



COPYRIGHT ON THE PHOTOGRAPHIC WORKS IN UKRAINE

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У статті проаналізовані основні підходи до визначення фотографічного твору, виявлені основні проблеми, що постають перед автором фотографій, з приводу захисту авторських прав на фото. У статті вказані суттєві прогалини в національному законодавстві, що регулює питання захисту авторських прав на фотографічні твори.

Автор розглядає механізм надання захисту авторських прав на фотографії, його особливості в мережі Інтернет. Також розглядаються основні критерії, відповідно до яких надається правова охорона та захищаються права на фотографічні твори.

У статті також розглядаються деякі новітні технічні засоби захисту прав на фотографічні твори, аналізуються їхні особливості. Зроблено огляд прогалин у національному законодавстві, що стосуються питань вільного доступу до інформації, свободи панорами.

Окрему увагу приділену такому поняттю, як цифрова фотографія, та проблемаці врегулювання питань, пов'язаних з нею на нормативному рівні.

Ключові слова: фотографія, авторське право, цифрова фотографія

During the last years the market of the printed products in Ukraine has considerably increased. Photos became one of the most important elements of information stream; they are used in an advertisement, tourism sphere, mass medias and other spheres of human activity.

«Photography» is a word derived from the Greek words *photos* («light») and *graphein* («to draw»). The word was first used by the scientist Sir John F. W. Herschel in 1839. The history of photography has roots in remote antiquity with the discovery of the principle of the camera obscura and the observation that some substances are visibly altered by exposure to light.

The first photography was made with a camera obscura on a summer day in 1827 by Joseph Nicéphore Niepce. Niepce's photograph required eight hours of light exposure to create and after appearing would soon fade away.

Louis Daguerre was the inventor of the first practical process of photography. In 1829, he formed a partnership with Joseph Nicéphore Niepce to improve the process Niepce had developed. In 1839 after several years of experimentation and Niepce's death, Daguerre developed a more convenient and effective method of photography, naming it after himself — the daguerreotype [1].

From that moment photography became one of the most interesting and demanded phenomenon in human life. Photos are all around us.

Photograph had changed a lot since the invention of it. The time influenced not only on the views, reflected on pictures, but it also involved the forms of legal protection of rights on photo. Photographic work passed a long way from an invention of the new process of image transmission («daguerreotypes») in 1839 by Louis Daguerre, artist and



inventor from France, to appearance of the modern digital photos.

In accordance with the Law of Ukraine «On Copyright and Related Rights» one of the objects of copyright are photographic works, including works made by methods similar to photography [2].

There was a term «photograph» in the previous formulation of the cited Law. Now the norms of Ukrainian Law «On Copyright and Related Rights» coincide with positions of Berne Convention for the Protection of Literary and Artistic Works. The Berne Convention settles that the expression *literary and artistic works* shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as ... photographic works to which are assimilated works expressed by a process analogous to photography... [3].

Thus, from position of the Ukrainian legislation photographic work is an object of copyright protected as the work of art.

However, there is no definition of the term «photographic work» neither in national laws nor in international acts, a consent to obligatoriness of which is given by Verkhovna Rada of Ukraine.

As a result there are plenty of different definitions of this term.

There are many variations of the definition of «photo» among scientists, including the definition given by a team of WIPO scientists — photography is defined as a still image, obtained on surfaces sensitive to light and other radiation, independently from the technical nature of the process of obtaining an image [4].

A group of Ukrainian scientists worked out their own version of the definition based on the experience of colleagues from WIPO, so under the photographic work is meant work, which depicts real objects obtained on surfaces that are sensitive to light or other radi-

ation. These works are protected by copyright as literary works under the condition that the composition, selection or fixation method of such object is marked by originality [5].

Ukrainian legislation imposes significant restrictions on the limits of the protection of photos — not every picture is protected by the copyright, but one that is a work of art.

Photographic work should have its artistic value, and any conception, the idea of a work must be expressed in an objective form. This means that any idea, concept have to be created in such a manner to be suitable for the perception by other people. For photos it is negative, slide, etc. and imprint by itself.

Photographic works protected by copyright are the result of intellectual creative acts of the author (photographer). So, concluding this, according to the laws of Ukraine creative or artistic photographs are protected by the copyright.

Creative and artistic photographs generally recognized those works, which emotionally impact on the audience, because of spectacular combinations of lighting on the subject and other. While taking the creative photograph authors personally choose photographic film or matrix sensitivity, choose the subject, build a scene or the composition of objects of shooting.

In the art. 12 of the Law of Ukraine «On Copyright and Related Rights» is imposed that «copyright and ownership right to the material object in which a work is embodied shall not be interdependent. The alienation of the material object in which a work is embodied shall not signify the alienation of copyright and vice versa» [1]. Thus, not the film, slide, negative, photographic print are protected by copyright, but the set of ideas and images depicted on them. Person, who acquired the photos becomes the owner, but does not gain the copyright in such photos.

The registration of copyright is not obligatory in Ukraine, as copyright on



photo shall arise by virtue of the work's creation. No registration of a work or any other special formalization thereof, nor performance of any other formalities, shall be required for the emergence and exercise of copyright [2]. It is enough to put a copyright sign with such information as the name of author and the year of first publication of work. It looks like © *Olha Ulitina, 2015*. There are some cases when the registration is necessary, for example during the assignment of rights.

The following personal non-proprietary rights shall be vested in the author of the photo: the right to require recognition of his authorship by properly indicating the author's name on a work and its copies and during any public use of the work, if practicable; the right to prohibit the mention of his name during public use of a work, if the author wishes to remain anonymous; the right to choose a pseudonym, indicating and requiring an indication of a pseudonym instead of the author's real name on a work and its copies, and during any public use thereof; the right to require preservation of the integrity of a work, and to counteract any distortion, deformation or other alteration of a work, or any other encroachment thereon that may prejudice the author's honor and reputation. The author's personal non-proprietary rights shall not be assigned (alienated) to other persons.

The proprietary rights of an author (or other copyright holder) shall include: the exclusive right to use a work; the exclusive right to allow or prohibit the use of a work by other persons. The proprietary rights of an author (or other copyright holder) may be assigned (alienated) to another person in compliance with the provisions of Law, whereupon this person shall become a copyright holder [2].

According to the Law of Ukraine «On Copyright and Related Rights» copyright shall remain in effect throughout the author's lifetime and for 70 years after his (her) death.

Ukrainian legislation doesn't expressly provide the copyright protection of digital photo. While the Law of Ukraine «On Copyright and Related Rights» have enough general words for the application of law to digital photos.

Since in the digital era photographic images are stored in intangible form, protection of digital photos is much more complicated.

According to experts the biggest specialty of digital photographs is that they don't have copies and only duplicates of a work. During the transfer of data from one data medium to another the original photograph is transferred without changes.

Infringement of the copyright which subsists in a photograph can be performed through copying the photograph. This is because the owner of the copyright on the photograph has the exclusive right to copy the photograph. For there to be infringement of the copyright on a photograph, there must be copying of a substantial part of the photograph. A photograph can also be a mechanism of infringement of the copyright which subsists in another work. For example, a photograph which copies a substantial part of an artistic work, such as a sculpture, painting, architectural work (building) or another photograph (without permission) would infringe the copyright which subsists in those works. The last state is connected with the institute of freedom of panorama, we'll return to this problem in further.

To protect from copyright violations on the Internet is recommended to use the latest technical methods of protection of photographs, because legal means are not entirely suitable for the current circumstances and needs of the authors of the photographic works. Among these technical means are watermarks with the name of the author or digital shorthand that can help to record information in the image file unnoticeably to the human eye [6]. A watermark is a visible image imprinted or



embossed directly onto the paper or digitally added onto an image later. It would be your name, your company logo, the company name, the copyright symbol or nearly anything that marks that image as belonging to you.

Watermarks are used on nearly every paper source; banknotes, passports, easy to purchase reams of paper, digitally created images and photographs. Copyrighting is a more in-depth way to protect your work. Essentially, if you took the picture and want to copyright it, you control what happens with that image as long as you own the copyright.

The other very important problem in Ukrainian legislation concerning the protection of photos is the absence of such institute as the freedom of panorama. Freedom of panorama, often abbreviated as FOP, is a provision in the copyright laws of various jurisdictions that permits taking photographs or video footage, or creating other images (such as paintings), of buildings and sometimes sculptures and other art which are permanently located in a public place, without infringing any copyright that may otherwise subsist in such works, and to publish such images [7].

Although there is no such an institute as the freedom of panorama in Ukrainian legislation, the closest to it is the norm of the art. 21 of the Law of Ukraine «On Copyright and Related Rights», which declares: «reproducing, in order to highlight current events by means of photography or cinematography, broadcasting or other public communication of the works seen or heard in the course of such events, to the extent justified by the information-related purpose shall be permitted without the consent of the author (or other copyright holder), but with a mandatory indication of the author's name and the source of borrowing» [2].

Such definition which restricts the use of the work by the information-related purpose is not the freedom of

panorama in the common sense. It is more like the fair use in the sphere of the information lightning of the events.

In the European Union, Directive 2001/29/EC provides for the possibility of member states having a freedom of panorama clause in their copyright laws, but does not require such a rule [8].

The lack of rules which regulates the freedom of panorama in Ukrainian legislation causes the situation when Ukrainians stay away from the filling the content of WikiProject Images and Media/Commons. Ukrainian organization Wikimedia is struggling for the providing the new Law of Ukraine «On the Freedom of Panorama» or adding the necessary norms to the existing laws.

Problem with the freedom of panorama is not the only problem with free content in Ukrainian legislation and doctrine. Creative Commons and Free licenses are used very little. This situation influences on the level of piracy in country a lot. Free content, or free information, is any kind of functional work, artwork, or other creative content that meets the definition of a free cultural work. A free cultural work is one which has no significant legal restriction on people's freedom: to use the content and benefit from using it, to study the content and apply what is learned, to make and distribute copies of the content, to change and improve the content and distribute these derivative works [9]. Free content encompasses all works in the public domain and also those copyrighted works whose licenses honor and uphold the freedoms mentioned above. Because copyright law in most countries by default grants copyright holders monopolistic control over their creations, copyright content must be explicitly declared free, usually by the referencing or inclusion of licensing statements from within the work.

Summary

Concluding the article it is necessary to admit that the legislation of Ukraine in intellectual property has been creat-



ed during all the time of its independence, so it is not without some shortcomings, gaps, conflicting provisions. Some norms are not harmonized with each other and so on. Some basic definitions are still not defined by the law; some basic concepts of copyright on photographic works are not stated in the laws. And this complicates a lot the legal protection of photo and negatively affects on the formation of contracting relations in the area of copyright.

Ukrainian legislation in this field should be dynamically developed and fulfill all the standards of international legal acts in the field of intellectual property. To prevent the infringements in copyright the idea of free content should be approved in Ukrainian legislation. ♦

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Улітина О. Авторское права на фотографические произведения в Украине. В статье проанализированы основные подходы к пониманию фотографического произведения, выявлены основные проблемы, возникающие перед автором фотографий, в связи с предоставлением защиты авторских прав на фото. Отдельное внимание уделяется такому понятию, как цифровая фотография, и проблематике урегулирования вопросов связанных с ней, на нормативном уровне.

Ключевые слова: фотография, авторское право, цифровая фотография

Ulitina O. Copyright on the photographic works in Ukraine. This article analyzes the main accesses to the understanding of photographic work, identifies the main problems faced by the authors of the photos during the copyright protection of the photo. Special attention is given to such concept as a digital photo, and the problems of regulating matters related to it on normative level.

Key words: photography, copyright, digital photo