



The Center of the Picture Industry (CEPIC) is a European interests group representing the picture industry on a global scale. We would like to outline Google's extensive unauthorized use of third parties' content in the area of images and explain why the proposals do nothing to bring this identified abuse of dominance to an end.

Introducing CEPIC

CEPIC represents approx. 900 picture agencies and libraries in 20 countries. We have affiliates all over the world. CEPIC's membership includes large and smaller stock photo libraries, major photo news agencies, art galleries, historical archives and museums, video companies. Our membership, which is mostly made up of micro and small to medium businesses, accounts for an estimated 50% of an estimated € 2,1 billion revenues generated with pictures worldwide and more than 150.000 visual authors in direct licensing. A description of our organisation is provided in the Appendix.

Our position is supported by the American Society of Media Publishers (ASMP), the largest commercial photographers association in the USA with 7,000 members, an affiliate of CEPIC since 2010 and a member of ICOMP since 2012.

CEPIC's motivation for submitting a response to the Market Test

CEPIC strongly supports the view that a transparent and competitive Internet is necessary to allow innovation to flourish, in particular in those commercial areas that depend on the Internet for the promotion of their content. Photography is digital and, with a very high and growing volume of images being exchanged and traded on-line, Internet has become the eco-system for photography. In consideration of Google's monopolistic position on the search market and the dependency of users on its services as an allegedly neutral search engine, we believe that the restoration of competition in the area of search is imperative for any other market initiative to be effective. We remind on the "special responsibility" that Google carries towards users and other stakeholders resulting from its dominant position.



For these reasons, we have been an active member of ICOMP since 2009. Our views have been integrated into their position papers and we support their actions on our website and through our conferences. We appreciate ICOMP as a platform where all Internet stakeholders can meet and discuss on-going issues. ICOMP's complaint to the European Commission and the subsequent initiatives on this basis largely integrate our views.

We have decided to submit an additional independent response to the market test in order to outline the special situation of images when it comes to Google's unlawful use of third parties' content.

Text is not the only third party content used by GOOGLE without authorization. Google also indexes and uses images for various GOOGLE services. The vast majority of those images is copyrighted material. GOOGLE uses them without any authorization by the rightholders. Indexation and display of the images is based on rules determined entirely by GOOGLE. The company never even tried to get the consent of the rightholders of images. GOOGLE uses indexed images not only for its horizontal search but also within several specialised services, most importantly for its vertical Image Search.

Recent developments relating to image search show more clearly than ever how by unauthorized indexing, ranking and displaying of images in a certain way, GOOGLE is slowly but surely turning into a large picture library for free content – without and sometimes even against the explicit will of the content owners. In January 2013, GOOGLE re-designed its Image Search in a way that heavily drives traffic away from content providers' websites. Instead of leading users to the source websites, GOOGLE now shows images in high resolution and often in full size directly in its search results page thereby rendering any click through to the source website unnecessary. This created an up-roar in the photographic community using the Internet (for that matter GOOGLE) in order to monetise their content and services. To be fair, other search engines follow a similar tendency to use third parties' content to answer search queries directly on their website. However, due to its market position only GOOGLE has the capacity of enforcing its terms and conditions upon content providers and users alike since they have no commercially viable alternative to turn to if they do not agree to those terms. While other search engines could be blocked by website operators



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using the Robots Exclusion Protocol or ignored by users, this is not an alternative when dealing with GOOGLE as the monopolistic intermediary between website operators and users on-line. Furthermore, the case of the new GOOGLE Image search (see above) demonstrates that GOOGLE is willing and able to alter its conduct rapidly and harm competition swiftly – even in the face of a pending competition investigation.

GENERAL REMARKS ON GOOGLE'S PROPOSALS

It is not sufficient to address searchers' interests. The content providers too are "users" of search engines.

The European Commission's statements on the GOOGLE investigation rightly point to the potential harm to "consumers". In this respect the Commission seems to refer primarily to the users searching for content. However, not just searchers are "using" GOOGLE but also the website operators and content providers who depend on being found on GOOGLE in order to present their content to searchers to monetise it. This category of users is made up for a large part, but not only, of professionals.

Search engines that bring these two categories of users together should be as neutral as technology allows. A quasi-monopolist in one market (here horizontal search) should not be free to take advantage of the dependency of its users (here content providers and website operators) on its services (intermediation) in order to develop new products for neighbouring markets in which its users are present (here for content), thereby using its customers' content to deprive them of traffic without any consent.

We expect the European Commission to not discriminate between users who go on-line to search for content on the one hand and users who want their content to be found on the other. All have a right to a fair treatment.

For consumers it makes no difference in terms of choice whether they cannot find relevant content because 1.) the content providers had to reduce their online activities in the face of GOOGLE's increasing use of their content or because 2.)



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GOOGLE leads users to less relevant content based on a search manipulation. In both cases consumers are equally harmed. Hence, there is little point in aiming at "neutral" search if at the same time GOOGLE may use third parties' original content such as images to boost up its own products on the cost of competing websites that bear the costs for the content.

The higher the risks for their assets and the less their commercial interests are appreciated the more likely it becomes that professional users will withdraw from the Internet leading to less innovation and a reduced offer to consumers. Therefore, in our view the protection of content providers should be at the core of the Commission's endeavours.

COMMENTS ON GOOGLE'S PROPOSALS RELATING TO THE USE OF THIRD PARTY CONTENT

I. For content providers of any kind, Opt-Out is an inadequate remedy

It does not make sense to offer “**opt-out**” as a remedy when this closes the content provider's access to a service of a near monopolist supplier and this service is essential to compete on-line – the horizontal search. Opt-out may work in a market where website publishers and content providers have a real choice between the search engines which index their sites due to the fact that searchers use several search engines. In this case the (threat of an) opt-out of those search engines that exploit one's content the most while opting-in to those engines that actually appreciate the content would be a strong tool to "discipline" the search engines. Opt-out is no alternative (and no serious threat), however, in a market where there is in actual fact just one search engine which knows that the content providers have no other choice than to opt-in to every use of their content that the search engine desires if the content providers want their websites to be found. Since content providers cannot turn to other intermediaries GOOGLE can impose its terms upon the content providers in a “take it or leave it” way. In a monopolistic market opting out of GOOGLE means opting out of the Internet. This is not a viable solution for professional content providers who need their content to be found in order to recoup their costs.



It should be noted that:

- The new features of GOOGLE's Image Search are very similar to the ones implemented by BING one year ago or by Yahoo Images at the beginning of the year. However, BING's introduction of the new features went almost unnoticed and did not provoke any resistance since BING's market share of less than 2,5% renders the harm to professional content providers minimal and is not worth the fight. For many years now every content provider is able to block the BING or the Yahoo crawlers by using the Robots Exclusion Protocol. In the case of BING or Yahoo this opt-out mechanism may well be an alternative to react to and sanction the search engines' expanded use of images. That is because the total traffic that content providers can expect from BING and Yahoo is negligible. Consequently, blocking them will not have significant repercussions for the websites' traffic. In fact, contrary to the situation with GOOGLE, disengagement (opting-out of BING/Yahoo) would probably hurt the search engine more than the content provider. With GOOGLE it is a different story. Here opting-out is not an alternative.
- Yahoo¹ in Germany has rolled back its Image Search to its previous design following the request of photographers' trade association Freelens².

Fair competition would restore a level playing field between Internet stakeholders by providing real technical and commercial "choice" (choice between search engines, choice for content). An "opt-out" option is no solution where - as in the case of GOOGLE - the affected parties have nowhere else to turn to where they could "opt-in" instead.

¹ Yahoo search ranks 4th in Europe with a market search of 1,01 % and third in the USA with a market share of 9,12%

² On 22 February 2013



II. The "opt-out" solutions may work for press publishers, they certainly do not work for other content providers

The "opt-out" solutions offered by Google do not appear to contain any substantial options that do not already exist today. As far as we can see all the proposals apart from the "HTML component" simply mirror what GOOGLE and other search engines already offer to website publishers under the Robots Exclusion Protocol. Independent of that we do not see which advantages / changes the proposed solutions are supposed to bring. They do not change the problematic economic fact that an "opt-out" is not an alternative in a monopoly market. Plus, they do not appear to allow the types of differentiations that would be required to adequately control the use of content technically. They may provide some protection for newspaper publishers. They certainly do not help image publishers in any way even though their content is used by GOOGLE in the same way as newspaper content and with similar detrimental effects to competition, innovation and incentives to invest.

Images are content of a double nature. They may be part of a product, if published in a newspaper or on a newspaper website – and would therefore be covered by the present insufficient commitment. However, they are also stand-alone products which continue their own life and may be published in several media.

Therefore, whichever technical solutions GOOGLE presents, they must be flexible enough to:

- Meet the requirements of all content providers,
- Work out in the future and adapt to the evolution of technologies and business models pointed out by Google



- Remedies that may work well for newspaper publishers will be ineffective for other content providers. In the present commitment, it is for example unclear whether a photographer or picture agency using the “**Notice Form**” graciously proposed by GOOGLE to exclude content would be allowed to use the procedure at all. Despite of that it is difficult to see which advantage the "Notice Form" shall have for content providers towards the existing "noindex" commands under the Robots Exclusion Protocol. In fact, we only see disadvantages.
- The remedies proposed are too narrow to be effective. The commitment in para 13³ for instance means that if an image is licensed to a website publisher, it may continue to show in search results although the photographer/picture agency may have wished to exclude it from Google Images results.
- This points to the more general concern that content providers in general and images providers in particular that do not want their visual content to be indexed and/or displayed by GOOGLE Images, will be completely dependant on the respective website publishers (as licensees of their content) to use the opt-out options offered by GOOGLE on their respective websites. Considering that even press publishers only have the possibility to block an entire webpage and not individual articles on a page or, for that matter individual images, it is very likely they will refuse to do so. In this respect it should be stressed that GOOGLE's proposals from the outset only provide a tool for website publishers but not for the actual content owners whose incentives to invest the Commission wants to protect.
- Futhermore, GOOGLE's proposals only offer remedies for text. Images are not mentioned at all. If compared to user-generated reviews of

³ 13. “Nothing in paragraphs 8-12 above shall affect Google’s ability to (i) otherwise use or process crawled content, (ii) display content that it has sourced independently, even if it is the same as or overlaps with content crawled from a website that has opted out, and (iii) display licensed content, including content licensed by sites that have opted out.”



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restaurants or alike we do believe that it is not justified to protect texts but not images, the creation of which often involves high costs and risks.

- In general, "Opt-In" solutions should be favoured over "Opt-out" provisions. Op-in solutions are technological solutions where a content provider can determine which content can be displayed and under which conditions.
- Any solution should be easily implementable using technological tools that could be put in place by site owners themselves – rather than through the use of the clumsy old-fashioned "**Notice Form**" proposed by GOOGLE in para 8 of the proposed remedies.

Google's proposed remedies are awkward and appear to contain nothing new. If despite the general criticism on the opt-out solution we were to consider those options, any "opt-out" solution regarding images would have to allow the content provider at the very least to:

- determine the maximum size of picture previews (thumbnails),
- determine the maximum quality in which a picture preview may be displayed;
- differentiate between the various Google services, in particular between the horizontal search and the various additional services (Image Search, Google News, Google+), without any repercussions for the ranking of the image;
- differentiate between Google and the companies that use Google's index by way of syndication deals;
- determine the types of allowed use (indexing, displaying, combining, enlarging etc.);
- communicate the license conditions for any unauthorized use.

GOOGLE's proposals do not cater for any of those needs, even though such technical solutions would in fact be possible, e.g. through rights expression languages such as those developed by the IPTC. In fact, Google could probably implement those solutions very easily via its schema.org project.



III. It is imperative that any remedy proposed applies to all Google domains.

The limitation of the remedies to EEA websites⁴ is unacceptable in the present Internet's structure. This limitation makes the remedies ineffective and puts GOOGLE's good will into question.

If accepted by the Commission, it would engrain the idea that GOOGLE is only responding to the whims of disgruntled competitors and not, actually, fixing a serious problem that affects all internet users.

Besides, if the assumption behind this limitation is that the Google.com domain should be excluded as a non-European domain, GOOGLE itself should know better- i.e. that this is not the case. Google.com is an international domain, available in Europe as well:

The new GOOGLE Images features for example have been rolled out on Google.com. Does this mean that the new features are not available in Germany or in France? No. Although Google.de and Google.fr still provide access to the old Google Images Search, the new version is available in both countries on Google.com and in the local language, German or French⁵.

⁴ ***“Google EEA Search Domains”*** means the following Google websites: www.google.at, www.google.be, www.google.cz, www.google.de, www.google.es, www.google.fr, www.google.ie, www.google.it, www.google.hu, www.google.nl, www.google.no, www.google.pl, www.google.pt, www.google.se, www.google.co.uk, www.google.gr, www.google.bg, www.google.com.cy, www.google.dk, www.google.ee, www.google.fi, www.google.lv, www.google.lt, www.google.lu, www.google.com.mt, www.google.ro, www.google.sk, www.google.si, www.google.is, www.google.li, as well as any successor of these websites, and equivalent websites for countries that become Member States of the European Union or a contracting party to the EEA agreement during the duration of these Commitments.

⁵ Browsers use default settings automatically redirecting to one of the domain and without Users' full awareness.



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Google.com is a global domain available all over the world: any remedies, if they want to be effective, should include this domain.

CONCLUSION

The proposed remedies are inappropriate and contain numerous deficiencies. In fact, if implemented the commitments would probably hurt website publishers and content providers even more than GOOGLE's present conduct. Therefore, we expect the Commission to reject the commitment proposals made by GOOGLE in their entirety.

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About Copic

CEPIC is a European non for profit trade association in the field of image rights. CEPIC was founded in 1993 to present a unified voice to advise and lobby on new legislation emerging from Brussels. Registered as an Economic European Interest Group (EEIG) in Paris in 1999 CEPIC brings together a thousand of picture agencies and photo libraries in 20 countries across Europe, both within and outside the European Union. It has affiliates in North America and Asia. The annual CEPIC Congress as the largest global gathering of the international photo community extends CEPIC's network on all five continents. CEPIC's membership includes large and smaller stock photo libraries, major photo news agencies, art galleries, historical archives and museums, video companies, for estimated revenues around 2,1 billion Euros. It has among its membership the larger global players such as Getty, Corbis or Reuters. Through its membership, CEPIC represents more than 150.000 authors in direct licensing.

Our members are expert in the conservation and marketing of imagery: they produce, collect and distribute content – moving and still images: footage and photographs for the major part, but also illustrations, cartoons, graphics, maps and 3D images. They have been digitising content from the advent of the Internet, making the resulting digital asset available for commercial use, such as to newspapers, magazines and broadcasters, off and on-line, as well as in non-commercial environments for the purposes of research and education. Picture agencies and photo libraries also act as commercial rights management service providers on behalf of creators.

CEPIC achieved observer status at WIPO (World Intellectual Property Organisation) in 1997. CEPIC has been a member of IPTC since 2005, of ICOMP since 2009 and joined the Linked Content Coalition early 2012. It is part of the ARROW project and, together with partner, EVA for collecting societies for visual arts, released a feasibility study on the inclusion of visual material in the ARROW system. In 2013 and 2014, it will be part of the EU funded project, RDI (Rights Data Integration) proposed by the Linked Content Coalition.