

# A Photography: Intellectual Property, Personal Data and/or Information?

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## Summary:

Intellectual property is as diverse in its objects of protection as no other branch of law. Copyrights, patents, trademarks, etc - they all result from intellectual activity and at the same time they are so different. Both a poem as a work of literature and the diesel engine as an invention are intangible results - creations of the human mind. But works of literature and inventions enjoy special protection. Photographic works are a small part of what is protected by copyright. And yet can we count the pictures published daily on the internet and printed in newspapers and magazines? There is almost no news without pictures, any event – public or private would be captured by cameras. Recently it has become fashionable to take a self-portrait photograph - "Selfie". We have seen thousands of pictures of celebrities, sportsmen, politicians and so on. Portrait picture images are copyrighted, but they also are personal data. And such photography is often designed to inform us about certain events. Copyrights are exclusive, but in case it is not a "selfie", in photography it is not the one whose picture is taken to be the copyright holder. The individual whose portrait is taken has the fundamental right of personal data protection. Three different interests seem to be affected by the use – that of the individual whose personal data

is taken, that of the photographer and copyright holder and the interest of the society to have access to information and to the works of art.

This article attempts to illustrate the complexity of the problems of intellectual property, data protection and information law and to emphasize the need for an integrated regulative approach to those problems.

**Key words:** intellectual property, copyrights, photographs

**JEL Classification:** K 11

## 1. Introduction

The importance of the protection of privacy and personal data as fundamental rights needs no explanation and is beyond the scope of this article. Nor the significance of copyright and its protection has to be questioned. It is true that internet made information easily accessible and that it made it much easier to disclose personal data. It is also true that what is referred to as information and what is protected as personal data may constitute a whole or be part of the copyrighted work, such as an article in a newspaper or a photography. People are interested in and have the right to be informed. News is not part of copyright. People go online to read stories. They can surf and find pictures to illustrate the events they are interested in. Pictures can easily be made public throughout the world. Then

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should it be possible for someone to enjoy protection under the copyright legislation and to profit himself in violation of the rights of another one? And will it be justified for someone to prevent the author's use of a copyrighted work because of a potential disclosure of personal data?

Intellectual property, privacy and information rights can be viewed from different perspectives: that of society and that of the individual. They all have their place in the CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION<sup>2</sup>. Article 7 from the Charter guarantees everyone the right to respect for his or her private and family life, home and communications. Article 8 entitles all individuals to protection of their personal data, Article 11 proclaims the freedom of expression and information and article 17, paragraph 2 guarantees the protection of intellectual property.

Personal privacy and data protection are to safeguard individuals from public disclosure, while intellectual property is intended to protect right holders namely in the course of public exposure.

The first part of this article is focused on the standards for copyright protection of photographs. The second part examines the problems that can arise in relation to the use of portrait photographs where data protection and information rights are also affected.

## 1. Photography and copyright protection

### 1.1. Photography as copyrighted work

Do all photographs qualify for copyright protection? There are controversies on

this question. Historically the protection of photographs has emerged from the protection of works of art. The first<sup>3</sup> and the second<sup>4</sup> Bulgarian Laws on Copyright would establish certain formal requirements for protection of photographs. The Copyright Act from 1951 provided that a photograph should indicate the author's name, place and the year of publishing<sup>5</sup>. At the time the Law was in force original photographs would not have been protected unless that condition was met. The above requirement was introduced within the legislation at the time photography was considered handicraft no matter if the photographs themselves could be classified as works of art<sup>6</sup>. Currently, the Law on the Copyright and Related Rights<sup>7</sup> provides in its article 3 (1) that any literary, artistic and scientific work resulting from creative endeavour and expressed by any mode and in any tangible form shall be the subject matter of copyright. Photographs have been listed shortly after works of art and separately from all other copyrighted works.

The Law on Copyright provides no special requirements for granting the protection of photographs. As any other type of protected work, a photograph has to result from the creative endeavour and be expressed in any form. Under article 6 from the Duration Directive<sup>8</sup>, photographs shall be protected by the member states' laws as far as they are original. Originality is met where the work is the author's own intellectual creation. The second sentence prohibits member states to introduce other criteria to determine their eligibility for protection. The Directive allows the states to provide

<sup>2</sup> OJ 2012/C 326/02, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>, accessed May 2014

<sup>3</sup> Copyright Act published SG 92 from 16 of November 1951.

<sup>4</sup> Article 18 paragraph 6 from the Copyright Act from 1951.

<sup>5</sup> Avramov, Liusien, Tadjer, Vitali, Copyright Law of Peoples Republic of Bulgaria, 1965, page 54.

<sup>6</sup> Law on Copyright and Related Rights, Published SG 56 from 29 of June 1993, last amended SG 21 from 8 of March 2014.

<sup>7</sup> Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31993L0098>, accessed May 2014.

<sup>8</sup> Decision N° 54 from 23.01.2008, [https://www.cdpd.bg/index.php?p=element\\_view&aid=95](https://www.cdpd.bg/index.php?p=element_view&aid=95), accessed May 2014.

protection of other photographs but the Bulgarian copyright legislation stays silent on that option. The wording of the Bulgarian Law on Copyrights does not follow strictly the Directive. Does the creative endeavour require any higher standard than that of the Directive? The answer should be negative. The Law on Copyright does not introduce any aesthetic or other requirements as for the photographs or any other type of work. Nor can such criteria be objectively met. Besides that, how will an aesthetic requirement be applied to schemes or to plans as they enjoy the same protection by the law? Article 3 from the Law on Copyright should be interpreted in a way that a photographic work will be protected as long as it is the author's own intellectual creation. But is the push of the button of the camera good enough to satisfy it? Though the Law on Copyright does not introduce special requirements for protection of photographs, the Bulgarian Commission for Personal Data Protection denied copyright protection to non-professional photographs. In a case from 2008<sup>9</sup>, the Commission was required to order the removal of some photographs of friends gathering from an internet site. In its decision the Commission stated that the case concerns pictures for household use, but does not concern photographs that are works of art included among the protected copyright works within the wording of article 3 (1) from the Law on Copyright and Related Rights. No arguments were provided to support this statement. And hardly can anyone find some, as the applied criterion is the use of photographs. Neither the Law on

Copyright nor the Duration Directive makes any reference to the intended use of the photographs in terms of granting protection. The use makes no difference with regard to originality.

But should photography be protected where it is just about pointing and taking it without any scene-setting, light arrangements, etc.? Will it be copyrighted when it is taken in an automatic mode, or where, after all it is taken in terms of an entirely automated process? There is a high degree of uncertainty, though in some states merely any photograph may enjoy copyright protection. For example in Great Britain "in contrast with the position in most systems of author's rights, the work of the humble snapshot-taker stands in the same category as Beaton and Cartier-Bresson"<sup>10</sup>. Similarly courts in the USA will generally hold that even factual photographs are creative works and thus deserve copyright protection<sup>11</sup>. As there are no special criteria established by the Bulgarian law, the originality should be interpreted in a way that copyright protection applies to the widest scope of photographs including those where the intellectual effort involves pointing the camera to the object.

### *1.2. Portrait photographs*

Even though a photograph may meet the originality requirement, it can still be not protected by the copyright legislation. This will be the case where the photograph reproduces without authorization another piece of protected work, or where it is a portrait taken without the consent of the

<sup>9</sup> OJW.R. Cornish, D. Llewelyn and T. Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, Seventh edition, 2010, p. 472<sup>10</sup> Copyright Act published SG 92 from 16 of November 1951.

<sup>10</sup> Craig C. Carpenter, *COPYRIGHT INFRINGEMENT AND THE SECOND GENERATION OF SOCIAL MEDIA WEBSITES: WHY PINTEREST USERS SHOULD BE PROTECTED FROM COPYRIGHT INFRINGEMENT BY THE FAIR USE DEFENSE*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2131483](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2131483), page 15, accessed May 2014<sup>12</sup> Avramov, Liusien, Tadjer, Vitali, *Copyright Law of Peoples Republic of Bulgaria*, 1965, page 54.

<sup>11</sup> Craig C. Carpenter, *COPYRIGHT INFRINGEMENT AND THE SECOND GENERATION OF SOCIAL MEDIA WEBSITES: WHY PINTEREST USERS SHOULD BE PROTECTED FROM COPYRIGHT INFRINGEMENT BY THE FAIR USE DEFENSE*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2131483](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2131483), page 15, accessed May 2014

portrayed person. If the first situation is in relation of breaching the other's copyright, the second is about the violation of privacy rights. It is a fundamental and constitutional right to respect a person's private life. To guarantee the privacy rights in relation to portrait photographs, the law on copyright would not grant copyright over such work unless the author has the prior consent of the person. The Bulgarian Law on Copyright and Related Rights stipulates that the consent of the portrayed person is required for the creation of works of fine art or photography constituting a portrait of another person<sup>12</sup>. Then the law establishes three exceptions to that rule<sup>13</sup>. The consent is presumed where: 1. the image has been created in the course of the public activities of the portrayed person or in a public place; 2. the image of the person is merely a detail in a work depicting a meeting, procession or landscape; 3. the portrayed person has received remuneration to pose, unless otherwise stipulated by the author and the portrayed person. The first hypothesis goes well beyond any standard for safeguarding personal privacy. It seems that an average person that goes for a walk has given consent for being photographed. The concept of protection from invasion of privacy is namely to prevent us in cases when we go public, as you cannot reasonably expect someone to break into a private place for the purpose of taking your portrait. On the contrary, the consent will be needed when you are in a place where others can potentially take your photograph without asking you. The third exception also raises certain concerns. The concept of

receiving remuneration does not necessarily imply the consent of the portrayed person, as for example in the case of mentally incompetent or minor persons.

### 1.3. Photographs and personal data

Photographs may contain different personal data. Personal data is defined within the EU law as "any information relating to an identified or identifiable natural person (data subject); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;"<sup>14</sup>. Under the definition provided by the Bulgarian Law for Protection of the Personal Data it "shall refer to any information relating to an individual who is identified or identifiable, directly or indirectly, by reference to an identification number or to one or more specific features."<sup>15</sup>. In the abovementioned decision of the Commission for Personal Data Protection it is assumed that as far as photographs contain images of faces or of the human body, persons may be identified and these photographs are personal data within the meaning of the law<sup>16</sup>. Indeed portrait photographs may be even better identifiers than our names. Everyone can think of a situation where we recognize a well-known face of politician, movie actor or a sports star, but have forgotten his name.

Personal data can be gathered and processed only for the purposes and under the conditions defined by the law. Natural persons and legal entities that collect and process such data (data controllers) are

<sup>12</sup> Law on Copyright and Related Rights, Article 13 (2)

<sup>13</sup> Article 2 (a) from Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31995L0046>, accessed 22.05.2014

<sup>14</sup> Article 2 (1) from the Law for Protection of the Personal Data, published SG 1 from 4 of January 2002, last amended SG 15 from 15 of February 2013

<sup>15</sup> Supra note 9

<sup>16</sup> Article 9 from Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995

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subject to obligations to protect it from misuse. In terms of a portrait photograph, the protected interest here is not that of the copyright holder, but the privacy of the portrayed person. The protected interest is in the general case controversial to that of the author of the photograph. The author would benefit from publishing, while the portrayed person may rather prefer keeping it far from the eyes of the public. There should be no conflict where the author has taken the consent of the portrayed person. Problems may arise where the photograph is taken in a public place, where such consent is not needed. A major obstacle for the portrayed person may become the exception from the rules for the processing of personal data to secure the freedom of expression. Under the Directive<sup>17</sup> and under the national law<sup>18</sup> such exemption is provided for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression if they are necessary to reconcile the right to privacy with the rules governing the freedom of expression.

### **1.4. Photographs as information**

Article 11 from the CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION is titled "Freedom of expression and information". Freedom of expression secures freedom of information<sup>19</sup>. The second sentence of paragraph one describes the freedom of expression as freedom to hold opinions and receive and impart information and ideas without interference by a public authority and regardless of frontiers. Paragraph two provides for the respect of the freedom and

pluralism of the media. The wording of the Charter of the Fundamental Rights of the EU follows the one provided in article 10, paragraph one of the Convention for the Protection of Human Rights and Fundamental Freedoms. Paragraph two provides the legitimate limitations of the exercise of these freedoms. Any limitation should be prescribed by the laws and necessary in the democratic society and serve the interest of national security, territorial integrity or public safety, of the prevention of disorder or crime, of the protection of health or morals, of the protection of the reputation or rights of others, of preventing the disclosure of information received in confidence, or of maintaining the authority and impartiality of the judiciary. The freedom of information has two perspectives – the first being that of the individual person and his legitimate right to express his opinions and be informed and the second – that of society. The second interest is about the free global exchange of information. In this way "freedom of expression and information not only protects individual rights but provides the basis for public disclosure in order to foster a free intellectual debate in society"<sup>20</sup>.

Photographs are an essential part of the information process. Not surprisingly some of the biggest court cases where freedom of expression and freedom of information are discussed, are such filed by celebrities against paparazzi. In this case the interest of the photographer to publish the image goes together with the freedom of expression and freedom of information rights. The one that could eventually suffer is the photographed person, as would most probably be where the image was taken in

<sup>17</sup> Article 9 from Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995

<sup>18</sup> Article 9 from Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995

<sup>19</sup> A detailed analysis of the copyright and access to information problems can be found in the article Copyright and Access – a Human Rights Perspective by Cristoph B. Graber, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1617892](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1617892), accessed May 2014

<sup>20</sup> Supra note 19, page 82

a public place. Avoidance of such situations can be successful on the basis of the exceptions from the freedom of expression granted under paragraph two of article 10 of the ECHR, namely for the protection of the reputation or rights of others or eventually for preventing the disclosure of information received in confidence. Still such protection depends on the national legislative measures and it differs among the states.

A potential conflict between the author's right and the freedom of expression and information rights may arise where the photography is used for information purposes without the permission of the copyright holder. National laws deal with that problem with the provisions establishing the scope of the free use of copyrighted works.

## 2. Use of portrait photographs not governed by copyright

### 2.1. Use of portrait photographs and personal data protection

The use of portrait photographs may cause a variety of problems that cannot be solved by the means of the current copyright and data protection legislation. There are at least two important rules established by the law to help us avoid and deal with such potential conflicts and to secure both privacy rights and freedom of information. The first one is the consent requirement for a portrait photograph introduced by the copyright legislation. No property rights should be granted in violation of privacy. The weakest part is probably that such consent is not needed when the portrait is taken in a public place. In terms of data protection, the misuse of personal data is of biggest concern namely in such situations where the access to our data and the possibility to be processed is not restricted. The

second rule is established by the personal data protection legislation and it limits the possibility of prohibiting the processing of such data when carried out solely for journalistic purposes or the purpose of artistic or literary expression.

Let's imagine a situation where portrait photography is made with the consent of the portrayed person and for remuneration. Then the author sells the paper original of the photography to an art gallery that exhibits it and enters a digital copy of the photography in its open electronic database that is freely accessible on-line. Under the Bulgarian Law on Copyright and Related Rights,<sup>21</sup> the transfer of ownership of works of fine art and works created by a photographic or analogous method shall also transfer, unless agreed otherwise in writing, the right of public exhibition of the works. The portrayed person will not be able to prevent the author from exhibiting his portrait, nor from selling the original photography and its further exhibition by the art gallery, but will he be entitled to prevent the gallery from including the photograph in the on-line catalog on the grounds of protection of his personal data? Will his consent to be photographed and consequently to have his portrait publicly exhibited be good enough for the gallery to process his personal data? And what if the portrait was taken in a public place and without the consent of the person?

The protection of personal data in the case of portrait photography may cause problems in providing access of different public institutions to information. Some good examples can be found in the paper Copyright Law and Personal Data Protection: on the Example of the Photographic Collection of the Tartu City Museum<sup>22</sup>. The author identifies

<sup>21</sup> Law on Copyright and Related Rights, Art. 68. (1)

<sup>22</sup> Kardla, Eevi, Copyright Law and Personal Data Protection: on the Example of the Photographic Collection of the Tartu City Museum, [http://www.baacouncil.org/media/public/files/2012/kardla\\_baac\\_2012\\_txt.pdf](http://www.baacouncil.org/media/public/files/2012/kardla_baac_2012_txt.pdf), accessed May 2014

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three areas where the work over the photographic collections of the museum is affected by the personal data protection and copyright protection legislation. The first is the use of existing photographs, the second – photography of city sights and events and the third – adding photographs to the electronic database of the museum. Protection of personal data seems to cause difficulties where material changes affected the person's life after photographs were given to the museum. An interesting example involves the use of pictures of a family given to the museum at soviet times that has provoked disputes between the older and the younger members of that family, the latter being children at the time the picture was taken<sup>23</sup>. Another example involves the use of a photo from a wedding where the couple has divorced.

### ***2.2. Use of portrait photographs and freedom of expression and information***

As said before, freedom of information may justify the use of copyrighted works without the consent of the right holder. In a recent case the Sofia City Court had to rule in a similar situation<sup>24</sup>. The plaintiff is the author of portrait photography of a singer. The photography has been published on the Facebook page of that singer. Further on the photography was copied and published by a newspaper to illustrate an article about the singer. The newspaper denied copyright infringement arguing that the photograph was made available to the general public by the singer as he has published it on his Facebook page. The court rejected any right of the defendant of free use of the photography, as it was

used for commercial benefit in order to profit from the newspaper's sales.

Another interesting case in relation to the possible exceptions from copyright protection in favor of freedom of information can be found in the practice of the Supreme Court of Austria (OGH)<sup>25</sup>. The court ruled in favor of the free use of a photography that was published on the website of a politician in e-mails that were distributed for criticism by a political opponent in the elections campaign for the regional Parliament of Vienna. In another situation the use of passport photography by a newspaper without the consent of the author was considered a copyright infringement<sup>26</sup>. The photography was reproduced by the newspaper in relation to the information about a child who was a victim of homicide. The court ruled that there was no necessity to reproduce the photo without the permission of the photographer.

### **Conclusion**

Problems of copyright protection are usually discussed isolated from freedom of expression and freedom of information and from data protection rights. There are good reasons for that as copyrights are considered to be property rights, whereas the other two are political rights. The problem is that the works of creative human endeavor such as a portrait of a person may be copyrighted, be also a form of expression and information, and finally be personal data. Property rights protect the interest of the exploitation and commercialization of works of art while the right to expression, the right to information and data protection are for no economic gain. Or at least they currently are not. As technically speaking personal data can also be protected as property. In fact databases

<sup>23</sup> Supra note 24, p. 4.

<sup>24</sup> Decision on case № 5673/2012 from 21 of November 2012 of the Sofia City Court.

<sup>25</sup> Supra note 19, pp 94.

<sup>26</sup> Supra note 19, pp 96.

of personal information can be highly valuable in terms of business<sup>27</sup>. But isn't it time for us to stop inventing new property rights to provide more economic benefits?<sup>28</sup>

All three rights are strongly dependent on the development of digital technology and of the internet. The easiest and the most common ways to exercise the right to expression and the right to information are via internet. Personal data protection is of biggest concern in terms of making it available or accessible on-line. Copyrights and in particular works of photography are commercialized by means of the global network. And once we have it on-line we can see how different interests protected by different rights are making it more and more complicated to find our way. As no one imagined the growth of the internet in the late eighties or even in the nineties, we are not able nowadays to know where the technology will bring us one or two decades ahead. And if the protection of portrait photographs by the copyright law was good enough to secure the interest of the author during the eighties as the image was taken on film and the control over any copying was quite simple, it is much different nowadays when photographs are mostly in digital form.

The biggest challenge intellectual property and copyright protection face is to find the new balance between the interests

of society and those of the creator. The need to change the existing system of protection of copyright in relation to the challenges of the digital era was expressly recognized by the General Director of the World Intellectual Property Organization that intellectual property Francis Gurry: "Digital technology and the Internet have had, and will continue to have, a radical impact on those balances. They have given a technological advantage to one side of the balance, the side of free availability, the consumer, social enjoyment and short-term gratification. History shows that it is an impossible task to reverse technological advantage and the change that it produces. Rather than resist it, we need to accept the inevitability of technological change and to seek an intelligent engagement with it. There is, in any case, no other choice – either the copyright system adapts to the natural advantage that has evolved or it will perish".<sup>29</sup>

The change of copyright may not go on its own. Only an integrated approach will be efficient enough to reduce the tension between copyrights, freedom of expression and freedom of information and data protection rights. Property rights should not gain preference and personal interests should not dominate over the interest of society.

<sup>27</sup> Renée Marlin-Bennett, *Knowledge Power: Intellectual Property, Information, and Privacy*, 2004, pp 7-10.

<sup>28</sup> The article below suggests alternative ways for protection of private interests in personal information instead of making it a property right: *Information Privacy/Information Property*, Jessica Litman, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=218274](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=218274), accessed May 2014.

<sup>29</sup> Blue Sky Conference: *Future Directions in Copyright Law, The Future of Copyright*, Queensland University of Technology, Francis Gurry, Director General, World Intellectual Property Organization, [http://www.wipo.int/about-wipo/en/dgo/speeches/dg\\_blueskyconf\\_11.html](http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html), accessed May 2014.