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Copyright limitations on photography

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ABSTRACT

In this paper the author reviews relationship between copyright law and photography and in particular, limitations imposed on this type of creative works from the side of copyright law. The work is based on recent legislation and other works of legal authors as well.

Keywords: copyright, photography, limitations, privacy

INTRODUCTION

Copyright as of 1710, in the Statute of Anne enacted by the British parliament, only covered books, maps and charts, protecting them from publishing, printing and vending exclusively. The term of existing was only 14 years starting after the first publication and could be later renewed for other 14 years¹. Today it has dramatically evolved, adding to the list of copyrightable objects sculptures, engravings, lithographs, dramatic and music works in XVIII-XIX centuries and today even DNA can be copyrighted.

Even the purpose of copyright law has changed from “for the Encouragement of Learned Men to compose and Write useful Books”² to creating balance between interests of the public and encouragement of the artists, dissemination of the artistic works and establishing legal grounds for reward for the author³.

As well, photography, from its beginning 200 years ago, has dramatically evolved from a fragile machine requiring long hours of the picture to hold still and then whole process of placing the image on paper for one picture. Today a rare mobile phone user has no camera in the device which may be even able to take a high quality image in a second, even Time newspaper has used a picture, taken with Apple’s iPhone as a cover of the issue in November 2012. Otherwise expensive telephoto lenses allow cameras to take pictures from 500 meters and the picture will be full of clear details. More than that, an average middle-class representative can buy oneself a professional camera today.

In addition to that, society has changed. Today over billion of people use Facebook and variety of other social networks, where users are struggling to find an attractive picture to attach to the post in order to make others view it. And rare user of Facebook knows that all the pictures uploaded to this social network are automatically giving non-exclusive and royalty free license to Facebook.

Therefore as photography and attitude of society to it are developing, and photography has become so common and is connected with various spheres of society, copyright law is facing high demands to cover all the areas of use of images.

¹ Blair, R. D., Cotter, T. F., (2005), *Intellectual Property: Economic and Legal Dimensions of Rights and Remedies*. Cambridge: Cambridge University Press p.26.

² Statute of Anne 1709

³ Tomkowicz, R.J., (2013) *Intellectual Property Overlaps*. Ottawa: Routledge p.124.

As far as modern computer technologies allow people to copy, share and publish images just by a mouse click and actual process of creating photographs does not take long time, it is hard to control how images are created and used. Simple process of photography causes violations of people's privacy or copyright of the artistic works, and simplicity of publishing may strengthen the damages done.

This paper reviews limitations which are made for photographers from the side of copyright law in regards to photography of people, artworks and locations. With regards to contemporary usage of photographs, the question of the paper is what are the limitations, how they are applied, what kind of consequences are caused, as well as what are the drawbacks of existing systems.

Existing legal limitations, unanswered questions, cases and possible improvements will be presented.

1. Photography of people

1.1. What are the different rights of “ordinary” and “special” persons?

For the beginning the author would like to review the issue of privacy and how it limits and regulates the right of a photographer to take pictures.

It is common practice to treat different persons differently in terms of privacy.

1.1.1. Public and Private persons

The first division which can be outlined is difference between public and private persons. Private persons will be called “ordinary” in this paper as they are subject to general rules, while public persons’ rights are limited.

The society generally believes that public persons deserve less privacy than private ones. The concept of general interest excuses intervention into private life of such a person, but there are also limitations to it which will be described later.

The definition for public figure may vary, but generally it concerns politicians, celebrity and business people.

On the other hand with a current development of media one can ask if an ordinary person becomes public after his or her page in social network reaches thousands of followers and therefore all information posted by this person becomes viewed by unusually big amount of people.

Matthew Kieran outlines a more general, but applicable division between public and private state of person: “To become a public person is to undergo a change in one’s status, associated with which is a lesser degree of privacy.”⁴

In conclusion, it is to be argued and proved in court if someone is a public or a private person as it is not possible to determine one from another by a legal definition.

The issue of privacy of public persons will be reviewed further in subchapter 2.2.

1.1.2. Children

⁴ Kieran, M. (1998), *Media Ethics*, 1st edition Abingdon: Media Ethics Routledge p87

Generally children are considered to be persons less than 18 years of age and this group of people is also given status of deprived from legal capacity. Therefore children are protected more in terms of gathering their data and in the context of this work, approaching in order to take photographs of.

The Guiding Principles on the Protection of Privacy in Media Coverage include the issue of photographing people and cover the above mentioned public persons and children. Regards children it establishes a number of rules.

The first general rule is that personal data of children can be collected only with the concern of their parents or legal representatives. It is also prohibited to approach children for journalistic purposes in case they are present in helpless situations such as being sick or wounded in a hospital, suffering after an accident and etc. The third thing which children shall be protected from is negative comments given by parents or legal representatives about them: such comments shall not be published or shall be published without mentioning the real name of the child if there is a legitimate public interest in such comment. Excuses to these rules can be given if a minor is given full capacity and recognized as a mature enough for certain actions⁵.

Therefore children are significantly more protected in terms of privacy than ordinary people. On the other hand, in the Court of Appeal's judgment in *Murray v. Express Newspapers* Lord Dyson mentioned that a child does not have any special right to privacy resulting merely from being a child⁶. Nevertheless *Weller v Associated Newspapers Ltd* concerned children of a celebrity, therefore it was also stated that in this particular case children are especially vulnerable in terms of safety from bullying and safety in general. As the parents of the children in this case have previously mentioned them in social networks and interviews, but never disclosed their faces. Besides, the parents took efforts to remove any pictures which were published, therefore the court has taken into account the struggle of parents not to make their children's lives public so that they can further decide if they want publicity after getting old enough for it. Therefore the case supported previous decisions in *Murray v Express Newspapers* by confirming a right of parents to protect their children from publicity⁷.

⁵ Guiding Principles on the Protection of Privacy in Media Coverage, issued by Consultative Committee on the Convention for the protection of individual with regard to automatic processing of personal data

⁶ Pillans, B. , (2016). Protecting the privacy of children: *Weller v Associated Newspapers Ltd*. — *Communications Law Review*, 21(1), 16-19

⁷ Agate, J. (2014). Celebrity gossip in a jam? Privacy damages of GBP 10,000 awarded in *Weller v Associated Newspapers Ltd*. — *Entertainment Law Review* 25(5), 197-199

This case also was also significant as the pictures were taken in the United Kingdom and published in California. Even though publishing was lawful, it did not deprive the claimants from their misuse of information claim⁸.

In conclusion, the treatment of children's photographs is similar to adults (described further in chapter 1.2), but nevertheless differs. Based on *Murray* and *Weller* cases, there have been established the following criteria for balancing the rights⁹:

1. The nature of the activity and the place where it happened

This criteria is similar to the one mentioned in von Hannover case: question is if the activity depicted shows a matter of public interest and if the person has voluntarily shown himself or herself to the public

2. Age of the children in question

Sensitivity to privacy violations increases grow older while younger children cannot protect their privacy themselves anyhow

3. Purpose of privacy invasion

JR38¹⁰ case has proven that the publication of an underage person's pictures on newspapers is legitimate if one was involved in riot and the police needed publications to identify the person.

4. Consent of the parents

Lack of parental consent to depict their children shall be an important factor in favor of declaring violation of privacy.

5. The effect on the claimant

The court shall address the interest of the child primarily especially if publication has caused safety issues for the child. Children are more vulnerable to privacy invasions in terms of safety and security.

Despite a number of specific criteria, there is no special right to privacy arising out of a mere virtue of being a child. This way children can be addressed as "special persons".

⁸ Foster, S. (2014). Press photographs: protecting the privacy of celebrities and their children. — *Communications Law Review* 19(3), 86-92, Bloomsbury Professional Ltd

⁹ Agate, J. (2016) Court of Appeal dismisses appeal in *Weller v Associated Newspapers Ltd*, *Entertainment Law Review* 27(2), 69-71,

¹⁰ JR38's Re Application for Judicial Review, Queen's Bench Division (Northern Ireland) 2013

1.1.3. Representatives of public authorities

This issue in practice mostly concerns policemen, but besides state guardian service's employees or prosecutors can be addressed as such also.

The above mentioned Guiding Principles allow taking photographs and videos of the policemen at time of them performing the professional duties and generally laws in the EU do not prohibit photography of the policemen¹¹. Nevertheless there is a number of cases of conflicts arising between policemen and photographers, which in context of street photography are to be discussed further in part 2.3.

After all it is possible to conclude that the division of people into ordinary and special groups is based upon their vulnerability and interest of public in the information about those persons or the responsibility of these persons. For example, public persons due to their status may be limited in privacy rights, but on the other hand due to the public interest in private affairs, this type of people becomes more vulnerable and therefore requires protection of own private interests. Another example is vulnerability of minors who are not capable of legal actions and are not mature enough to bear responsibility of protecting themselves require more protection from law than adults.

Nevertheless, representatives of public authorities are barely covered with any protection from being photographed during their service time. On the other hand as soon as such person's work day is over, he or she becomes subject to the rules of ordinary people, therefore uniform in this situation serves as a distinctive element for a public authority representative.

1.2. To what extent one can infringe a public person's privacy?

The definition of a public person differs from country to country. In the article "Paparazzi and Privacy" P. J. Alach compares the attitudes of the United States and European Union. While United States gives more freedom to paparazzi photographers referring to the United States Constitution's First Amendment and therefore favoring the freedom of expression. Generally, this issue can be explained as the competition of two rights: right to privacy and freedom of speech.

While USA favors the first one more, the European Union, governed by European Convention on Human rights, establishes more balance to this conflict. The European Convention on Human

¹¹ Ibid. 5

rights governs this issue by two articles: article 8 “Right to respect for private and family life” and article 10 “Freedom of expression”.

Beside the existence of these two equal legal provision, there are court decisions which have determined the relationship between the provisions and respectively the interests of celebrity and photographers.

In case *von Hannover v. Germany* Princess Caroline von Hannover filed a claim against paparazzi, who have published pictures of her taken while she was engaged into everyday private activities: walking, doing sports, attending restaurant. First of all the court decided that it shall be a right thing to focus not on a person’s nature as private or public, but on the nature of activities, which were found solely private in case of Princess Caroline, though she is a representative of a royal family.

Therefore the court has stated that photographs of private nature, the purpose of which is to satisfy the curiosity of the viewer about the details of a person’s private life cannot be deemed to contribute to the issue of general interest. This way the court has shown that a public person’s privacy shall be also protected and intervention of a photographer into it cannot be excused by general interest unless the information gained in fact makes certain interest regards political nature of the person.

Therefore there is not only the state of the person to decide is he or she is private or public to establish the amount of privacy which shall be granted to the person, but also the actions during which one photographed.

In the EU members states violation of privacy by photographers mostly questions balance between articles 8 and 10 of the ECHR: privacy and freedom of information. The US has to find balance between 1st amendment and right to privacy. Therefore, even though the court decisions may be different, main question is the same for any jurisdiction.

1.3. What rights do photographer and by-passers have in case of street photography?

Nancy Zeronda in her divides all street photography claims into “four categories based on the invasion felt by the plaintiff”¹²:

¹² Zeronda, N. D. (2010). Street photography: covert photography and public privacy. — *Vanderbilt Law Review* p.1140

- “Accidental celebrities” cases in which the plaintiffs object the fact of being photographed without consent , while nothing of private nature is being revealed;
- Plaintiff photographed in public places while being engaged into activity of private nature;
- Private parts of plaintiff unintentionally filmed or photographed
- “Upskirt cases”

A remarkable representative of the first type is *Nussenzweig v. DiCorcia* case. Mr. DiCorcia, a street photographer, took a picture of Mr. Nussenzweig, an Orthodox Hasidic Jew, in Times Square in Manhattan without any consent in the course of a two-year project of taking photographs of the by-passers at the streets of Manhattan. Mr. Nussenzweig learned about the photo four years later. The photograph meanwhile, with 16 other individuals featured in a collection “Heads” has been presented in a gallery, included into a book and printed with a limited edition by its author¹³. After that Mr. Nussenzweig, being a highly-religious person and also a holocaust survivor believed that the photograph violated his religious rights and therefore sued the photographer and the gallery for violation of privacy and religious reasons.

The court stated right to privacy of Mr. Nussenzweig against right to the freedom of expressions of Mr. DiCorcia and ruled that the photograph is an artwork, but not commerce and therefore it is protected by the First Amendment of the Constitution of the United States and also that freedom of expression transcends right of an individual to privacy, though the court still declared the picture offensive and distressing. In conclusion, photography is protected as a form of freedom of expression and therefore overrides interest of an individual and even if the expression is offensive and not liked by the individual, it is still protected¹⁴.

With the second type of cases one can refer to the case of Princess Caroline mentioned above. In contrast to it one can bring a case concerning life of non-public persons.

In case *Gill v. Hearst Publishing Co.* a couple was photographed at a market and the picture was later printed in a magazine Harper’s Bazar illustrating an article on a topic of love. The couple claimed that their privacy was violated, but the Supreme Court of California noted that the couple has voluntarily waived their right by embracing themselves in a public place where they

¹³ Wortman, R. (2010) Street Level: Intersections of Art and the Law - Philip-Lorca Dicorcia's 'Heads' Project and Nussenzweig v. Dicorcia. — *Georgetown University’s Journal of Communication Culture and Technology*, Vol. 10, No. 2

¹⁴ *Erno Nussenzweig v. Philip-Lorca diCorcia.*, 15.12.2007. Court of Appeals of the State of New York. 9 N.Y.3d 184

could be seen by other people and therefore they should have been aware of the risk of being photographed which was assumed¹⁵.

On the other hand, Justice Carter has dissented from the majority's opinion: he claimed that the picture has no independent news value and that the plaintiffs while belonging and acting in front of a little amount of people did not consent to be subject to the view of millions of magazine's readers. The judge also stated that a person shall not be presumed to give consent to photography under any circumstances as soon as he or she leaves own home.

Therefore comparing this case with the case of Princess Caroline one can see that different courts in different countries can give even more protection to the public persons than to private ones.

Third category of cases has formed itself even before the wave of the upskirt photography. In case *Daily Times Democrat v Graham* the plaintiff complaint about the photograph of her which was taken at a public place when wind has raised up her skirt and therefore private body parts were shown at the picture. The court denied the protection of the photograph under the First Amendment as the picture was not newsworthy and stated that in this case privacy protection demanded the consent of the plaintiff to publish the picture. The court also found the picture embarrassing and offensive to modesty and decency of the plaintiff. Therefore the court denied the opinion mentioned above that private person has no protection in public place.

«Upskirt cases» are referred to images taken from the ground level up the skirts of young girls and/or women. The court treats this situation as a photograph in a place where a person could be reasonably entitled to privacy, which relates also to expectation of a person to be safe from public surveillance or other attention. However in case *State v Glas* the court did not find the defendant guilty as photographing in a public place did not reach the definitions according to the view of the court as well as voyeurism statute did not cover such actions.

In conclusion, it is vividly depicted in the above mentioned cases that legal field is yet in process of adaptation to the rapidly changing abilities of photography technologies.

Comparison between UK and US cases shows a vivid pattern: US legislation provides 1st amendment to protect pictures violating privacy of person of any kind in case the photo has newsworthy content, while UK courts base their decision on the circumstances of the violation and nature of the person.

¹⁵ *Gill v. Hearst Publishing Co.*, 17.02.1953 Supreme Court Of California L. A. No. 22038.

2. Photography of Objects and locations

2.1. Works of art

From the beginning of photography there has been a dispute about the originality: is a photographed image just a copy or can it be treated as a separate work of art.

The standard of originality is a matter of dispute in the UK law. Graves' case in 1869 viewed a photograph of a public domain work of art. The Court has decided that photography in comparison to other artistic expressions is a copy of something; therefore a copy of a public domain art shall not be protected under copyright law.

Further, in 1999 *Bridgeman Art Library v. Corel Corp.* has addressed a similar issue: Corel Corporation was selling CD-ROMs containing digital images of paintings which, as the corporation stated, had been obtained from a company called "Off the Wall Images" which by that time was not longer existing. Bridgeman Art Library had a library of photographs of these paintings and therefore claimed that as it had owned the copyright on the paintings and did not license their use, Corel's copies were infringements of its copyright.

The case was viewed by the Southern District of New York under two legislations: the UK law was used in order to find out if the plaintiff's photographs were protected under copyright law and US law was applied to determine if there was an infringement of the copyright. So the court stated that as Bridgeman Art Library's photographs were not original works of art (as was stated in the above mentioned Graves case), they could not be copyrighted and even if they were protected, no copyright infringement would have taken place as "the only way in which Bridgeman's and Corel's photographs were similar was that "both are exact reproductions of public domain works of art," so the only similarity between the two works was an element which cannot be subject to copyright: the public domain material itself. Therefore, under well-settled U.S. law, there could be no infringement"¹⁶. The court also noted that the case would reach the same solution if viewed under the US law.

So in this case the photographs again did not meet the originality requirement to be copyrighted. Therefore the decision has allowed public to use the photographs of public domain images stored in museums collections without permission.

¹⁶Stokes, S. (2003). *Art and copyright*. London: Hart Publishing p.104

Despite *Bridgeman* case is not binding for the UK courts, as it was pointed out, “If [*Bridgeman* is] correct, the decision has potentially severe consequences for photographic libraries, art galleries and museums, for whom an important source of income is the licensing fees obtained for use of photographs of works of art, particularly, of course, where access to the original work of art for photographic purposes is restricted”¹⁷.

After all Antony Reese argues in his article that if no protection is granted to photographic reproductions, the amount of access especially to less popular artworks will dramatically increase, while on the other hand granting museums and public libraries a copyright for public domain works is not a way to solve this problem, as “we may get too few uses made of underlying public domain works reproduced in those photos”¹⁸. A *sui generis* system of protection of photographs of public domain artworks presented by to solve the problem was further claimed to be impossible to comply with international law by the author.

In conclusion one can refer to Robert Cooter and Tomas Ulen’s outline of such legal problems: “without a legal monopoly not enough information will be produced but with the legal monopoly too little information will be used”¹⁹

Aside from public domain photographs, new pictures may still be protected by copyright and as far as photography as an independent art is questionable in terms of originality, it is to be proved that the copy of the art was a fair use as derivative work.

Originality is as well required to claim violation of copyright of the work. Recent case *Societe Bowstir Ltd v EgoTrade SARL* has risen the issue of photograph’s originality in terms of portrait of Jimi Hendrix used in advertisement of electronic cigarettes. The defendant argued that the picture lacks originality and therefore is not protected by copyright. Nevertheless, plaintiff won the case.

From the point of view of the photographer, taking pictures requires not only a skill of putting light sources in the right order, but also a degree of creativity to establish composition, choose appropriate frame and make other creative choices, but from the point of view of the rest of the people, a photograph is one click which makes a photocopy. Unfortunately, no legal code includes specifics of originality, neither allows get copyright protection just by proving the

¹⁷ Garnett, K. (2000), Copyright in Photographs. — *European Intellectual Property Review* 22, p229

¹⁸ Reese, A. (2009). Photographs of public domain paintings: How, If at all, should we protect them? — *The Journal of Corporation law* vol. 34.4, p.1047

¹⁹ Cooter, R., Ulen, T. (1997) *Law and Economics*. 2nd edition Cambridge: MIT Press p.135

authorship²⁰. Therefore the closest description of proof of originality would be that claimant has to prove one's personal contribution to the creation of a photographic art. In the mentioned case, the photographer explained his work during preparation of the studio, light, background, choice of gear and angle of shooting to convince the court of personal contribution. On the other hand, this method would hardly work for report or street photography which is usually made in a spontaneous way and followed by photographers feeling rather than rational decisions.

Another popular question regards authorship of the work: if one person takes the picture while the entire scene, settings and other choices were made or directed by someone else, who owns the picture then? In case originality of such photograph is questioned, personal input would have been made by the director of the shooting.

2.2. Architecture

Freedom of panorama is a right given to the photographer to make images of architecture, works of art, sculpture and other copyrighted works situated in public places. As Bryce Clayton Newell stated, "copyright is s a typical tool to address freedom of panorama although other laws related to trademark or national security may also restrict public photography"²¹.

In the European Union Copyright directive or officially Directive 2001/29/EC gives an opportunity for the Member states to establish freedom of panorama clause in their copyright act which is done for example in Germany and the UK unlike for example Italy, which copyright legislation requires a permission of local Ministry of Arts and Cultural Heritage for commercial as well as personal use of the pictures of cultural and/or artistic value.

Just like the work of art discussed previously, architecture is as well a result of creative work and is protected by copyright. The difference is that works of architecture are most commonly situated in public places where regular people walk on regular basis and protected building may occasionally appear in a picture or tourists might be attracted by an outstanding façade.

It often happens that in places such as libraries, parks or museums, it is prohibited to take pictures of inside and outside of the building without permission of the authority (a marketing director or management) even if the pictures do not include sign, logo or any other kind of trademark of the place.

²⁰ Jacques , S. (2015). Are national courts required to have an (exceptional) European sense of humour? — *European Intellectual Property Review*, 37(3), 134-137,

²¹ Newell, B.C. (2011) Freedom of Panorama: a comparative look to the restrictions of public photography. — *Creighton Law Review* 44, p 405

In the EU this issue is partly covered by the Copyright directive article 5(2)(h) which sets a copyright limitation for “use of works, such as works of architecture or sculpture, made to be located permanently in public places”. For this reason an architect cannot prohibit taking pictures of the façade from the public place, but on the other hand taking pictures of the inside of the building or its inner yard which is not visible from a public place, the photographer might become subject to trespassing issues in case of unlawfully being on a private territory. This issue will be discussed further.

Besides, if interior or decoration of the building includes for example a sculpture or a painting, which is separately from the building protected by copyright, close-up pictures of these artworks still conclude a breach of copyright.

Therefore it shows that basically no protection is granted to architect’s work if it can be seen from a public place.

On the other hand it is possibly to prevent a photographer from distribution the pictures of the building with the help of a Trademark. Richard Stim points out 4 criteria required for this procedure:

- “the building would have to have an identifiable, distinctive appearance;
- the building would have to be publicly associated with certain goods or services;
- use [of the photographs] would have to be commercial (not editorial); and
- use [of the photographs] would have to be linked to an offer or endorsement of similar goods or services.”²²

After all it is still not possible to prevent a photographer from selling the pictures of the work of architecture if one does not offer a similar product as the one trademarked.

Therefore an architect or designer cannot anyhow protect own creation from being photocopied and distributed unless it was meant to be located in a private place, when the owner of it is free to set own rules on photography and generally access to the territory.

But there are always exceptions like the Eiffel’s tower. Besides that another attempt to copyright monuments and tourists places was undertaken by the government of Egypt to copyright the Sphinx and Giza pyramids in 2007. However this attempt was did not succeed. The Eiffel tower protection differs from it: prior to the tower got repossessed by the city of Paris in 2003 and

²² Stim, R “How Copyright Law Applies to Photos of Buildings and Architecture”
<https://www.nolo.com/legal-encyclopedia/copyright-architectural-photos.html>

installed a new lightning of copyrighted design, the court confirmed copyright protection for the original lightning design installed in the 1898. Therefore the tower can be freely photographed during daytime, but as soon as the lightning is turned on, the photographer intended to distribute pictures of the tower is subject to copyright restrictions and licensing requirements.

This also shows “copyright as an economic right”²³ which usually dominates over the moral right doctrine in the Anglo-American legal systems.

2.3. Restrictions to taking photographs due to security reasons

A photographer can be subject to restriction to take pictures in public places based on security reasons. This can concern not only casually-looking buildings which may appear to be belonging to the state defense and other offices, but also there can be restrictions and cases of arrests after people taking pictures on train platforms, subway, public, airplanes, shopping centers.

Bert P. Krages explains shortly in his handbook that: “Photographers may be criminally liable for taking photographs that depict national security and defense material if they know the photographs will be disseminated by the media”²⁴. In this case the criminal liability mentioned by the author arises under Espionage act.

After all one can say that numerous conflict between photographers and police occur mainly to poor legal advice and legal enforcement measures as a result of it, and non-awareness of national law provisions from both sides of the conflict.

The UK is a source of numerous conflicts between photographers and police happening on regular basis. Police in these cases usually requires deleting photographs and challenging photographers on the ground of counter-terrorism legislation, even though no legal act prohibits taking pictures in public events, places (shops mostly). Only in Heathrow airport it is prohibited to take photographs during a terror alert. In 2008 the home secretary ruled that there is no legal ground for such actions by the police but nevertheless allowed to proceed with it.

It is also not only about taking a picture, but about publishing also. In 2003 in Switzerland an editor of Sonntag Blick magazine was charged for publishing pictures of an underground bunker which was subject to a state secret. The editor was charged with a jail sentence, but the highest

²³ Miller, A.R. (1993). Copyright protection for Computer Programs, Databases and Computer-Generated works. — *Hayward Law Review*. 106 977, p104

²⁴ Crages, P.B. (2006) *Legal Handbook for Photographers: the rights and liabilities of making images*. 2nd edition Amherst: Amherst Media , p. 43

military court annulled the decision two years later. Therefore in case of state secret trials, an editor can also be a subject to it, not only the person who took the picture, but the publisher as well.

Unfortunately, as outlined by David Banisar, law and police officers rarely do distinguish between professional and amateur when restricting photography²⁵. Nevertheless there is a big difference between these two type of photographers, first of all in the way pictures are used and secondly, in the quality of the picture and how much can be clearly seen on it.

²⁵ Banisar, D. Speaking of Terror, 1st Council of Europe conference of ministers responsible for media and new communication services 28-29 may, 2009

3. Exceptions to general rules

While copyright serves a purpose of giving authors an exclusive rights to their creations and th encourage artists to create further. As it was already discussed in part 3.1, there has to be a balance, because “giving authors too much copyright protection could inhibit rather than enhance creative growth”²⁶.

3.1. News reports

News reports are treated differently from usual publishing. Using copyrighted material in order to report a news event is considered to be a subject to fair use doctrine which is an exception to copyright protection. Secondly, news is subject to public interest, which was mentioned above in case of privacy as an obstacle to photography. First of all this means that copyrighted material can be shown in news report without an permission from the author as long as subject of the copyrighted material is related to the even reported.

In 1962 Abraham Zapruder filmed a clear and explicit tape of president Kennedy’s death. This video was sold to Time and was obviously subject to copyright protection. Later, a series of drawings was created based on this tape and used as illustration to a book by Josiah Thompson. The book was telling a theory and other information about Kennedy’s assassination, which court found to be “entitled to public consideration”²⁷. Even though there was a definite violation of copyright protection by drawings of Thompson, The court decided that they were important for the public to see as illustrations to the book.

However this is the case when photography is no similar to drawing or video record. The rule of news report does not extend to photographs²⁸. This allows photojournalists to earn money with their craft and newspapers to copy passages from each other, but without copying photos. Otherwise, in case the picture was made “with journalistic purposes”, both editor and photographer own copyright²⁹. This part is usually covered by the contract between the photographer and the editor.

²⁶ Fishman, S. (2008), *Copyright Handbook*. 10th edition Berkeley: Nolo publishing p. 2/4

²⁷ Gilbert, J. (2004)*The entrepreneur’s guide to patents, copyrights, trade secret and licensing*. New York: Berkley Publishing Group, p. 138

²⁸ Stech, M.T. (2015), *Artists' Rights : A Guide to Copyright, Moral Rights and Other Legal Issues in the Visual Arts Sphere*. Builth Wells: Institute of Art & Law p108.

²⁹ Dr. Georgiades, E. (2018). The limitation of copyright: sharing personal images on social networks. — *European Intellectual Property Review* 40(4), p.235

In conclusion, one can copy text, video, make drawings from a video to report current events, or past events in exceptional cases, but cannot do the same with a photograph. The question left open is the following: if a screenshot from a video practically will look like a photograph, to which type of visual art it will be referred in case of news repost – a video or a photograph?

Despite this rule, case *Sixto Nunez v. Caribbean International News Corp.* has established a new precedent: a transformative use exception can be granted if the picture is newsworthy. Miss Puerto Rico Universe 1997 was photographed by Sixto Nunez and later on local newspaper *El Vocero* has published the picture of the model. The court found the picture was centre of a story reported by the newspaper and therefore nude and nearly nude photographs of a model were newsworthy as the story in the newspaper was about the model keeping good physical form after winning the award. Therefore the usage of the picture was granted transformative and therefore fair use. Even though the newspaper used the photos commercially in order to attract readers, the court still favored the good faith of the newspaper and informational use of the picture which was stated to be essential for the story and that pictures were used not fully, but in part³⁰.

Second consequence arising from usage of photographs in news reports is the ability to publish photographs which are of inappropriate content, contents breach of privacy of a person or picture which was made in any other unlawful way. One of the examples was discussed above in terms of celebrity's privacy: if a private activity of a public person constitutes a significant interest to the public (politician's activities related to views which he or she expresses to the public) then the picture can be published in order to report a certain event.

Another vivid example of it is war photography and pictures of various nature disasters. In 1991 a future Pulitzer prize winning picture of a burning man by Greg Marinovich was sold to Associated Press and published as an illustration of a conflict in South Africa. The picture showed a man on his knees, caught in flames and being hit in the head by a person holding a machete and on the background a kid was running, presumably, in celebration. This picture was showing a murder and still was published as it was an illustration to a news report.

Unfortunately, this case along with many others later caused another problem to the photographer: local police called him to testify, but if he had agreed, no more news reporters would be allowed such a close access to all areas where events are happening.

³⁰ Bunker, M.D. (2005). Transforming the News: Copyright and Fair Use in News-Related Contexts. — *Copyright Society of the U.S.A Journal* 305, p. 313

3.2. Non-commercial use, private use

Another reason for justifying a copy of the work is private and non-commercial use. This can be also educational use or making of temporary copies.

There is an important condition for a personal copy of the image to be legal: the one who is making a copy has to have a legal copy prior to making a new one from it. Therefore copying an image from the website is not treated as legal private use copy while copying pages from a photography book or postcards is fine as long as this material was acquired by the owner in accordance with the law. Then the owner can make copiers for private research, storage or making back-up copies and also to lent temporary to another person for private use. But as soon as the copy is displayed, sold or starts bringing commercial benefit in any other way, the exception stops applying.

Also, as was mentioned above, accidental inclusion of people into frame of a photograph does not constitute invasion of privacy. Similarly, accidental inclusion of a copyrighted work into a tourist's picture, news broadcasting or any other record will not constitute infringement of someone's copyright.

3.3. Humor

One of the most important factors for determination whether copying of the work falls under fair use category is a reason for which the copy was created.

The fair use doctrine covers also use with the purpose comments and criticism, one sort of which happens to be parody which is a copyright exception under Article 5(3)(k) of the Copyright Directive (2001/29/EC). Nevertheless parody has not been common for all of the EU countries, for example the UK has added this close only in 2014.

As far as parody can be presented in different forms from a drawing to a fully written cartoon, the amount of a copyrighted work used and the amount of its transformation will be different in various cases. Therefore courts when reviewing such an issue also pay attention to the fact if a parody is actually funny as it is generally supposed to be. A clear caricature drawing in the case will be more favored than a re-drawn cartoon with the same characters, but changed. Last one was declared copyright infringement in case *Walt Disney Productions v. Air Pirate* for making a cartoon with Disney characters engaged into inappropriate behavior. But that does not always mean that legal parody depends on the amount of work copied. Case *Leibovitz v. Paramount*

Pictures Corp. was about a photograph of a naked pregnant actress made by Annie Leibowitz which was used by Paramount Pictures to advertise a new movie. The picture was edited and head of the woman on the portrait was replaced with a head of male actor who played a role in the movie. Even though the picture was copied in full without editing anything but the head of the model, which was even replaced in the same pose, the court found this parody appropriate.

It is important that the use in terms of parody has to balance the interests of the author and freedom of expression of the user.

Partly alike the US examples, English case law establishes three questions to check fairness of a parody:

1. "Proportion of the original work that has been reproduced.
2. The necessity of featuring the original work in the reproduction.
3. Whether the reproduction will be in competition with the original work, thereby affecting the original author's sales."³¹
4. Fair dealing.

On the contrary, French Code of Intellectual Property which has a longer experience with accessing parody provides other rights:

1. Parody does not necessarily have to be humorous.
2. Parody shall not cause confusion with original.
3. Parody shall be a transformative work.
4. If used commercially, parody shall not compete with original.³²

This example shows how Copyright legislation is not fully harmonized within the EU. As a result one and the same work of parody may be legitimate in France, but violate copyright in the UK.

In *Deckmyn* case in 2014 Belgian Court of Appeal decided to turn to CJEU to ask for interpretation of the Copyright Directive provision. CJEU replied that matter of fair parody is to be harmonized between the states³³. The requirements set were the following:

1. The work is significantly different from the original
2. Shall be mocking or humorous³⁴

³¹ Lagarde, L., Ang C. (2016). Parody in the UK and France: defined by humor? — *PLC Magazine*, 27(3), 14-15,

³² *Ibid.* 28

³³ Jacques, S. (2015). Are national courts required to have an (exceptional) European sense of humour? — *European Intellectual Property Review*, 37(3), 134-137

The rest of the suggested criteria were not declared mandatory, therefore there are only two qualifications for a work to be a parody. This case has started new process of harmonization now in terms of definition of parody as a copyright limitation.

³⁴ Jongsma, D. (2017). Parody after Deckmyn - a comparative overview of the approach to parody under copyright law in Belgium, France, Germany and the Netherlands. — *International Review of Intellectual Property and Competition Law* 48(6), 652-682,

CONCLUSION

This paper has viewed different cases which concern issues of photography. The photography itself can be extremely various and for this reason there are various exceptions to copyright protection and there are exceptions from exceptions. As well as there are different limitation on photography of various categories of people and different categories of objects, artistic as well as not artistic.

On one hand variety of legal norms for each type of photography, which has been reached during last 300 years since modern copyright law started to exist, looks sufficient to regulate actions of today photographers even with the highly technologic means to capture anything and anyone.

But on the other hand there are a significant number of unanswered questions or grey areas in which everything depends on the nature of the work or copy, its purpose, usage and etc. where it is hard to say what is a fair use and what is not and later court decision becomes surprising.

As it was shown in this paper, main tool of copyright law to stop photographers is prohibition to earn money with the creation, deemed inappropriate. Namely, it is a prohibition to publish, exhibit and sell photographs rather than prohibition to make photographs. Therefore one can take pictures while trespassing, violating someone's personal or home privacy for example, and a certain appropriate system of punishment will appear only after the photographer attempts to publish or somehow use one's art. Therefore to no punishment is applicable for making and keeping the pictures privately, neither in the EU, not in the US legislation. The consequence of such allocation was shown in case of Kate Middleton's photographs which were banned from publication in the United Kingdom, but nevertheless were sold to a Swedish website without facing any obstacles³⁵. This shows the first major problem of current copyright limitations to photography: "illegal" photos can be kept after being made and later can be published outside of the jurisdiction where the prohibition was issued. Only in case of photographing children taking the picture can be prohibited and therefore punished, but not regards adults and other photography subjects.

Photographs of art, sculptures or interior is often treated as a mere copy and therefore violating copyright of the original work which nevertheless makes it possible to create a copy which would be subject to fair use doctrine, which in its turn is also causes doubt regards newsworthiness, use for parody or transformative use.

³⁵ Topless Kate pics published in Sweden, - The local 19.09.2012 Accessible
<https://www.thelocal.se/20120919/43336>

The third questionable field which also prevents photographers from receiving revenue from their pictures in form of royalties is originality. Burden of proof is on the photographer to convince the court that a picture has one's sufficient personal and creative input while no set requirement for originality are in place.

Therefore one can say that in relation to photography copyright law limitations do not yet fulfill the needs of society. And the problem is not too much in the rapid technological development, but rather in extreme growth of consumption of photography products by various industries and private persons.

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