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COPYRIGHT CHALLENGES FACING DIGITAL PHOTOGRAPHY AS AN ART FORM

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ABSTRACT

The interpretation of copyright has become more difficult with the development of society. This thesis examines the role of photographs in the interpretation of copyright and what problem areas it raises, which in other arts may not occur, or may not be common. The purpose is to examine the definitions of copyright in terms of how they are implemented in relation to photographs.

The topic is explored by going through different legal cases, examining differences in copyright laws between states, and different types of international law. An important part of the study is also the historically noteworthy decisions and interpretation of the law, which have had a great impact on how photographs acquire copyrights even today. The subject is important because photography differs from other art in many ways.

Historically, relatively recently, there was a fierce struggle for photography to be officially recognized as an art form, but on the other hand, it already has the title of applied art in modern society, e.g. in the form of advertising graphics, in which case it still does not fall completely into the traditional mold of the arts. Thus, the research question of this thesis is: ‘’What difficulties does digital photography face as an art form?.’’ The thesis reviews the basic concepts of copyright and mirrors them in photographs while looking at them in the light of digitalization and internationalization.

Keywords: Photography, copyright, originality, art, digitalization

INTRODUCTION

Copyright covers a wide range of literary and artistic works, which is why legislation must be both, *interpretatio lata*, but at the same time comprehensive, in order to avoid deficiencies in the acquisition and use of copyrights. Digital photography is a relatively new art form and it has increased at a rapid pace with technological development. Today any smartphone holder is able to take a picture and share it on social media to the general public. The audience for the picture is able to access the work anonymously worldwide instead of the traditional gallery with a limited accessibility. Naturally, the law develops slightly behind social change, and because the change has been large and rapid, it is difficult to determine, using traditional terminology, how and when copyright arises in the modern day photographic works. As an art form, digital photography is particularly easy to copy, but it also makes it easy to copy other works of art. This makes it an exceptionally challenging art form in terms of copyright.

Depending on the applicable law, certain conditions are set for obtaining copyright: it must be an original artistic, musical, dramatic or literary work and show the creativity of its author.[1] Originality is affected by whether the work is copied or not and whether the author has used more than a minor amount of labor, effort and skill to create the work. This leads to the research problem of this thesis: Does the push of a button by a photographer take more than a negligible effort and skill, and is he able in this way to create an artistic, original and creative work that could be automatically protected by copyright? Until now, it has been widely accepted that a photographer automatically obtains the copyright to the photo they take. This may also be accompanied by a problem of what is the subject of the photograph: It is controversial whether the photo which has been taken from a public domain or nature in reality acquires copyright and prevents a similar picture from being taken from the same subject. In addition, the law does not explicitly state whether a photographer acquires full economic rights to a photograph, if it is

[1] Berne Convention 28 September 1979 for the Protection of Literary and Artistic Works, World Intellectual Property Organization, p 4, art 2.

taken from another work in which the copyright is valid. Thus, it is highly important to determine what is considered as original work.

Because of the simplicity of photography, there is a large amount of data available on the internet which makes it difficult to keep track of who owns the copyright and how long it is valid. For example, it is less common to know when a photo was taken, but when the image was uploaded to the platform. As a result, copyrights may often be accidentally infringed. Thus, the purpose of this study is to point out the deficiencies which have not yet been exhaustively regulated in regard to digital photographs and clarify how copyright law can be reformed to avoid contradictions and shortcomings, including in the field of digital photography. Hypothesis for this thesis is therefore that copyright has been extended to cover photographs, but due to the complexity of the matter, the required clarifications on its application have not been given comprehensively. Originality, the cornerstone of copyright, which has previously been claimed from other works and which safeguards the rights of the creator of the work, has been relaxed because of photographs to ease out the process.

The first chapter discusses the most important conditions for photographic questions such as how originality is established and whether photography must be art in order to obtain full rights. In addition, the paragraph discusses the conditions under which photography acquires full moral rights and how this relates to the issues mentioned earlier. The chapter also aims to examine the differences between artistic and non-artistic photography, and whether they can be distinguished from each other as well as whether different photographs can be copyrighted on different grounds. Copyrights are universally recognized, but there are small divergencies in national legislations, which, interpreted *de jure*, can lead to large differences in whether or not a work acquires copyright in an international scale.

The second chapter uses cases to highlight how copyright is interpreted and how it can be obtained when it is intended to copy another's work, photograph, or art. It takes into account the copying of public domain works and copying for marketing purposes. This approach is important as it demonstrates the growing amount of difficulties of enforcing digital photography copyrights compared to other works and how copying and including other works into a photograph is an easy way to infringe on the copyrights of others.

The third paragraph deals with applied- and derivative art and how copyright issues arise when a photograph acquires use value in addition to its artistic essence as well as if art is created by exploiting the works of others. There are many things associated with applied art that are not related to traditional art, and that is why the subject is important to address. In addition, the boundary between copying and derivative art is fine, so the aim is to explore the grounds on which works like this can obtain copyright without infringing on the copyrights of others.

1. OUTLINES OF COPYRIGHTS IN DIGITAL PHOTOGRAPHY

Fact-expression dichotomy is one of the cornerstones of copyright. According to it, copyright protects the way of expression, not the idea. Just as at the time of writing this thesis, mere words are not under copyright, but the way in which they constitute this work is, however, protected by copyright. This is also used for photographs when assessing whether a work is eligible for copyright. However, this is very problematic for unprocessed photographs, as it might be difficult to distinguish between an idea and its presentation in a traditional way.[2] In other words, some think that a photograph can be seen as reflecting the idea of the object presented in the photograph. According to this position, the photographer has only captured a certain moment and thus, he does not affect the way of expression *per se.* In this section, we review the key concepts and regulations of copyright in photographs, as well as the problems and contradictions that arise in them.

1.1. Does digital photography have to be art to get copyrighted

Different sources offer a slightly different definition of what kind of work can be copyrighted, but many still have a similar line that it should be an artistic or literary work. Under the 1908 revision of the Final Protocol of the Berne Convetion, however, it is up to the states themselves to decide whether the acquisition of copyright in a photograph will be judged on whether it is a literary or artistic work, but the signatories need to provide some protection to the photographs.[3] Much more comprehensive development of copyright in photographs has taken place in national levels since then and it is widely recognized that photographs are also subject to copyright. However, the application of this rule can be seen as challenging and may lead to complexities, due to ambiguity of what kind of photo can be copyrighted.

[2] Bruce, T. M. (2012). In the language of pictures: How copyright law fails to adequately account for photography. West Virginia Law Review, 115(1), p.155-156.
[3] Hughes, J. (2012). The photographer's copyright photograph as art, photograph as database. Harvard Journal of Law & Technology, 25(2), 339-428.

According to Finnish Copyright Act, the subject of copyright may be literary or artistic work which includes photographic work.[4] Berne Convention, in turn, defines the subject matter of the copyright as being literary, musical, artistic and dramatic works.[5] Literally intepreted, this means that digital photographs can be copyrighted, but only if they are considered as works of art. The Finnish Copyright Act was introduced in 1961 and the last amendments were made in 2015. Also section Photographer's rights to the photograph were added and it did not include a separate requirement for artistry. However, no further definitions about photography as a subject were made, for example, about originality. Since then, a lot of technological development has taken place and many problems arise with the way photos are taken, how they are edited, and how they are uploaded for the public to see. Thus, Finnish national law is somewhat insufficient to cover photographs and the special problem areas they bring.

1.1.1. Originality

A photograph does not necessarily have to be art to be protected by copyright, but next it should be determined whether it must be original. Less frequently, the law directly defines how the originality of photographs is assessed. If the photos were evaluated in the same way as other works, many photos would be left without copyright, as the mere push of a button on a smartphone camera does not necessarily indicate a specific kind of skill, effort, or photographer’s perspective by which originality could be established. Therefore, the traditional definition of originality may not be enough to identify digital photographs as works that can be copyrighted. They raise new questions about originality that have not previously had to be taken into account on the same scale.

However, The United States Supreme Court has decided, due the case Burrow-Giles Lithographic Co. v. Sarony, that the originality of the photograph is always assessed in court on a case-by-case basis and does not have to meet the requirement of originality of the thought and the novelty.[6] Various elements such as shadows, the position of the characters in the image and the location of the scene can be used in the assessment. In this case, the court did not assess, so to speak, the originality of the photograph itself, but how the photographer has used his skills and knowledge, e.g. on arranging the costume and the background. According to this, for

[4] suomen tekijänoikeuslaki
[5] Berne Convention 28 September 1979 for the Protection of Literary and Artistic Works, World Intellectual Property Organization, p 4, art 2.
[6] Sherer, M. D. (1986). Copyright and photography: The question of protection. Communications and the Law, 8(6), 31-38.

example, nature photographs whose subject are not produced by the photographer himself would not meet the original requirement. This can be seen challenging today, as there is a great amount of data and an individual judge hardly has the resources to comprehensively assess the originality of the image, taking into account all the facts necessary for the evaluation. Among other things, the fact that copyright of the costume or staging may belong to another person makes the assessment even more difficult. In addition, even if only e.g. shadows, lighting and other naturally occurring elements would be evaluated in respect to recognize the originality, it is very possible that there are many very similar images taken, where elements such as the persons positions, background, shadows, and medium are very similar.

Moreover, as today photography has largely shifted from chemical film production to databases, the photographer's choice of film or how the photograph was developed can not be used in the evaluation. Nowadays, it is easier to edit photos with various editing programs and apps, but in that case, one's own vision and input is already put into the photo, making the originality of the image more easily recognizable. An unprocessed digital photograph differs from other copyrighted works in many ways: it is difficult to distinguish texture, artist style, and it is a digital file that can be copied in seconds. These can also be seen as reasons why copyright protection for digital photographs requires particular attention.

However, traditionally evaluated originality is not an absolute condition for obtaining copyright in all countries. In Germany, for example, a non-original photograph can also be copyrighted. The law has a separate article for photographs, and products manufactured in a similar manner to photographs and are not subject to the condition of personal Intellectual creation.[7] The criterion for these is that they show minimal originality. These can be considered to include so-called amateur photographs. However, the protection of these photographic images differs in that their copyright expires 50 years after its publication or, if it has not been published, upon its creation.[8] This is therefore a notable exception to the fact that generally copyright expires 70 years after the author's death.[9] Such a distinction raises the question of whether the photographs have in fact relaxed copyright and its originality requirement which are otherwise considered to be so fundamental. On the other hand, this may also be a matter of legal facilitation, as a photograph is capable of obtaining some protection despite its nature, but in contrast, it is less likely that copyright will be disproportionate compared to other peoples rights to enjoy that image.

[7] Urheberrechtsgesetz 9.9.1965 section 72 Photographs
[8] Ibid
[9] Urheberrechtsgesetz 9.9.1965 section 64 General

1.1.2. Moral rights

Moral rights are protected *inter alia* in the Berne Convention and the Visual Artists Rights Act (VARA). All of the European Union Member States are signatories to the Berne Convention, while VARA is a part of the national legislation of the United States. Both grant works two moral rights: the Berne Convention grants right to Paternity and right to Integrity, while VARA grants right to Attribution and right to Integrity.[10] The purpose of both is therefore to secure the recognition, honor and reputation of the author of the work. However, the difference between these two is that according to Visual Artists Rights Act moral rights apply only to certain visual arts, including photographs.[11] However, photographs must be for exhibition purposes in order to be subject to this right.[12] There is no such distinction in Berne Convention.

If the author decides to display his photograph for exhibition, it can be considered that the photograph then may have a certain value for its author. Thus, moral rights are severely limited to those works that are more likely to also meet the definition of originality in terms of the creator's creativity and effort. In other words, works which, for example, have been taken accidentally and do not reflect the creator's creativity and skill or his own views are not generally published for exhibition. These aspects can be seen to be important for creating value for the author, which in turn requires the protection of moral rights in particular. This raises the question of whether each work needs moral rights. While commercial rights are tied to the author acquiring exclusive rights to the profits of the work, moral rights are more tied to the author's emotional attachment to the work and how the work makes its author look to others.[13] It is questionable whether an author may subsequently invoke such emotional rights, for example in a legal dispute, to work for which he has not had an emotional connection or other value for which the author would have liked to have been identified as the author. The crux of the problem lies in the fact that where, for example, human rights are automatic rights that take effect after a person is born, copyright is also an automatic right that arises when a work is created. However, the difference is that application of copyright is more difficult to determine, especially if the applicable law does not clearly define originality.

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[10] Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, art. 6bis, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 41 (1986).
[11] "Moral Rights Basics". *cyber.harvard.edu*. Retrieved 2020-04-13
[12] Gassaway, Laura (December 2002) "Copyright and moral rights", *Information Outlook*, Vol. 6, No. 12, p. 40 (Copyright Corner)
[13]Wilkinson, M. A., & Gerolami, N. (2009). The author as agent of information policy: The relationship between economic and moral rights in copyright. *Government Information Quarterly*, *26*(2), 321-332.

The reverse approach is how digital photography facilitates the violation of the moral rights of other arts. Graffiti can be considered as one example of a problem that the protection of moral rights can cause. Because the author of graffiti has often decided to create his work in a public place so that it is open to all, he is rarely able to benefit from it financially. However, moral rights still apply in full to these works. What makes this difficult is that in many laws public buildings and architecture can be freely photographed without fear of copyright infringement.[14] In Finland, taking a photograph of a work is permitted if it is placed in a public place permanently or in its immediate vicinity. If a work of art is the main subject of an image, the image may not be used for commercial purposes.[15] However, public buildings may be photographed in accordance with Finnish copyright law.[16] This can cause controversy in a situation where a subject is photographed in front of graffiti for an advertisement.

There is an ongoing copyright dispute related to graffiti in Finland, between a newsletter Ilta-Sanomat and the artist Jouni Väänänen. The case is currently pending before lawyers and is awaiting the opinion of the Copyright Council. In this case Ilta-Sanomat made an article reviewing a certain car. Ilta-Sanomat had used an image in which the car is parked in front of graffiti made by artist Jouni Väänänen. Väänänen had not been asked for permission to use the work for advertising purposes and he has stated that he would not have given his consent even for monetary compensation.[17] The main issue of this case is whether graffiti is indeed the main subject of the image and would therefore infringe the moral rights of the author or whether the magazine's photographer has added so much of his own view to it that it would no longer be considered a copyright infringement. According to Finnish copyright Act, an image which is related to the text may be published in a newspaper or magazine.[18] Thus, it is still disputable whether the review presenting the car is in fact published for commercial purposes, or whether the image is only part of a standard newspaper article in which it can be used for. This case shows how the moral rights of another artist may be violated accidentally or through indifference when taking a picture of public domain.

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[14] Inesi, A. (2005). Images of public places: Extending the copyright exemption for pictorial representations of architechtural works to other copyrighted works. Journal of Intellectual Property Law, 13(1), 61-102.
[15]Tekijänoikeusneuvosto, Lausunto 2002:6, 12.6.2002, Veistoksista otettujen valokuvien käyttäminen vaatekuvastoissa ja mainosjulis- teissa
[16] Tekijänoikeuslaki 8.7.1961/404.
[17] Tenkanen, T. (2021). Mainos on kuvattu julkisella paikalla, eikä teoksen tekijä ole tiedossa:Mainoskuvissa näkyvä graffiti ja tekijänoikeudet. Metropolia Ammattikorkeakoulu, p. 11.
[18]Tekijänoikeuslaki 8.7.1961/404 Accessible in:
https://www.finlex.fi/fi/laki/ajantasa/1961/19610404

1.1.3. A distinction between artistic and non-artistic photography

An earlier assessment of originality shows that there is a need to clarify when photography is seen as an art, as in many legal definitions it is a condition for the recognition of originality and thus for the acquisition of copyright, even if photography can generally be seen as an exception to the rule of originality. It is often defined separately from other art, and is often seen more as technical reproduction than as fine art.[19] It can be argued that this has taken several turns in history: When photography was still done mechanically and chemically, it was considered that photography required the photographer to press only one button. Since then, there has been a shift to much more complex photography equipment, where the photographer is required to have the knowledge and skill to create good photos. At that point there started to be discussion whether photographs should be given some artistic value. After that, however, smartphones, which are relatively easy to use, evolved following the fact that anyone could take good pictures. It did not require any special skill. Thus, one can consider whether the artistic value depends on the medium used to take the picture.

However, according to the utilitarian notion, art is how it is experienced by oneself. Thus, anyone who experiences their own photographs as art is art.[20] According to this view, it would therefore not matter how much effort has been put into it or how easy it has been to take a picture. If the photographer intents to see the photograph as art it can be seen as benefitting the society at the cultural level. In this case the photographer's view may transform an accidentally taken photograph into art even if the content in the work does not change. It has been widely criticized that the intention of artists to create art solely for the joy of creation, and not for economic gain, would be just a way for artists to get exclusive rights to a work. However, it is good to note that most artists cannot support themselves by doing art alone. Photography has grown significantly in our society in many different areas in recent times, and it can benefit financially in many ways, for example in marketing. It can therefore be considered questionable why a photographer would want to claim to make a work solely for the creation of art and not for financial gain.[21] This would argue that if the work were required to be art in order to obtain copyright, these photographs in question would earn unconditional copyright. However, In practice, photographs are copyrighted despite the fact that the photographer himself would not,

[19] Olsson, J. T. (1992). Rights in fine art photography: Through lens darkly Texas Law Review, 70(6), 1493-1494.
[20] *Ibid*
[21] *Ibid*

for example, consider the photograph as art. However, if a certain photography would be considered to be art, the photographer has a greater motive to protect his or her moral rights.

1.2. Applicable legislation

All countries belonging to the World Trade Organization are committed to The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Another international regulatory role in intellectual property rights is played by the United Nations (UN) World Intellectual Property Organization (WIPO). However, there are problems with the application of these global legal structures. The problem arises that these often incorporate existing, national standards that can sometimes conflict with each other.[22] International trade, and with it intellectual property rights, require more international legislation, but there are many differencies between different legal systems *inter alia* between civil and common law. This is also complicated by the change in the perception of intellectual property (IP) in our digitalizing world, where digital photography also plays a major role. Comparative law is too broad to interpret in this regard and would require fundamental changes. That is why we need to look at intellectual property rights at internal and national level.

The Berne Convention for the Protection of Literary and Artistic Works is the dominant factor in the copyright laws of the EU member states. However, unlike other works, the minimum term of copyright in photographs is not 50 years but 25 years. This can be seen as a possible indication that copyright law has begun to transform as photographs become more common and even to make relaxing decisions when it comes to photographs. In addition, another problem arises that is particularly relevant for photographs. In general, the coutry of origin is determined by where the work is published. According to Article 5 of Berne Convention, a photograph enjoys protection in other member countries of the Berne Convention, such as the country in which it is published.[23] However, the definition of country of origin for works published online is unclear. Especially for digital photos, internet platforms often serve as publishing tools. However, it means that images are available to people around the world who have access to the web, also in countries that are not members of the Berne Convention. This can make it difficult to determine the country of origin and how long the copyright is valid. The Berne Convention was to be

[22] Engle, E. (2002). When is fair use fair: comparison of e.u. and u.s. intellectual property law. Transnational Lawyer, 15(2), p 187-189.
[23] Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, art. 6bis, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 41 (1986). Accessible in: https://web.archive.org/web/20180523095521/http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P109_16834

continuously developed to keep pace with technological developments, but has not been revised since 1971. As a result, many important issues related to digital photography have been completely ignored. Countries have developed at such a different pace, and therefore it is said to be impossible to revise the Convention.[24] Thus, it can be seen that the Berne Convention still does not provide a solid basis for safeguarding copyrights of digital photography.

1.2.1. A comparison of copyright law between the USA and the EU

As mentioned earlier, the US copyright legislation differs significantly from EU legislation in many aspects. In the United States, there is *inter alia* a Fair Use doctrine that allows the use of art without the artist's specific consent, despite the artist's monopoly. This has been created to balance the authoritarian rights with the public benefit. This can be seen, among other things, as an improvement in freedom of expression and cultural development.[25] It can be seen as bringing fairness and transparency to an otherwise drastic copyright law. However, the topic is also in many ways very sensitive, and share peoples opinions on behalf of and against. The sharp defenders of copyrights are of the opinion that they have exclusive right to work, and no one should benefit from it. Fair Use defenders believe that people should stick to their right to Fair Use in order to continue cultural and educational development, although it can be challenging and risky in terms of possible prosecution for the ones using the photo.[26] Poland has added fair use to its legislation as the only EU country, but has only extended it to private use according to articles 23 and 35 of Polish copyright law.[27] Excluding public use creates the reason why this particular doctrine in Polish legislation cannot be seen as contributing to the same principle as Fair Use in Common Law. Although fair use is not part of civil law doctrines, its impact can be seen in internationalizing copyright problems.

The case *Kelly v. Arriba Soft*, shows well how Fair Use should be balanced with the financial rights of the creator. Kelly sued Arriba Soft, as the defendant had developed a program that could redirect the user to the original images using a small thumbnail. They had taken a picture from the original site and copied it to their website in low resolution. The applicant himself claimed a commission on his images if they were downloaded from his website. By clicking the

[24] Ricketson, S. (2018). The international framework for the protection of authors: Bendable boundaries and immovable obstacles. Columbia Journal of Law & the Arts, 41(3), 341-368.
[25]Okediji, R. (2000). Toward an international fair use doctrine. Columbia Journal of Transnational Law, 39(1), 170-173.
[26]Aufderheide, P., & Jaszi, P. (2018). *Reclaiming fair use: How to put balance back in copyright*. University of Chicago Press.p 70-73
[27] Krzemińska, A. (2012). Public access to copyrighted materials in light of the act on copyright and related rights in Poland: Possibilities and difficulties. *Retrieved June*, *15*, 2014. p. 3.

thumbnail the users of the Arriba Soft's site were transferred to the original site, where the image is displayed in high resolution. If the exclusive right under U.S. Copyright Law § 106(5) would be applied, Arriba would have *prima facie* infringed copyrights by copying them to their website. However, the court held that it would be Fair Use to use the images as thumbnails as it was done in informatic use and they did not require any financial compensation for them. Thus, the fair use goes beyond copyright, which allows the author's exclusive rights to copy and distribute the work.[28] From this decision, we can see that the court sought to advance the interests of both, rather than a literal interpretation of U.S. copyright law. Merely copying an image does not generate financial rights for the other party, but helps people find the author's work.

At the international level, every signatory country of the World Trade Organization (WTO) is bound to follow the substantive law provisions of the Berne Convention, excluding moral rights.[29] As the US has never implemented moral rights in its legislation, it can be considered that EU member states enjoy more comprehensive copyrights in this regard. There are, however, some moral rights stated in VARA, but they are only limited to certain visual works. Thus, the greatest differences can be seen to lie in the interpretation of moral rights and originality, which are defined differently in signatory States. The internationalising nature of digital photography makes it difficult to interpret the law, especially when even all the EU Member States determine nationally how copyright is to be interpreted and which specific works can obtain these rights. In addition, although the choice of law which is to be chosen in an international legal issue is to some extent clear, it is sometimes difficult to find out where a work is based and thus it is difficult for the public to find out whether or not they are infringing copyright by acting in a certain way.

Both, in the EU and in the US, registration is not needed for acquiring a copyright. However, in the US registration is necessary if one wishes to bring a lawsuit for infringement of a work based in the US.[30] In addition, only when it is done before the infringement or in three months after publishing the work, the owner of the copyright has a right for attorneys fees and statutory damages. The right is thus granted automatically in connection with the publication, but if the right is violated and financial damage is caused, the damage can only be compensated to the

[28] Ginsburg, J. C. (2002). How copyright got bad name for itself. Columbia Journal of Law & the Arts, 26(1), 61-74.
[29] Cordray, M. L. (1994). Gatt v. Wipo. *J. Pat. & Trademark Off. Soc'y*, p. 130.
[30] United States Copyright Office(2019), Library of Congress, Copyright Basics, Accessible in: https://www.copyright.gov/circs/circ01.pdf

registered work. It is therefore necessary to consider what rights copyright actually protects without registration. However, this condition of registration can be seen mainly as a procedural simplification factor which eases the burden of proof in court and guarantees *prima facie* evidence. It is also worth mentioning that since the US has itself opted for a registration requirement in this matter, it cannot require works from other Berne member states to be registered. This prevents the discrepancy of the appliation of Berne Convention.

However, the above registration requirement is balanced by the Digital Millennium Copyright Act (DMCA) applicable in the US. This allows for the requirement to remove infringing material from the platform. Although not directly implemented in the EU, it has *de facto* landed with the Internet and internationalization, as it facilitates control over social media use and many social media indeed originate from the U.S., so naturally this applies to those applications. However, this means that the matter and whether the work has infringed copyright is not being assessed by the judiciary, which may be problematic for the rule of law.

In the US, there is also a "work for hire" principle, according to which an employee who creates a work as part of an employment, the work automatically belongs to the employer company. There is no such basic practice in the EU, but this approach is defined separately by the Member States and the individual Member States. Moreover, such a case must always be examined on a case-by-case basis, and since moral rights play a greater role in the EU than in US, it is not automatically possible to assume the employer's rights to work. Such an automatic right of the employer to work is not easy to implement in a state where moral rights are highly valued, as these rights are strongly tied to the author's relationship to the work.[31]

Indeed, the U.S. can be considered to have clear guidelines and exceptions, such as fair use, work for hire, and the Digital Millennium Copyright Act, to facilitate the administration of justice. They might seem as shortcuts to happiness that do not pursue the interests of the individual, but on the other hand outline consistent guidelines that allow the law to be predictable. The EU, on the other hand, favors a case-by-case interpretation, which allows for a comprehensive and holistic assessment of individual rights, but in turn complicates the interpretation of case law.

[31]Fisk, C. L. (2003). Authors at work: The origins of the work-for-hire doctrine. Yale Journal of Law & the Humanities, 15(1), p. 68.

1.2.1. Development points and discussion

Although current international legislation may not be fully up to date, change will soon take place at EU level. It has soon been two years since the Directive on Copyright in the Digital Single Market was adopted and entered into force, which means that each Member State has had to implement it by June 2021. This also has a lot of importance with digital photographers, as it also takes into account social media, which is a key part of this art form. While the directive brings many new perspectives and seeks to improve copyright, it also contains many issues that do not necessarily cover all important areas.

One of the big improvements for photographers is that not only the user but also the provider of the platform is held liable for its users action when it comes to copying and posting the photo to their social media.[32] This helps prevent copying and thus copyright infringement, as the service provider is in a better position to track the images uploaded to its platform than the photographer himself. However, the Directive does not require platforms to use tools that facilitate identifying Copies, which makes monitoring relatively inefficient. In addition, the new directive is intended to promote education and research, which in turn takes us away from strengthening copyright, as it allows broader exception to them.

Another fundamental issue can be seen in the balance between consumer and author rights. Legislators have long wondered how to secure the financial incentives for artists while still preventing the unreasonable monopoly that exclusive rights might create.[33] One of the key parts of U.S. copyright law protecting public interest is the first-sale doctrine. It allows copyrighted works to be resold without the author being in control of it.[34] Thus, the distribution right can be transferred. This can be seen as one of the doctrines created for the benefit of the consumer. However, this does not, of course, work in the same way for digital content, because often when a digital work is sold, the original copy remains with the seller, and the product purchased is actually an identical copy of the original. Thus, in fact, the distribution and presentation of a work changes to copying in a case of the sale of digital content. In other words, so that pro-consumer interpretation does not rule over copyright, the buyer of a digital product should possibly be seen as a licensee, not an owner.[35] The law has not been changed to cover the digital

[32] Directive of the European Parliament and of The Council No 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives, OJ L 96/9/EC and 2001/29/EC, art 17.
[33] Robin, J. A. (2007).After Bridgeman: Copyright, Museums, and Public Domain Works of Art. University of Pennsylvania Law Review, 155: 961, p. 969-970
[34] 17 U.S. Code § 106 - Exclusive rights in copyrighted works
[35] Asay, C. D. (2013-2014). Kirtsaeng and the First-Sale Doctrine's Digital Problem. Stanford Law Review Online, 66, 18.

age and creates problems because both consumer rights and copyrights are held in a high and inviolable position in our society. This, of course, also poses difficulties for digital photography copyright.

2. THE ROLE OF DIGITAL PHOTOGRAPHY IN COPYING A WORK

It is clear that photographing a copyrighted photo infringes rights of the author of original work. However, photography makes it possible to easily copy other works, such as paintings. It must therefore be borne in mind that mere direct copying using the same medium is not the only method considered to be copying, but re-creation by other mediums is also considered to equally infringing copyright.[36] In other words, copying is about copying a message, not about copying a method. However, for example many paintings which copyright has expired have been used by photographing for posters and other works. In this case, the photo does not infringe anyone's copyright. The problem with such a work, however, is whether it is possible to consider the work to be original if the photographer does not change the work in any way and does not add his own view to it. In other words, the work might not be bound by anyone's copyright.

2.1. Copying art in public domain

When art is in the public domain, it means that it is not bound by any copyright. Such works include e.g. works of art in the museum whose copyright has expired. Thus, the basic prersumption is that anyone can copy a work and benefit from it commercially. Sometimes, however, the situation needs to be examined more closely, as the rights freed up for such work may differ from person to person in practical terms.

2.1.1. Museums' rights to public domain works

In a case Bridgeman Art Library v. Corel Corp, Corel Corp had created digital versions of some public domain works which were displayed in the Bridgeman Art Library. Bridgeman sued Corel and claimed that they had infringed Librarys copyrights, as they were the only ones who had rights for digital remakes of the works displayed in the museum such as those on their website. The court ruled that copies made by photographing works in the public domain can not gain copyrights as they show no originality.[37] The definition, according to which a work can obtain

[36] Shonack, S. (1994), Postmodern Piracy: How Copyright Law Constrains Contemporary Art, 14 Loy. L.A. Ent. L. Rev. 281.p. 303

[37] United States District Court for the Southern District of New York,36 F. Supp. 2d 191, 1999 U.S. Dist. LEXIS 1731, 50 U.S.P.Q.2d (BNA) 1110,*Bridgeman Art Library v. Corel Corp.*

copyright if it requires more than a minimum of skill, effort and experience, could not be applied in this case. Originality therefore goes beyond this definition. Subsequently, in a case National Portrait Gallery (UK) v. Wikimedia Commons, the gallery posted high-quality images of works on its website.[38] The images were published so that when you zoomed in on the screen, it showed only the zoomed part, not the entire painting. In this way, the museum also protected the digital works from being copied. In 2009, a graduate student at the University of California, Derrick Coetzee, downloaded the out-of-copyright images in a way that he could assemble them into complete, high-quality images and then uploaded them to Wikimedia Commons. The gallery claimed that this infringed the copyright of the gallery and the new digital versions of the paintings and thus the copying also infringed the database rights. The matter never got to court, but it was agreed to disagree.

The question is, can a museum obtain copyright for a digital photograph that is a direct copy of public domain art? Firstly, although the image itself is developed and published by the museum, it does not show any creativity or view of its own from the photographer and thus, can be seen as lacking originality. Secondly, since the art is in the possession of the museum, only the museum has the opportunity to produce exact copies, unlike visitors who only visit the work in an exhibition. When a work is in the public domain, everyone should have an equal opportunity to do so, and no one should benefit more from this than others. Even if a museum has control over a work, it should still not have more favorable rights in regards to reproduction. Given that this museum, like many other museums in London, operates on a voluntary basis and no tickets are charged to give a possibility for all people to access the culture and history valuable for the whole mankind, the financial benefits of work that is in public domain exclusive only for the museum can be seen as somewhat ethically questionable.

2.1.2. Case: Reinsdorf v. Skechers

Unlike in the previous case, the work considered is not in the public domain. Skechers, an American shoe company, hired a photographer Richard Reinsdorf, plaintiff in this case, to take several photo shoots for advertisement purposes. In the beginning of every shooting, Skechers explained the way they wanted the photos to be taken with i.e. drawings of models poses and photographic examples.[39] During the shoots, Reinsdorf arranged the props and lightning and

[38]Gallery in Wikipedia legal threat (2009), BBC News, British Broadcasting Corporation.
[39]United States District Court, C.D. California, 922 F. Supp. 2d 866 (C.D. Cal. 2013), *Reinsdorf v. Skechers U.S.A.*

directed the photography sessions. Skechers modified the images more or less depending on the picture and used them for advertisement. Reinsdorf granted a limited license for the pictures to Skechers. Reinsdorf brought an action against Skechers on the ground that Skechers had infringed copyright in its marketing as it exceeded the time and geographical limits set out in the license. However, Skechers claimed that the photographs were joint work by both Skechers and Reinsdorf and thus brought motion to dismiss for the lack of jurisdiction. Here the court stated that a work is jointly copyrightable by two or more authors who make their own contributions for copyrightable work and the intention is to combine these contributions to form a whole in which the contribution of both authors is inseparably merged. The court therefore refused to determine whether the raw images were subject only to Reinsdorf's copyright, since those images were not in dispute, unlike the processed images, which were entirely the result of the work of two different authors: Reinsdorf's photography and Skechers' editing. However, it appeared that Reinsdorf had not intended to grant licensing rights for advertising in a way that Sketchers carried it out and thus, the court rejected Skechers' claim of joint authorship. In addition, Skechers failed to demonstrate that the parties intended to be co-authors. However, the court also found no connection between the infringement and revenue if it would be a matter of a breach of contract by Skechers. Reinsdorf also did not register his photos before the possible infringement, so statutory damages were denied.

This case demonstrates the difficulty associated with digital photographs used for commercial purposes. In this case, the main value of the photograph was not artistic since they were taken for advertisement. Other fields of art are less likely to encounter a similar situation where the artist would work for another party, creating a work exclusively for advertising purposes, after which the other party would modify the work of art to suit his or her own uses. In such a case, it could be seen that at least the joint authorship might be more easily identified. Licensing for marketing such as that described in the case can cause complexities in many aspects. Licensing in other areas of intellectual property can be considered more effective, such as patents for pharmaceuticals. Copyright licensing is also common when talking about, *inter alia*, computer programs. These are socially and commercially beneficial to spread to a wider area and promote the commercial interest of the copyright holder. However, in the case of a work whose principal function is its visual nature and which is licensed in such a way as to allow its modification, commercial exploitation and distribution to the public, it does not necessarily in itself promote or secure the rights of the author. That’s why many companies favor the way where they hire a

photographer to specifically take pictures. When this is stated in the contract, the copyright then belongs to the party who hired the photographer.[40]

2.1.3. Case: AFP v. Morel

A photographer named Daniel Morel took photographs of the immediate aftermath of 2010 earthquake in Haiti and uploaded the pictures on Twitter with his attributions. He also used a third-party application ”Twitpic” to upload the pictures which used Twitter Terms of Service. These particular terms had a clause which granted Twitter a non-exclusive, worldwide, royalty-free license and in addition, a right to sublicense any content poster on the application. Right after posting the images, they were reposted by several entities around the world. Agence France Presse, the plaintiff in this case, used them also in their image database giving the credits to Lisandro Suero, who claimed the photos were taken by herself. Agence France Presse also forwarded these photos to other news outlets and therefore they were seen as licensing agents and Suero was seen as the photographer. Morel did not grant any license to use the photographs. When the case was handled in the U.S. District Court for the Southern District of New York, defendants AFP and third parties who Morel claimed had infringed his copyright claimed that Morel would have licensed the images for their use by uploading them to Twitter, as Twitter was entitled under their terms to sublicense the material uploaded there. The claim was denied by the court to reject the copyright claim, as Twitter's terms of use do not automatically grant other users a license for images uploaded there. The license is only available to Twitter and its partners, not AFP or the third parties as they were not partners.[41]

The case demonstrates the difficulties posed by social media and the internet in relation to copyright. This problem is primarily related to digital photography, as the sharing of photos on social media has increased over the years, and the social media’s own terms of use complicate the interpretation of copyright infringement. As mentioned earlier, the abudance of data can lead to not always knowing who the copyright holder is and misunderstandings can easily arise. In addition, it should be borne in mind that social media is a relatively new phenomenon, and most of the copyrights of contents uploaded to platforms are probably not yet expired. This is one of the problems of the future, as it can be considered to be very difficult for the average individual

[40]Gardner, J. M., & Allen, T. C. (2019). Keep calm and tweet on: legal and ethical considerations for pathologists using social media. *Archives of pathology & laboratory medicine*, *143*(1), 75-80. Accessible in: https://meridian.allenpress.com/aplm/article/143/1/75/65341/Keep-Calm-and-Tweet-On-Legal-and-Ethical

[41] United States District Court, S.D. New York, 10-cv-02730, *Agence France Presse v. Morel.*

to trace when a photograph was taken and when its copyright expires so that the image can be used without infringement.

2.2. Issues created by online platforms

Copyright is an issue that affects every Internet user. However, it can be assumed that many Internet users do not have a deeper knowledge of copyright, or of the behavior that leads to copyright infringement. The Internet serves many distribution platforms for many different art forms, such as cinematography and music. However, one thing distinguishes these art forms from photographs: their copyright infringement is more difficult than respecting them. You can easily find an application for listening to music, which allows the author to receive a commission for their work. For watching movies, on the other hand, there are applications that help realize financial rights of the authors. Such applications may even often be an advantage for the work that would not otherwise reach as large an audience. Using these applications can be seen to be easier than, for example, downloading music or movies from the internet in violation of copyright. In this way, they also contribute to respect for copyright. In the case of photographs, however, the matter is different. Copying a photo from the web or taking a screenshot is often easier than, for example, applying for a license from its author.

In addition, many social media application terms contain a lot of clauses that are detrimental to the author, or at least they cannot be considered to promote copyright benefits. For example, Instagram, a popular American photo and video sharing social media service, has included in its terms a clause that they receive a sublicensable, royalty-free, worldwide, transferable license to use, maintain, modify, share, copy, publicly display or translate, and create derivative works of content uploaded to their platform.[42] This licensing can be seen as partially necessary for the platform to be able to maintain the image on its site.[43] However, users may not have any information about whether their uploaded images will be used and they in many cases will not receive any compensation for it. Digitization has created a new, easy way to distribute photographs, but not necessarily an effective way to protect their copyrights.

In addition, because the content can be easily shared around the world, orphan works become more common. Sometimes it is impossible to find out who took the picture and whether the

[42]Instagram, Ohje- ja tukikeskus, Yksityisyys- ja turvallisuuskeskus, Käyttöehdot. Accessible in: https://help.instagram.com/581066165581870?helpref=page_content

[43] Directive of the European Parliament and of The Council No 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives, OJ L 96/9/EC and 2001/29/EC, art 17.

copyright is still valid. The issue of orphan work also arises when works are digitally saved as new files, e.g. library databases. Furthermore, if files from these databases are transferred elsewhere, as Google did in 2004 when it started to scan works from the world library, it will be difficult to determine who has the right to use the images and who the original copyright holder is.[44] When a photo is re-copied many times to different databases, it is more difficult to find out when the photo was originally taken and by whom.

2.2.1. Case: Land Nordrhein-Westfalen v. Dirk Renckhoff

In this case, a secondary school student had used an image for his school project, which was freely accessible online, on a certain website. The school also uploaded that image to its own website afterwards without photographers approval. The photographer Dirk Renckhoff claimed that the school had infringed his copyrights, since he had only granted the rights to use it to the site it was originally uploaded from. The court agreed with him in this and stated that it is not enough that the original site had the rights to the image and the school website would be required to get a new authorisation from the copyright holder. Thus, European Court of Justice (ECJ) ruled in Renckhoffs favour as according to the European Union Copyright Directive 2001/29/EC the school should have been granted a right to use the photo before publishing it to their website. The court also stated that it does not matter whether the photographer did or did not limit the ways internet users could use the photo.[45] This case can be seen as particularly important for future copyright infringement cases of digital photographs.

The case shows how acting on the internet without infringing copyright can be challenging if there is no deeper knowledge of copyright law. Controlling copyright, such as respecting it, is difficult on the Internet, especially when there is no information about the copyright holder. It is good to mention that often copyright is not infringed if the image is used for educational purposes. However, the school should not have uploaded the image to its website for it does not fall within the scope of this exception. For digital photographs, it is particularly difficult, as there is no way for the photographer to have comprehensive control over who uses his or her images. Therefore, the following section discusses an alternative solution that protects the photographer's economic rights, even if the image is redistributed without his or her license.

[44] Sag, M. (2012). Orphan works as grist for the data mill. Berkeley Technology Law Journal, 27(3), 1503-1506.
[45] Court decision, 7.8.2018, Land Nordrhein-Westfalen v. Dirk Renckhoff, C-161/17, ECLI:EU:C:2018:634

2.2.2. Future opportunities

Although this thesis addresses the shortcomings and deficiencies of copyright laws for photographs, the development of the law alone is not enough to effectively protect copyrights in today's modern world. Technological development is an important part of realizing and maximizing the economical rights of artists. Recently, a new licensing-based blockchain technology has sparked debate in legal and technological circles as a new way of creating opportunities to implement economic rights digital art. It allows the author financial compensation for redistributing the image by using a Non-Fungible Tokens (NFT). Public blockchains enable data to be shared and stored between multiple parties on a decentralized ledger.[46] After checking the data and then saved on a blockchain network, it cannot be abused, it is flexible and is irrefutable.[47] In this way, the author would receive a profit every time the image is re-licensed using this technology. However, there are many aspects of this technology that the law should keep up with, such as taxation and security. The proliferation of such a cryptocurrency on various social media platforms may be far in the future, but the licensing chain for digital photographs, in the same way that has been created for music and movies, is a viable option.

[46] Narayanan, A., Bonneau, J., Felten, E., Miller, A., & Goldfeder, S. (2016). *Bitcoin and cryptocurrency technologies: a comprehensive introduction*. Princeton University Press.

[47] Fisher, K. (2019). Once upon time in nft: Blockchain, copyright, and the right of first sale doctrine. Cardozo Arts & Entertainment Law Journal, 37(3), 629-634.

3. DIGITAL PHOTOGRAPHY IN DIFFERENT ART CONCEPTS

Digital photography is a broad art form and can be used for many different purposes. Different art forms raise different copyright issues related to how copyright can be obtained and when it is infringed. In many cases, this is at the discretion of the court, as there is no comprehensive legislation on photographs. The various art forms have been the subject of legal debate, precedents and laws, but digital photographs seem to be intervening, as today they often fit the definition of art form but not the definitions of law.

3.1. Appropriation art

As can be shown from previous cases, in the late 19th and early 20th centuries, photographs were considered to be derivative works if they depicted something that can be met in reality without the photographer's own vision or was not created by the photographer himself. Thus, the object of photography would have been the work of art itself, of which the photographer only makes a derivative work.

Today, however, photography is in a different position regarding derivative art than before. Appropriation art means an art form in which an artist incorporates already existing works into his or her work of art. Derivative work is a legal term for such art. Derivative art is not seen as a copyright infringement *per se*, and an artist who creates the derivative work acquires copyrights for the contribution of his or her own. However, this section explores how digital photography complicates the interpretation of the law in the derivative art respect. Derivative art is an important topic to deal with, as it is often known for testing the limits of copyright law.[48] The biggest problem can be seen in the lack of originality of the work. According to professor Nimmer, copyrights can not be granted for photographs in two situations: If it was taken from another photograph and was intended to completely copy the original image, or if it attempted to copy the original image by arranging the lighting, background, and subject matter so that it corresponds exactly to the original work.[49]

The art of appropriation was born in the 1970s in New York, that is, in the history of art, relatively close to the beginning of digitalization. Indeed, today, the works representing art of

[48] Greenberg, L. A. (1992). The art of appropriation: Puppies, piracy, and post-modernism. Cardozo Arts & Entertainment Law Journal, 11(1), 1.
[49] *Ibid*

appropriation are easier to create than in its birth, partly due to digital photography, which, in turn has led to a number of copyright issues. Many artists create works that fall into the Nimmer categories mentioned above. Such works naturally provoke a debate over copyright and originality. For example, artist Sherrie Levine is known for her images which, among other things, depict works by other artists. She photographs original photographs taken by other authors. This has sparked much debate as to how originality should be examined. According to Levine's proponents, Levine makes her own contribution to the work of art by creating criticism and a certain kind of reputation that can be seen as a whole in the artistic image she pursues.[50] However, the legal standards can not recognize this kind of approach, as it is not seen as a factual component in the work that could be assessed. In other words, this so-called "art" is no different from copying from a legal point of view. It is difficult to determine when the inclusion of another work in a photograph can be considered a derivative work and when it is a pure copy. In this matter, the judge has a wide margin of discretion.

3.2. Applied art

Applied art means art in which a work has its artistic but also practical purpose. Many times people think of pottery, decorative fabrics and other products of the art industry. However, advertising graphics are also part of applied art. These often include digital photos that have been edited in many cases. Such art has a work threshold that determines whether it can receive copyright protection as art. The fact that a work is also created for use does not invalidate the acquisition of copyright *per se*, but, for example, the Copyright Council of Finland has held that if the intended use of a product determines its outcome to a dominant extent rather than the author's creative contribution, it is not a sufficiently original work to deserve copyright.[51] This raises the question of the extent to which a photographer should have his or her own view of when creating art such as advertising graphics so that its predominant purpose is not to serve to advertise the product or service to which it relates. Such an interpretation would seem to support the view that a work, i.e. also a photograph, should be an art in order to earn copyright. In addition, U.S. copyright law only protects a work of art if the pictorial, graphic, or sculptural features of the work can be identified separately and be able to exist independently.[52] However,

[50] Van Camp, J. C. (2007). Originality in postmodern appropriation art. *The Journal of Arts Management, Law, and Society*, *36*(4), 253- 254.
[51]Keskinen, H. (2019) Käyttötaide, Tieteen termipankki, Accessible in: https://tieteentermipankki.fi/wiki/Oikeustiede:käyttötaide
[52] Ginsburg, J. C. (2016). Courts have twisted themselves into knots: U.s. copyright protection for applied art. Columbia Journal of Law & the Arts, 40(1), p. 1.

U.S. copyright law distinguishes the use of articles from those whose primary purpose is to present its essence or convey information.[53] Applied art and the interpretive options created for it create their own challenge when evaluating the copyright of digital photographs. As previously stated, the function of a photograph, the licenses granted for it, its purpose, and the subject matter of the photograph are relevant to whether it infringes copyright. It is therefore important to find out whether, for example, photography used for advertising and photographic art have different rights and on what grounds. In other words, it would be important for the law to determine whether the purpose of a photograph is relevant to its copyright.

[53] 17 U.S.C. § 101 (defining "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information").

CONCLUSION

Digital photography is a multi-level phenomenon from a legal perspective. It needs to be seen from the perspective of both legal and digital developments. It challenges long-standing copyright standards and its international nature creates a globally common puzzle for all. The aim of this thesis was to determine the obstacles digital photography faces as an art form and how the current copyright legislation could be reformed to apply better to photographs.

Copyright, in the literal interpretation of many pieces of legislation, requires originality. Originality, on the other hand, is often defined in such a way that the work must demonstrate the creativity, skill, and more than minimal efort of its author. Literally interpreting some laws, a copyrighted work should be art. These laws are very clear and fundamental, but they also require a broad interpretation and are not detailed. Society and the works are changing at a rapid pace, which is why copyright law is loose and can be interpreted broadly. However, photographs have expanded the scale of works, their purpose and way of creating art, which is why it would be good if the law could be extended to photographs in more detail.

Digitalisation and the development of the law often go hand in hand. Usually, the law always comes a bit behind digital developments, but copyrights might be an exception. EU Copyright Directive seeks to improve the legal protection of works distributed on the Internet, even when comprehensive copyright protection technologies have not yet been fully developed. The hypothesis was therefore slightly wrong, as the law does take photos well into account and has been created proactively, although digital tools to enable its full compliance are still lacking. The relevant questions are therefore more philosophical and fundamental, eg. what kind of digital photos deserve moral rights and what digital developments should be taken forward so that photographs get better protected in practice as well. There are many well-founded views on either of these issues and both require fundamental research and development, and possibly the renewal of societal structures. Therefore, it can be said that such changes to protect photographs are probably still a long way off in the future.

There are also differences in copyright law between states and legal systems, and as copyright law becomes more international, it is good to use comparative law and take into account the best aspects of each system. There are a lot of good sides, both in US and EU law and they often overlap, *inter alia* in social media matters. However, they are very different and a complete universalization can be considered to be very difficult atleast in the near future. Copyright can be also considered to be somewhat relaxed, as some works have shorter copyright terms and the EU is working to promote research and education, in which case copyright may no longer be absolute and inviolable in the same sense as before. Copyright thus struggles between the public interest and the interest of the author and sometimes the balance between these can be difficult to find.

When equated with other arts, photographs create a problematic situation, as the copyright issues include aspects related to photography, traditional arts, digitalization and possibly also international nature. As stated before, photographs are particularly easy to copy and share, but they also make it easy to copy other kinds of art. This has created a lot of confusion within the arts community as well as for the judiciary. Appropriation art and applied art are in the center of attention when it comes to problematic issues in the copyright law interpretation.

Photography is inevitably a challenging art form that needs special attention. Social media has provided an easy way to disseminate images, but it has also eased copyright infringement. Photographs can also often be considered of non-artistic value, such as in advertisements. In that case, it could be seen to be beneficial for the public interest to distinguish whether the work in question has the characteristics of art or whether it should possibly be treated differently from other arts by law. Indeed, the answer to the research question is that the copyright challenges that digital photography faces as an art form are largely related to the purpose of the photograph. There is still no exact definition of the artistry of digital photography. It is therefore somewhat confusing how the same copyright laws apply to all photographs, even though there are major differences in the uses of the digital photographs. In other words, whether copyright infringement has ocured may depend on whether the photograph has artistic value or is purely made for some use. The outcome between these two may differ very much and depend on the interpretation of the law. It would therefore be important for this obscurity to be regulated more precisely in a law that has not had to be specified for other art forms before.

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28. 17 U.S.C. § 101 (defining "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information")

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