and also prevents SAIF from allocating the amounts that should revert to each of them.

As a result, SAIF cannot act in the name of its members unless it identifies them, excepting ten, and unless it describes the infringement author by author and also puts a figure, author by author, to the amounts claimed in redress.

Concerning the admissibility of SAIF's right to act on the basis of the collective interest of its members

SAIF's mission is to represent the interests of the professions of photographers, architects, designers, drafters, graphic artists, illustrators, painters, plastic artists and sculptors; it represents more than 9,000 authors of French and other nationality.

SAIF's claims formulated in the interest of the professions it represents and in view of preventing any possible infringement are admissible and in accordance with its constituent documents.

Concerning the applicable law

Google Inc. does not contest the jurisdiction of the French court but solicits the application of US law on the basis that, in application of section 5§2 of the Berne Convention of September 9, 1886, the law applicable to the lawsuit is that of the country in which protection is claimed; whereas this law is not necessarily that of the court of referral but that of the country where the proximate cause and not the damage was produced, whereas recent well-established case law issuing from the *Cour de cassation* has upheld this interpretation of the text in two rulings, the first in the Siro case on March 5, 2002 and the second in the Lamore case of January 30, 2007; whereas in the present instance the servers enabling access to the www.google.fr website being located in California, the basic technology of Google Images search engine belongs to Google Inc. and the registered office of Google Inc. is located in the United States.

SAIF responds that the location of the server enabling access to the www.google.fr website has not been shown by Google Inc, and that as regards complex offenses such as copyright infringements committed on the Internet, no conflict of law rule provides a clear answer to the issue of the applicable law, and that pursuant to case law the applicable law is that of the place where the loss is sustained, while legal theory has broadly come down against recent rulings by the *Cour de Cassation* which, in any case, did not adjudicate on similar cases.

It contests the application of the law of the location of the servers since it would suffice to place the servers in countries where there is no legal protection of copyright for there to be no preservation of any copyright whatsoever.

IN RESPECT OF WHICH:

The parties are in agreement that in this lawsuit application should be made of Article 5 of the Berne Convention, which provides that:

“(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.”

In assessing the extent of the protection granted in cases of complex offenses such as copyright infringements occurring in various signatory countries of the convention, reference should be

made to the law of the country where the incriminated acts occurred. This is the notion of the place where the proximate cause of the infringement occurred, which is applied in determining the law applicable to the lawsuit and not that of the place where the harm or loss was sustained.

The Lamore ruling of January 30, 2007 enshrined this interpretation and held that in a case where infringement was being prosecuted in France as a result of the distribution of the film *Waterworld*, application should be made of the [law of the] territory where the wrongdoing was produced and not of that where the harm or loss was sustained, and consequently decided that the applicable law was US law, that of the place of film's design, creation and display.

In this lawsuit, the alleged acts of infringement are carried out on the one hand by the collection of images and their referencing by Google Images search engine and on the other by access to the www.google.fr server.

It is clear that this activity, namely that of the developer of the search engine, is the core and leading activity of Google Inc. and that it is therefore Google Inc.'s registered office that is the location where decisions are taken and where the activity of the search engine is implemented out of the premises of Google Inc. which should determine the law applicable to the lawsuit.

Accordingly, US law on copyright protection, namely the 1976 Copyright Act shall receive application.

Concerning infringement under the Copyright Act

Section 106 of the 1976 Copyright Act provides that the holder of the copyright has the exclusive right to reproduce and authorize the reproduction of images of copyrighted works.

Accordingly, the right of reproduction and of display is protected and subject to authorization.

Section 107 sets forth exceptions to such exclusive rights authors are recognized as having and sets forth factors to be kept in mind in assessing whether fair use is involved.

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.”

The case law decisions produced by the parties also establish that it is up to the party sued for infringement, claiming application of section 107, to show that the requirements under section 107 have been met.

In the instant case, Google Inc. asserts the non-commercial nature of Google Images search engine, the transformational nature of this service, the indexing of images in the form of thumbnails and the non-storage of images, the positive effect of Google Images search engine's activity on making authors and their works known to the public.

SAIF contested the cost-free nature of the service and stated that the extent of the use was such that it was not compatible with the "fair use" exception.

The activity of the search engine is a nonprofit activity *per se* and allows access, on a completely cost-free and universal basis, to all Internet users, without any registration or license fee payment requirement.

The natural results of the search engine are analogous to a mix between a dictionary, encyclopedia and a directory.

The first requirement under section 107, which enables reproduction of a copyrighted work on the basis of "fair use", including for the purposes of research or scholarship/cultural activities is therefore met.¹

In effect, the Google search engine is a tool that searches for all information circulating on the Web, which it references and indexes. In the instant case, Google Images search engine carries out this work for all information in connection with all types of images; it searches, identifies and references them in their context, associates them to keywords and enables the Internet user to find them. Google Inc. does not make any independent use of the images it indexes.

It therefore meets the scholarship/cultural activities requirement.

The term "including", used in that section, means that the list is not restrictive and can cover new cases.

¹ Section 107 of the US law provides that:

*Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), **scholarship, or research**, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:*

- (1) *the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit **educational purposes**;*

While the French translation used by the Court reads: "*de culture ou de recherche, n'est pas une contrefaçon (...)*" and "*s'il poursuit des objectifs économiques non lucratifs*". Therefore, when the judge refers to "activités culturelles" this should refer to "scholarship" and not "Cultural activities". We however put these two terms in order to be consistent both with the US law and the English translation

The activity of Google Images search engine is a nonprofit activity *per se*, it does not directly generate revenues.

Only the association of the adword links to that activity generates revenues and enables the company to survive and grow. This allows giving entirely unrestricted and cost-free access to that search engine.

The first requirement is thus met in full.

The second requirement (*nature of the copyrighted work*), in the present case images, is not debated by the parties.

Regarding the third requirement (*amount and substantiality of the portion used in relation to the copyrighted work as a whole*), Google Inc. argues that it does not store the images, does not use them and displays them as a thumbnail on the results page so as to allow the Internet user to view the results.

SAIF retorts that this is a distortion of the image and that the cache memory corresponds to storage.

The reduction of the size of the image in the thumbnail and in a lower quality resolution than that of the image on its original site cannot, in the instant case, be deemed a distortion but rather as a necessary adaption so as to inform the Internet user who is required, if he wants to have a good resolution image, to go to the website address mentioned under the photograph. This responds to the simple necessity of informing the Internet user.

In any event, the distorting of the image is covered by the moral rights of artists and not by their economic right, which is the only right contributed to SAIF.

Google Inc. is also accused of storing images in cache memory for a certain period of time.

Yet, contrary to what SAIF states, this temporary and automatic storage takes place at the level of the servers, without any voluntary intervention by Google Inc.

What are involved are called “caching” operations, which consist in temporarily recording the data available on the network to which subscribers frequently access so as to preserve, if not improve, the fluidity of its transfer. These caches are in fact also used by relatively big companies so as to speed up and improve employee access to the Intranet and Internet or by Internet Access Providers.

The third requirement of the “fair use” exception is also met.

The last requirement (*the effect of the use upon the potential market for or value of the copyrighted work*) enables verifying the economic effect of the tolerated use.

The indexing of the images found on the Web by Google Images search engine in the form of thumbnails does not replace the works themselves and in no way prevents the creators from marketing their works.

Indeed, many have opened their own websites where the indexed images were found and thus promote their works on the Internet.

The making available to Internet users of thumbnails on an informational basis on the results page does not interfere with the complainant's possibility of using the works of its members and in fact, actually enables distribution and knowledge of the works via this search tool which is accessible to all.

Lastly, SAIF does not show that the professions it represents experienced a decline in the marketing of their images due to the display of the photographs of its members in the form of thumbnails on the results page of Google Images search engine.

Not having itself set up an image bank of the works in its repertory, NAIF has not furnished proof that its own activity declined on this basis.

The fourth requirement of the "fair use" exception also being met, it should be found that under US law no infringement of the photographs displayed in the form of thumbnails on the results page of Google Images search engine is committed by Google Inc. and all of SAIF's claims should be dismissed.

Concerning the other claims

Interim enforcement is compatible with the nature of this case; it is necessary and shall be ordered.

The conditions are met to order SAIF to pay Google Inc. and Google France the overall sum of EUR 30,000 on the basis of Section 700 of the Code of Civil Procedure.

FOR THESE REASONS

Ruling by delivery to the Court Registry and by adversarial decision in the first instance,

The Court:

Nonsuits Google France;

Holds SAIF to lack standing to sue in the name of its members, having failed to clearly specify the acts of infringement asserted and to detail the sums claimed in each of their names;

Holds SAIF to have standing to act in the name of the collective interest of the professions it represents;

Finds that the lawsuit is governed by US federal law and, more specifically, by the 1976 Copyright Act.

Holds SAIF's claims to be unsubstantiated;

Dismisses them;

Orders SAIF to pay Google Inc. and Google France the overall sum of EUR 30,000 on the basis of section 700 of the Code of Civil Procedure;

Orders interim enforcement of this decision;

Dismisses all other claims by the parties;

Orders SAIF to pay for the costs, with payment to be collected directly by Herbert Smith law firm, in application of the provisions of section 699 of the Code of Civil Procedure.

SO HELD IN PARIS ON MAY TWENTY-SECOND OF THE YEAR TWO THOUSAND AND EIGHT.

s/Clerk

s/President

Enforceable copy of the decision in the case opposing:

Complainant: **Société des Auteurs des Arts Visuels et de l'Image (SAIF)**

Defendant: **Google Inc., SARL Google France**

ACCORDINGLY, THE REPUBLIC OF FRANCE MANDATES AND ORDERS:

All official process-servers, upon this requisition, to enforce this decision,

All district attorneys (*procureurs généraux*) and attorneys general (*procureurs de la République*) of all civil courts (*tribunaux de grande instance*) to provide their assistance, and

All police commanders and officers to provide their assistance, when legally required to do so.

In witness whereof, this document was executed and delivered by the Clerk of at the Court Registry of the Civil Court of Paris.

[Signature and seal of the Head Clerk]