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COPYRIGHT PROTECTION FOR PHOTOGRAPHS

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I hereby declare that the work submitted is mine and that where I have made use of another's work, I have attributed the source(s) according to the Regulations set in the Student's Handbook.

Abstract

Photography constitutes one of the forms of visual arts. As such, all types of photographs are protected by copyright, provided that they fulfill the requirement of originality. Copyright protection not only allows photographers to preserve their creations and ensure that they will always be attributed to them (moral rights protection), but also to economically exploit their pictures by reproducing, distributing and communicating them to the public (economic rights protection). In any case, these powers should never undermine the protection of other rights deriving from photographs, such as the right to personal data protection and the right to personality. Given the possibilities that new technology offers (ease and speed with which pictures can be manipulated and disseminated even without the author's consent), special measures should be adopted in order to safeguard the protection of copyrighted photographs in the digital, and particularly, the online environment. In addition to that, specific categories of photos require more specialised copyright protection. That is why, orphan photographs are subject to a particular EU Directive, whereas particular case-law has been also developed for photographic reproductions of public domain artworks. Nevertheless, despite their possible copyright protection, photographs can be used without the authorisation of the copyright holder when specific exceptions apply, such as the fair use and fair dealing rule of common law jurisdictions or the limitations to the copyright found in civil law countries. For instance, according to the Greek Copyright Act, certain exceptions and specific provisions apply in the case of photos published in the mass media. Further to that, due to their artistic value, copyrighted and non-copyrighted photographs are also used in several initiatives of the European Union aiming at enhancing the protection of artworks, as well as their communication to the public.

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1. Introductory remarks

According to the Oxford Dictionary, *photograph* is a “picture made using a camera, in which an image is focused on to light-sensitive material and then made visible and permanent by chemical treatment or stored digitally”¹. It was not until G. Eastman produced in 1888 his first Kodak camera that photography and the photograph “changed from being the privileged domain of its early progenitors to one of the most accessible and accepted means of visual representation”². It allows everyone to create an individual view of their world and particular stories. As photographers maintain, photography is more than pressing the button of a camera: it requires that one wants to look into the landscapes and the people that are being photographed.

Even though photographs have enjoyed a variety of forms of protection over the years, they have traditionally been placed within the law of copyright. Photographic works were firstly listed in the catalogue of copyrightable works set out in Article 2 of the Berne Convention 1886 for the Protection of Literary and Artistic Works, as this was revised in Stockholm in 1967, and were considered to be intellectual works long before the modern photographic methods had been invented. However, copyright protection of photographs has always been a controversial issue. It is indicative that up until the late 1970s, an attitude was shaped that photographs were in some way a ‘lesser’ form of art, compared to other traditional artistic works, and many copyright lawyers regarded photography as an industrial process rather than an artistic one.

The lack of consistency of the copyright protection of photographs in the various jurisdictions around the world is reflected in the provisions of international conventions and treaties that permit signatory states to protect photographs differently from other categories of artistic works. Some years ago, Article 7(4) of the Berne Convention seemed to discriminate against works of photography by providing a minimum term of 25 years from the creation date, when the general rule corresponding to the life of the author plus 50 years *post mortem auctoris* applied for the rest of the works. And, even if this provision was subsequently modified by Article 9 of the WIPO Copyright Treaty 1996, Article 12 of the TRIPS Agreement 1994 still allows contracting parties to protect photographs with a

¹ <http://www.oxforddictionaries.com/definition/english/photograph>

² G. Clarke, *Oxford History of Art, The photograph*, Oxford University Press, 1997.

term of protection different from that conferred on other artistic works. Similarly, the EU Term Directive (Directive 2006/116/EC³ on the term of protection of copyright and certain related rights) explicitly recognises that different Member States may protect types of photos that are different to the ones regulated there (non-original pictures) differently pursuant to the respective national laws.

In addition, while photography as a technique has been around for more than 150 years, the copyright protection of photographs has been complicated in recent years due to the advent of new technology enabling not only the digital⁴ storage, alteration and reproduction of pictures, but also facilitating their global dissemination via the internet. One of the biggest problems (professional) photographers face on a daily basis is the unauthorised use of their copyrighted photos by third parties, particularly online. The removal of rights management information from published or unpublished images and the subsequent reuse of such works is widespread and out of control. And, this is both a national and an international problem, as online copyright infringement does not respect national borders.

This dissertation addresses most of the legal issues that relate to the copyright protection of several types of photographs and explores the implications of digital technologies in this field: the requirements and terms of copyright protection of pictures are examined, the specific powers awarded to photographers in several occasions are analysed and the possible instances involving the use of (copyrighted) photos by private or public third parties are explored. More precisely, the results of a comparative research are presented, comprising examples of the relevant provisions adopted and the case-law produced in several European and non-European countries. Special focus is placed on the Greek legal framework for the copyright protection of photographs, the Copyright Act 1993⁵, as well as the respective EU Directives, since this is the legal context I have been mostly exposed to and worked on so far.

³ This Directive repealed Directive 93/98/EEC and was subsequently amended by Directive 2011/77/EU.

⁴ Digitisation describes the process of converting analogue information, regardless of its form, into digital information/signals with the help of suitable electronic devices, in order to get information that can be stored, processed or transmitted through digital circuits and networks, see A.Lucas-Schloetter, *Digital libraries and copyright issues: Digitisation of contents and the economic rights of the authors* in I. Iglezakis, T.-E. Synodinou & S. Kapidakis (eds), *E-Publishing and Digital Libraries: Legal and Organisational Issues*, Information Science Reference, Hershey and New York, 2011, p.160.

⁵ Law 2121/1993 on Copyright, Related Rights and Cultural Matters.

2. Some basic issues concerning the copyright protection of photographs

2.1. Originality

In order for an intellectual creation that qualifies as a literary, artistic or scientific work, to be copyright protected it needs to be original. Photographs are considered to be artistic works and are, therefore, afforded copyright protection provided that they are original. Subject matter of the protection are photographs themselves and not the depicted objects.

The requirement of originality is common for the copyright protection of artistic works in all jurisdictions. However, no uniform definition of originality can be found⁶. In common law traditions, the work only needs to have been independently created by the author and possess at least some minimal degree of creativity⁷, meaning that it has not been slavishly copied from the work produced by the efforts of another person⁸. In the UK for example, as a matter of principle, it is submitted that a minimum standard of *skill, judgment and labour*⁹ suffices so as to affirm originality. On the contrary, in civil law traditions, a stricter criterion normally applies providing that the work needs to reflect the personality of its creator, in the sense that the work must contain the mark of the intellectual and personal contribution of the author. In any case, the original character of a work is a matter of fact in all legal systems and should not be confused with novelty. Merit and artistic value are also irrelevant, as case-law from all countries tends to emphasise that judges are not referees on artistic merit.

The European Union has designed partial copyright harmonisation for the concept of originality. In particular, the respective EU criterion concerns the preconditions for the

⁶ R. Casas Valles, *The requirement of originality*, in E. Derclaye (ed), *Research Handbook on the Future of EU Copyright*, Edward Elgar Publications, 2009, p.110-5.

⁷ That is why it is suggested in the American copyright literature that “almost any photograph may claim the necessary originality to support a copyright merely by virtue of the photographer's personal choice of subject matter, angle of photograph, lighting and determination of the precise time when the photograph is to be taken”, see M. Nimmer, *Nimmer on Copyright*, Matthew Bender Publications, 1963.

⁸ K. Lupton, *Photographs and the concept of originality in copyright law*, *European Intellectual Property Review* 1988, vol.10(9), p.258.

⁹ By “skill”, the use of one’s knowledge, developed aptitude or practised ability in producing the work is meant. Whereas one’s “judgment” implies the use of one’s capacity to discern or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual and physical effort (“labour”).

affirmation of originality only in computer programmes, databases and photographs and strikes the balance between the different civil and common law views on this matter¹⁰.

As specifically concerns photographs, Recital 16 in the Preamble to the Term Directive states that “the protection of photographs in the Member States is the subject of varying regimes”. The first regime can be found in Article 6 of the Term Directive which provides that: “photographs which are original in the sense that they constitute the **author’s own intellectual creation...**” reflecting his/her personality, shall be granted a copyright protection running “for the life of the author and for 70 years after his/her death, irrespective of the date when the work was lawfully made available to the public”. This provision is applicable across the EU without any other criteria, such as merit or purpose, being taken into account.

The second regime comprises other photographs which do not fulfil the criterion of “the author's own intellectual creation”. According to the last indent of Recital 16 of the Term Directive, the protection of such photographs is left to national law and falls entirely within the Member States’ discretion to protect their authors by a related, *sui generis* or unfair competition law right. Such rights have their own terms of protection and are based on conditions other than originality, depending on the Member State. In Italy and Spain for example, photographs not fulfilling the originality requirement are protected by a related right for 20 and 25 years after the creation date respectively¹¹.

The only instance where the Court of Justice of the EU (CJEU) addressed the issue of originality of photographs was in case C-145/10¹². In this case, judges had to deal with a preliminary ruling concerning, among others, the question whether “*portrait photos* are afforded ‘weaker’ copyright protection or no copyright protection at all against adaptations because, due to their ‘realistic image’, the degree of formative freedom is too minor”.

The CJEU observed that the author of a portrait photograph will be able to meet the standard stipulated in Article 6 of the Term Directive by making free and creative choices in several ways and at various points in its production. This includes: (a) in the preparation

¹⁰ I. Stamatoudi, *Commentary on Article 2 of L. 2121/1993* in L. Kotsiris & I. Stamatoudi (eds), *Commentary on the Greek Copyright Act*, Athens-Thessaloniki, Sakkoulas Publications, 2009, p.37.

¹¹ G. Minero, *Commentary on The Term Directive* in I. Stamatoudi & P. Torremans (eds), *EU Copyright Law - A Commentary*, Elgar Publications, 2014, p.277-8.

¹² C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others*.

phase, the choice of the background, the subject's pose and the lightning; (b) when composing the shot, the choice of the framing, the angle of view and the atmosphere created; (c) when developing the photograph, the choice from a variety of developing techniques or the use of computer software. In making these choices, the author is able to stamp the portrait photograph created with his/her 'personal touch'. Thus, the freedom available to the author to exercise his/her creative abilities will not necessarily be minor or non-existent. In view of this, the European Court held that a portrait photograph can be protected by copyright if it is an intellectual creation of the author reflecting his/her personality and expressing his/her free and creative choices in the production of that particular photograph.

In relation to the question of whether such protection is inferior to the one enjoyed by other works and particularly photographic works, the CJEU referred to Article 2(a) of the EU Directive 2001/29/EC (Infosoc Directive) under which the author of a protected work is entitled to the exclusive right to authorise or prohibit its reproduction and highlighted that such protection must be given a broad interpretation. In particular, the Court stated that, as nothing in the Infosoc Directive or any other applicable directive supports the view that the extent of copyright protection available should depend on possible differences in the degree of creative freedom in the production of various categories of works, the protection conferred upon a portrait photograph cannot be inferior to that enjoyed by other works, including other works of photography¹³.

As far as the Greek Copyright Law is concerned, in general terms, a work meets the requirement of originality if it is *statistically unique*. Being part of the civil law family, the Greek Copyright Act is stricter compared to the respective common law copyright rules on originality, and requires that no other person under similar circumstances and with the same aim in mind would reasonably reach the same creative outcome. Nevertheless, as specifically regards photographs, the criterion of the Term Directive has been transposed and, therefore, copyright is available if such a work is simply the *author's own intellectual creation*. Theoretically, the EU criterion is considered to lower somehow the above-mentioned standard of protectability, however the two criteria do not differ considerably

¹³ Y. Harn Lee, *Case Comment: Photographs and the standard of originality in Europe: Eva-Maria Painer v Standard Verlags GmbH, Axel Springer AG, Suddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co KG, Verlag M. DuMont Schauberg Expedition der Kolnischen Zeitung GmbH & Co KG (C-145/10)*, *European Intellectual Property Review*, 2012, vol.34(4), p.291.

between one another. Thus, a photograph should be statistically unique but only in the sense that no other person could have produced exactly the same picture, as this would be judged by a professional photographer specialised in the respective type of photos and not by an average person that is ignorant about photography¹⁴.

The Greek case-law on the criterion of originality applied to photographs is not settled and the distinction between the traditional/Greek and the EU criterion is not always respected¹⁵. For instance, the Supreme Court in its judgment No 152/2005 examined in detail whether the photographs of a celebrity which had been taken in order to accompany a magazine interview with him, displayed any singularity probative of creativity before granting them copyright protection. Thus, the general criterion of the “statistically unique work” was applied here. On the contrary, in its later decision No 1493/2009 concerning photographs that had been used in a travel guide without any authorisation by the photographer, the Supreme Court only invoked the EU criterion of the “author’s own creation” and clarified that any other stricter criterion should be excluded¹⁶.

Nevertheless, in any case, it is well established in the Greek jurisprudence and literature that the criterion of originality in pictures should be less severe than the one applied to other works. The main reason for this is that the application to photos of a high criterion of originality would possibly leave them unprotected, as they are closely intertwined and dependent on the evolution of technology. There can be no high claims of originality and creativity for photographs as they are technological works, like software and databases. At the same time, it is also maintained that almost every photograph should qualify as original, since no picture could ever be repeated due to the insignificant and possibly imperceptible difference that always exists (e.g. in the lighting) when re-taking a photo of the same subject-matter¹⁷.

¹⁴ I. Stamatoudi, *Mass Media, Information & Communications Law Journal*, Commentary on the decision No 152/2005 of the Greek Supreme Court, 2005, p.415-6.

¹⁵ I. Stamatoudi, *Commentary on Article 2 of L. 2121/1993* in L. Kotsiris & I. Stamatoudi (eds), *Commentary on the Greek Copyright Act*, p.39.

¹⁶ Some other relevant judgments are: Court of Appeals of Athens, decisions No 2724/2012, No 4040/2001 and No 3252/2002; Court of First Instance of Athens, decisions No 2264/1996, No 11923/1998 and No 2122/2004; Court of First Instance of Thessaloniki, decision No 19928/2004.

¹⁷ D. Skourtis, *The protection of photographs according to copyright law*, Greek Justice Journal, 1996, p. 1234.

Lastly, it should be underlined that Article 2(1) of the Greek Copyright Act refers to “photographs” and not to “photographic works”. The same distinction is also made in Germany¹⁸ and implies that the courts should verify the originality of the images only with objective criteria and not based on aesthetics, the person that takes the photograph (whether s/he is an amateur or a professional) or the value of the work. Not only works of photographic art, but also simple images constituting a direct visualisation of the object are being protected as original¹⁹. All that practically leads to the conclusion that, in order for a photograph to be copyright protected, it suffices that it does not constitute copy of another picture. A characteristic example of a photograph that is not original would be a simple picture of an already existing photo²⁰.

2.2. Authorship and Ownership

In the case of photographs, the affirmation of *authorship* is not always as easy as it may seem. Photographs constitute one of the few forms of artistic expression where the author does not start creating something from scratch, like a sculptor or a painter, but rather imprints reality as this is exactly formed by nature or others²¹, after just pressing a shutter button.

Focusing on the Greek Copyright Act, Article 10 provides for a rebuttable presumption that the author of a photograph is the person whose name appears on a copy of the work²². Where the photograph is of an unposed subject or a naturally occurring scene, and where everything necessary to fix the image is undertaken by one person, there will be little difficulty in deciding that the author is the photographer²³. His/her name should, thus, be mentioned on the picture. The same applies to cases where the person operating

¹⁸ G. Koumantos, *Copyright Law*, 8th edition, Athens-Komotini, Sakkoulas Publications, 2002, p.134-5.

¹⁹ L. Kotsiris, *Copyright Law*, 6th edition, Athens-Thessaloniki, Sakkoulas Publications, 2011, p.81.

²⁰ I. Stamatoudi, *Photographers' Rights and Publication of Photographs on the Media* in I. Stamatoudi (ed.), *Journalists and Mass Media Publishers: Copyright Law Issues*, Athens-Thessaloniki, Sakkoulas Publications, 2009, p.271; “if no originality can be claimed in making an additional print from a photographic negative, there should be no finding of a greater originality where the same effect is achieved by photographing a print rather than printing a negative”, see M. Nimmer, *Nimmer on Copyright*.

²¹ L. Kotsiris, *Copyright Law*, p.82.

²² Paragraph 1 of this Article provides that “the person whose name appears on a copy of a work in the manner usually employed to indicate authorship, shall be presumed to be the author of that work”, whereas paragraph 4 stipulates that “the presumption referred to in (1) may be rebutted by evidence to the contrary”.

²³ A. Abbott & K. Garnett, Who Is the “Author” of a Photograph, *European Intellectual Property Review*, 1998, vol.20(6), p.206.

the camera does so entirely at the direction of another. In particular, where one person sets up the scene to be photographed (the position and angle of the camera and all necessary settings) and directs a second person to press the shutter at a moment chosen by the first. Since, the person behind the camera is merely acting as the passive agent of the other, without making any original contribution of his/her own, the authorship and, therefore, the copyright should be awarded to the person giving the instructions²⁴.

Nevertheless, there are instances where the answer to the question of authorship is not self-evident. An indicative example form photographs taken in public spaces, depicting persons that have been selected randomly and who are acting naturally and have chosen themselves the way they are dressed or the way and place they appear. Here, both the photographer and the depicted persons contribute to the creative outcome, even though the latter are not really aware of that. The photographer chooses the most suitable camera settings and decides when is the best moment to take the picture in terms of lighting, gestures and expressions of the persons, whereas the latter choose where and how they will appear. Another example are cases where a person other than the one operating the camera makes a substantial creative contribution to the final image - perhaps in the darkroom or in digitally composing and processing the picture- without actually pressing the button. Here, it would not be right to deny copyright in the photograph to that other person on the ground that he was not the actual photographer of the work, as both the person that presses the camera button and the one who elaborates afterwards the picture are equally important and necessary²⁵.

The examples described above demonstrate that there could be instances where photographs constitute 'works of joint authorship'. These are cases of collaboration between the person behind the camera and one or more others, whose contribution is indispensable for reaching a specific creative outcome. In particular, depending on the specificities of each case of joint creation, such photographs may qualify as 'collaborative', 'collective' or 'composite' works, according to the definitions that the Greek Copyright Act provides in Article 7 for those types of works. In such instances, the name of all contributors should, thus, appear on the copies of the photograph.

²⁴ This view was also adopted in the decision of the Court of First Instance of Paris, TGI Paris, 3^{ème} Chambre, 6th July 1976.

²⁵ The exactly opposite opinion has also been maintained, see in D. Skourtis, p.1236-7.

It has to be underlined that authorship should not be confused with *ownership*. Even though Article 6 of the Greek Copyright Act provides that “the initial holder of the economic and moral right in a work shall be the author of that work”, there are instances where the ownership of a photograph belongs to a person or entity other than the photographer. In particular, the economic rights deriving from the copyright over a picture could be inherited or transferred by the photographer/author through contracts and licences²⁶, which are granted in return for the payment of specific remuneration (royalties). Therefore, in such cases, those rights would be exercised by the person to whom ownership has been transferred.

In the case of photographs produced in the context of a contract, the ownership of the contested pictures will be determined depending on what is contractually agreed upon. As specifically concerns employment contracts, Article 8 of the Greek Copyright Act makes a distinction between employment in the private and employment in the public sector. As for the private sector employees, the economic right in works they create on the job is transferred to the employer only to the extent necessary to fulfill the aim of the employment contract. On the contrary, as for employees working under any work relation of the public sector or a legal entity of public law, the whole economic component of copyright in works created in execution of their duties is *ipso jure* transferred to the employer, except if it is provided otherwise by contract.

Focusing on the British legal framework on authorship of artistic works and ownership of copyright, photographs suffered a long period of treatment as quasi-industrial works between 1912 and 1989. More precisely, they were placed under a regime which did not recognise the normal concept of authorship, gave them a shorter period of protection than other artistic works and conferred first ownership of the copyright not on the photographer, but the owner of the original negative or other material on which the photograph was taken. However, the Copyright, Designs and Patents Act 1988 restored the protection of photographs to a position alongside other artistic works as regards authorship and first ownership and, since then, author of a photograph is regarded to be the person responsible for its composition.

²⁶ J. Armstrong, *Comment: The Digital Era of Photography Requires Streamlined Licensing and Rights Management*, Santa Clara Law Review, vol.47, 2007, p.794-8.

In particular, according to Section 9(3) of the Copyright, Designs and Patents Act 1988 “in the case of a[n] artistic work which is computer-generated, the *author* shall be taken to be the person by whom the arrangements necessary for the creation of the work are taken”, whereas Section 11(1) stipulates that “the author of a work is the first *owner* of any copyright in it”. Therefore, in such plain instances, the photographer is both the author and the copyright holder²⁷. After the repeal of the provision on commissioned works in 1988, the same rule also applies to commissioned photographs: the photographer and not the commissioner is considered to be the author and the owner of the copyright, except if it is otherwise provided in the respective contract. Contrary to that, with reference to photographs taken in the context of an employment contract, Section 11(2) provides that “the employer is the first owner of any copyright in the work”, without that depriving the photographer from his/her status as author.

2.3. Powers awarded to photographers

Copyright affords authors with economic and moral rights. They are both ‘exclusive’ in the sense that they belong only to the author and ‘absolute’ in the sense that they may be asserted against anyone and be violated by anyone²⁸. Article 12 of the Greek Copyright Act provides that “the economic right may be transferred between living persons or *mortis cause*”, whereas moral rights cannot be contractually transferred. Consequently, holder of the economic copyright may either be an original creator or a transferee.

2.3.1. Economic rights

Economic copyright empowers owners to economically exploit their photographs after introducing them to the public, subject to specifically enumerated exceptions. Among the economic rights stipulated in Article 3(1) of the Greek Copyright Act, the right of reproduction, the right of distribution and the right of communication to the public are mostly of relevance to the nature of photographs. Courts have repeatedly dealt with cases

²⁷ Y. Gendreau, *Copyright ownership of photographs in Anglo-American law*, European Intellectual Property Review, 1993, vol.15(6), p.211.

²⁸ G. Koumantos & I. Stamatoudi, *Greek Copyright Law*, Athens-Thessaloniki, Sakkoulas Publications, 2014, p.72 and 83.

concerning the infringement of such rights deriving from photographs that enjoy copyright protection.

The *right of reproduction* allows the copyright holder, either this is the author or the person to whom the economic right has been transferred, to control the fixation and the direct or indirect, temporary or permanent reproduction of the work by any means and in any form. The right of reproduction extends to analogue and digital reproductions, such as for example, uploading and downloading on/from the internet, saving in the computer, printing and scanning. Therefore, the copyright owner of a photograph may make copies, print or electronically reproduce it. Yet, any act of reproduction that is performed without authorisation is an infringing act, irrespective of whether it is done for public or private purposes.

As for the *distribution right*, this concerns the original embodiments and hard copies of photographs. In particular, the copyright holder has the right to control the distribution of his/her photograph, either this is done through a sale or by any other way. Thus, the copyright holder may print and market copies of a photograph, as well as produce and sell posters and postcards. However, the principle of 'community exhaustion' needs to be taken into account. According to Article 3(1)(d) of the Greek Copyright Act, the right of distribution is exhausted within the EU upon the first sale or other transfer of the ownership over a photograph within the EU, provided that this is made by the right holder or with his/her consent. That means that if the copyright holder of a photograph decides to distribute it in an EU Member State, s/he will not be able to claim royalties if this is subsequently marketed in another Member State.

The *right of communication to the public* entitles the copyright holder to control the dissemination of copyright works by wire and wireless means and mostly refers to their transmission over the internet. Variation of this right constitutes the *right of making a work available to the public*. In the latter case, the member of the public/internet user may access a photo published by the copyright holder from a place and at a time individually chosen. The notion of 'public' is defined in Article 3(2) of the Greek Copyright Act as encompassing any circle of persons larger than the narrow circle of family and friends or larger than the immediate social environment. Therefore, the copyright owner of a photograph may upload, for instance, a digital copy of the picture on the internet and can generally authorise its use online. Unfortunately, the infringement of copyright has

become extremely easy on the internet nowadays, as new technologies enable a vast number of users not only to access artistic works within seconds but also to manipulate them. Consequently, these two rights are constantly undermined.

Even though it is not strictly speaking an economic right among the ones enumerated in Article 3 of the Greek Copyright Act, reference should also be made to the *resale right* (or *droit de suite*), as this grants photographers a royalty as well. More precisely, according to the EU Directive 2001/84/EC (Resale Right Directive) and Article 5 of the Greek Copyright Act that transposed it into the Greek legal system, authors of works of the visual arts are entitled to a percentage of the price obtained at every resale of their creation that ranges from 0,25% to 5%, depending on the price at which the embodiment of their work was sold. The resale right is inalienable and unwaivable, while two preconditions need to be met for its application: (a) the work should be original²⁹, in the sense that it is “made by the artist himself” or “under his authority” and (b) needs to have been sold by an art market professional, such as an art dealer, an art gallery or an auction house.

Visual artists like painters, but also photographers at a later stage, were afforded this special protection since, due to the existence of a unique embodiment or limited copies of their work, they were unable to exploit their creation to the same extent as creators of other types of works were. Therefore, every time a photo changed hands, the photographer was able to share in the profits that would be earned from his/her creation. However, given that the use of analogue cameras has been significantly reduced nowadays, in combination with the ease of duplicating digital photos, the implementation of this right is mainly limited to photographic works that are produced by professional photographers employing traditional photographic techniques.

The management and protection of photographers’ economic copyright can be carried out either individually by each beneficiary separately, or collectively through *collecting societies*. There are collecting societies focusing on the administration of photographers’ rights in every European country³⁰, which operate under a specific legal framework³¹. In

²⁹ This originality has nothing to do with the concept of originality used to assess the granting or denial of copyright, as “it is not aimed at identifying the work but rather the specific object (the original, not the copies) to which it will apply”, see R. Casas Valles, *The requirement of originality*, p.130.

³⁰ As far as Greece is concerned, collecting societies operating for the management of photographers’ rights are FOIVOS for photographers and ISOKRATIS for photography directors.

³¹ Relevant legal provisions are Directive 2014/26/EU on collective management of copyright and related rights and Articles 54-58 of the Greek Copyright Act.

particular, these are bodies empowered (usually by virtue of a delegation contract that the beneficiary in principal signs with them on a voluntary basis) to collect remunerations, conclude contracts/licensing agreements on behalf of the right holders, bring civil and criminal actions, take all necessary steps with all public authorities and oversee the legality of any use subject to the rights they administer. The main responsibility of such organisations is the collection of royalty payments and their subsequent distribution to their members. But, rather than manage licensing/payments deriving from primary uses of photographs (such as, for example, where a client contacts a photographer to enquire about their usage in a book), the relevant collecting societies mostly administer secondary copyright uses, such as photocopying and TV broadcasting of photographs³².

Despite that copyright holders are primarily the owners of the economic copyright, the exclusive powers deriving from it are limited by certain restrictions that either arise from the broader legal system of a country (like the prohibition of the 'abuse of rights' provided in Article 281 of the Greek Civil Code) or are expressly stipulated in the respective national copyright law. When these limitations apply, any exploitation of copyrighted photographs by third parties will not be subject to the right holder's authorisation or the payment of fees³³. In common law jurisdictions, for instance, a relevant typical example is the general fair use and fair dealing exception. Nevertheless, in any case, any such restriction needs to comply with the requirements set by a general rule applicable to all the contracting to the Berne Convention parties and the EU Member States, the so called *three-step test*³⁴.

More specifically, according to Article 28C of the Greek Copyright Act, all the limitations found in this law with respect to specific uses of copyrighted material have to comply with the three-step test. These are the three factors that should be taken into account when assessing the lawfulness of a restriction, namely: (a) whether it is exclusively applied in certain special cases; (b) whether this conflicts with the normal exploitation of the photograph and (c) whether it unreasonably prejudices the legitimate interests of the

³² M. Evening, *Photographers at work: Essential Business and Production Skills for Photographers in Editorial, Design and Advertising*, New Riders Publications, 2015, p.113.

³³ Detailed reference to such limitations is made in several parts of this paper and more specifically in chapters: 3.1., 3.2., 3.2.1., 3.3.2. and 3.4.2.

³⁴ S. Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, SCCR, 9th session, 2003.

right holder. This provision aims at ensuring that authors are not unjustly deprived from enjoying the exclusivity of the economic powers normally awarded to them³⁵.

2.3.2. Moral rights

As any other artist whose work is original, photographers are granted moral rights. The concept of moral rights relies on the special spiritual connection of the artist with his/her creation and protects the personal interests of the author in the work. Common and civil law jurisdictions have adopted divergent approaches in relation to moral rights. Thus, depending on the country, moral rights may confer to authors more extensive or limited powers. Continental European systems place more emphasis on the protection of the creator's rights, whereas the Anglo-American approach focuses on the commercial exploitation of the copyright work.

As concerns artistic works and more precisely photos, Article 4(1) of the Greek Copyright Act entitles photographers to the following four powers. First, they can determine the time, way and place of the first publication and disclosure of a photograph to the public (right of dissemination). Second, they may have their name mentioned on the original or copies of a picture (right of attribution of authorship/paternity right), as well as keep their creation anonymous or use a pseudonym. Third, they can forbid any distortion, mutilation or other modification of the photograph, as well as any prejudice that may arise due to the conditions of presenting the photograph to the public (right to integrity). Fourth, they are entitled to maintain the right to access their work when the economic right or the ownership of the photo has been transferred to another person and provided that there is only a unique copy or limited copies to which the photographer has no access (right of access). Even though these rights should not in principle be transferred, a photographer could consent to actions or omissions which would otherwise constitute an infringement.

A characteristic example of violation of the photographers' rights of dissemination and integrity can be found in the decision No 2122/2004, published by the Court of First Instance of Athens³⁶. In this case, a photograph taken by a professional photographer was partially modified without his authorisation, was uploaded afterwards on the website of

³⁵ T.-E. Synodinou, *Copyright and New Technologies: the relation of the user with the author*, Athens-Thessaloniki, Sakkoulas Publications, 2008, p.48.

³⁶ Ch. Tsigkou, *Mass Media, Information & Communications Law Journal*, 2005, p.100-8.

the defendant and was used as a trademark on some of the products produced by the latter. As for the right of dissemination, the court held that even if the author has already disclosed his work to the public, as was the case here, he retains the right to decide on if and when to publish the work via a different medium³⁷. Thus, although the photographer had already placed the contested picture in the market in hardcopy format, he was entitled to decide when to make his work available online. As for the right to integrity, the court found that the degree of alteration of the photograph is of no importance. Therefore, even if most items/characteristics of the initial picture have been removed or changed, an infringement will be affirmed, as long as the original work can be recognised, even as a sketch.

Reference should be made to the impact that the use of new technologies may have on photographers' moral rights. First of all, photographs can be easily copied at a low cost and, even more importantly, without any loss of quality. In addition, digitisation allows deletions and alterations to be made to the work without necessarily copying the entire photograph and without depriving the new creation from having the appearance of an original work. Or, the same activities could even lead to the deletion of the author's name and its replacement by another name. Such violations are particularly common on the internet, due to the free circulation of photographs.

It is stated that two types of moral rights should be mostly protected online³⁸. First, the paternity right. This is essential in order for the link between the photographer and his/her work to be maintained, while the latter is in turn vital in order for the photographer to be able to satisfy his/her personal and economic interests in the work. Second, the integrity right. In the digital era that changes to photographs can be made effortlessly and rapidly and without that being easily detected by subsequent internet users, photographers should be given the possibility to retain full control over their work. One could argue that the right of dissemination should be added to this list too. However, this right would be better dealt with by other means. For example, in cases where the economic copyright is being transferred, by adding a relevant clause in the employment or any other type of contract concluded between the photographer and the party that will exploit the

³⁷ D. Kallinikou, *Copyright and Related Rights*, 3rd edition, Athens, Sakkoulas Publications, 2008, p.129.

³⁸ I. Stamatoudi & P. Torremans (eds), *Copyright in the Digital Environment: The Need to Redesign Copyright*, Sweet & Maxwell Publications, 2000, p.99.

photograph. The decision of when to release a work to the public is closely linked to its successful exploitation and should, therefore, be examined within the context of the contractual relationship developed among the parties.

Further to the negative effect that it may have on the preservation of photographers' moral rights, digitisation of photographs may also lead to the emergence of private international law issues, in the case of disputes concerning moral rights' violation on the internet. In particular, online networks are international by their very nature, in contrast with the territorial approach that has traditionally been adopted in relation to copyright protection. Therefore, disputes concerning infringement of photographers' moral rights occurring in the online environment will be dealt with differently, depending on the jurisdiction that will be principally involved. Certainly, the free circulation of photographs on the internet also has an adverse effect on the exploitation of the economic copyright, as copyright holders cannot receive the royalties that they should normally be entitled to. However, the big differences that currently exist worldwide on the approach adopted on moral rights' protection, in combination with the lack of EU harmonisation in this field, makes the resolution of potential disputes more complicated.

Nevertheless, irrespective of the legal system to which a country adheres to, if the law of a contracting to the Berne Convention state is applicable, the minimum standards of protection set in this Convention need to be complied with. In particular, Article 6bis(3) stipulates that "the means of redress in relation to moral rights are governed by the legislation of the country *where protection is claimed*". Whereas, Article 6bis(1) of the Convention requires that, in any case, protection of at least the author's right of paternity and integrity is granted, as these are the core aspects and the very substance of moral rights. Thus, all the states that are party to the Berne Convention need to ensure that at least these two moral rights are not infringed, in case a dispute concerning photographs is brought before their national courts.

2.4. The related right of the depicted person

There are examples of photographs whose aesthetic or economic value is increased due to the fame or the expressive abilities and particularities of the persons photographed. More specifically, in many instances, the depicted persons are expected, under the direction of the photographer, to deliver a certain aesthetic outcome, which is accordingly

intensified or differentiated depending on their performance. In such cases, would it not be fair to award some kind of right to the person portrayed for his/her aesthetic contribution?

Article 3(a) of the Rome Convention 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations provides that “*performers* means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works”³⁹. As concerns photos, one might question the fact whether the photographed person is actually acting or performing a work. However, if a comparison is made between an actor, that is included in the indicative list of performers of Article 46, and the depicted person who is instructed by the photographer on how to pose and which facial expression and body movement to adopt, one could say that the latter is really interpreting a role, as an actor does.

We have all seen pictures where the persons portrayed adopt such expressive gestures and facial reactions that it is as if we are actually watching a person moving and performing in front of us. The same would apply to pictures that are taken during a theatrical play and which depict the actors while they are acting. The latter are not equally performing in the photograph as they are performing at the theater? Therefore, for reasons of equal treatment of all such artistic expressions and performances, the persons that are depicted in photographs and who are interpreting the concept the photographer has in mind, should be awarded a related right.

This view has not only been expressed in Greece but also all around Europe⁴⁰. In particular, it is accepted that in case there is some kind of scenario/photographic concept as well as a form of direction by the photographer, in the sense that the photographed persons are instructed to play a particular ‘role’, the existence of an artistic performance can be claimed, even if there is no movement or speech⁴¹.

If the depicted in a photograph person is finally granted a related right, s/he will be the holder of economic and moral rights. In particular, the photographed persons will be able to authorise or prohibit the reproduction and distribution of any fixation of their

³⁹ A similar provision concerning the related right of performers can be found in Article 46(1) of the Greek Copyright Act.

⁴⁰ References to: (a) *Germany* and *Italy* are made in G. Koumantos, p.380; (b) *France* can be found in T.-E. Synodinou, *Legal protection of images*, Athens-Thessaloniki, Sakkoulas Publications, 2007, p.24.

⁴¹ K. Kyprouli, *Related Rights of Performers*, Athens-Thessaloniki, Sakkoulas Publications, 2000, p.98-9.

performance. In addition to that, they have the right to claim the attribution of the performance portrayed in the picture to them, as well as prohibit any form of alteration of such a photo.

2.5. Clashes between copyright and other rights

A conflict between copyright and other rights may arise in cases of photographs portraying persons, since copyright exists independently of the rights of the depicted persons. In particular, *the right to personality* as well as *the right to personal data protection* could be undermined when persons are pictured in photos, whose artistic value and copyright is claimed by the photographer. Such clashes could be very common, especially considering that the use of social networking sites, which are based on the sharing of pictures, has become extremely popular.

Focusing on the Greek legal order, taking an unauthorised photo of a person is *in principio* illegal and would violate both the right of personality and the legislation for the protection of personal data. The publication or non-publication of a picture does not affect the affirmation of infringement, as the respective legal provisions would be undermined even if it was never presented to the public⁴². Necessary requirement for the lawful depiction of a person in a photograph is the unequivocal expression of his/her consent⁴³. This consent could be even tacit, for instance, when the depicted person is remunerated for the respective photograph. If no consent is provided by the depicted person, the photographer will not be able to exercise the economic right deriving from his/her copyright, no matter if s/he is the author of the photograph.

Nevertheless, there are instances where taking a picture without prior authorisation of the person portrayed is not illegal. First of all, in case the person depicted is a public figure⁴⁴ and the photo is taken in public spaces during a public activity/event⁴⁵. It should be underlined that in such a case, the photograph should not depict activities related to

⁴² O. Garoufalia, *The incorporation of one's own image in copyrighted works*, Private Law Annals, 2005, p.495.

⁴³ I. Karakostas, *Mass Media Law*, 3rd edition, Athens-Komotini, Sakkoulas Publications, 2005, p.279-283.

⁴⁴ As specifically concerns *athletes*, Article 9(7) of the Greek law N. 2557/1997 provides that photographing them for reasons other than publishing their pictures in the press/mass media (such as for commercial or advertising purposes) is not permitted without their written consent or the consent of the trade/professional union where they belong.

⁴⁵ M. Kanellopoulou-Boti, *The Right of Personality and the right of Photography* in I. Stamatoudi (ed.), *Journalists and Mass Media Publishers: Copyright Law Issues*, p.244.

personal life, except if these are intertwined with one's capacity or profession and satisfy the constitutional right of the public to be informed⁴⁶. More specifically, the European Court of Human Rights held in two judgments concerning Princess Caroline of Monaco⁴⁷ that the right to private life (and, therefore, the right to personality and personal data protection that are its components), enshrined in Article 8 of the European Convention on Human Rights, is not violated if the information contained in the picture portraying a public figure "contributes to a debate of general interest". In such a case, precedence should be given to Article 10 of the Convention, providing for the freedom of expression and information. Furthermore, consent is not required either in case this is provided as an exception to a specific legal provision like, for example, the publication of photographs depicting wanted by the police persons. In conclusion, it is worth mentioning that there are also instances where the publication of a photo is illegal because, even if the affected person has given his/her consent, the respective authorisation covers specific actions, has a specific duration, or has been revoked.

As far as the right of personality is concerned, Article 57 first indent of the Greek Civil Code provides for a comprehensive right of personality for natural persons. This provision is a specification of the Article 2(1) of the Greek Constitution stipulating that "the respect and protection of the value of the human being constitute an obligation of the state". In addition to that, according to Article 5(1) of the Greek Constitution, "one can freely develop his/her personality and participate in the social financial and political life of the

⁴⁶ T.-E. Synodinou, *Legal protection of images*, p.214-9.

⁴⁷ Von Hannover v. Germany, Applications No. 59320/00, 24.6.2004, No. 40660/08 & 60641/08, 7.2.2012. Since the early 1990s Princess Caroline had sought, often through the Courts, to prevent the publication of photographs of her private life in the press. Two series of photographs, published in German magazines in 1993 and 1997, had been the subject of litigation in the German courts that led to leading judgments of the Federal Court of Justice in 1995 and of the Federal Constitutional Court in 1999 dismissing her claims. Those proceedings were the subject of the European Court's judgment in Von Hannover v. Germany, in which the Court found a violation of Princess Caroline's right to respect for her private life under Article 8 of the European Convention on Human Rights. Following that judgment the applicants brought further proceedings in the domestic courts for an injunction restraining further publication of three photographs which had been taken without their consent during skiing holidays between 2002 and 2004 and had already appeared in two German magazines. The Federal Court of Justice granted an injunction in respect of two of the photographs, because it considered that they *did not contribute to a debate of general interest*. However, it refused an injunction in respect of the third photograph, which showed the applicants taking a walk during a skiing holiday in St Moritz and was accompanied by an article reporting on, among other issues, Prince Rainier's poor health. That decision was upheld by the Federal Constitutional Court, which found that the Federal Court of Justice had valid grounds for considering that the reigning prince's poor health *was a subject of general interest* and that the press had been entitled to report on the manner in which his children reconciled their obligations of family solidarity with the legitimate needs of their private life, among which was the desire to go on holiday. The Federal Court of Justice's conclusion that the photograph had a sufficiently close link with the event described in the article was constitutionally unobjectionable.

country, as long as s/he does not infringe others' rights, the Constitution or the good morals".

Aspects of the right of personality are, among others, *the right to determine one's own image* and *the right of publicity*. The first is an absolute non-economic right and is related to one's right to determine if, when and how his/her image will be disseminated to the public. A photograph depicting a person constitutes direct reproduction of his/her image and is directly related to his/her personality. Thus, any presentation of such a photo to the public without the consent of the person photographed would constitute infringement of the right to determine one's own image alone, without necessarily violating other aspects of the right of personality⁴⁸. Contrary to that, the right of publicity deals with the exclusive power to use components of our personality, such as the image or the name, for commercial purposes. In particular, a strong tendency of commercialisation of the image can be noticed nowadays in the field of publicity and promotion of products. However, in case an image forms the theme of a photograph or an artistic work in general, such uses would be delimited by the respective legal framework on copyright and the protection of personality⁴⁹.

As far as personal data protection is concerned, Directive 95/46/EC and the respective Greek Law 2472/1997 stipulate that personal data relating to a certain person cannot be used by third parties, if specific legal requirements are not met. As far as photos are concerned, personal data constitute not only the facial features of a person, but also the photograph depicting the person itself⁵⁰. More precisely, Article 3(1) of the Directive 95/46/EC provides that such a picture needs to "form part of a filing system or be intended to form part of a filing system". Both copyright and data protection are enshrined as fundamental rights under the EU Charter of Fundamental Rights: Article 17(2) of the Charter refers to the right to intellectual property (and copyright as its component) and Article 8 to the protection of personal data. In addition to that, Article 52(1) states that all fundamental rights can be restricted according to the principle of proportionality, if that is necessary, in order to protect the rights and freedoms of others. However, the constitutional status of the Charter makes the reconciliation of conflicting fundamental

⁴⁸ G. Plagiannakos, *The right to one's own image*, Greek Justice Journal, 1966, p.118; Court of First Instance of Athens, decision No 2303/2006.

⁴⁹ O. Garoufalia, *Legal protection of works of art*, Athens, Sakkoulas Publications, 2001, p.216-7.

⁵⁰ M. Kanellopoulou-Boti, *The Right of Personality and the right of Photography*, p.247.

rights more difficult than it may seem, since all rights that will possibly have to be balanced enjoy equal protection.

A very interesting example regarding the balancing of copyright with the right to personal data protection in photographs can be found in a case the Greek Data Protection Authority dealt with⁵¹. In particular, the question addressed to the Authority was whether professional photographers are entitled to keep the photographic negative of pictures they take, as well as display them on the window of their shop without the consent of the depicted persons. The Authority, after considering the copyright protection that photos qualifying as original enjoy, held that photographers/authors of such works have the right to keep them in their file. However, since this right clashes with the rights of personality and personal data protection of the portrayed persons, the Authority also found that, even if the latter cannot ask for the photographic negative unless this has been agreed upon, they can prohibit any use of the photographs that infringes their right to protect their image. Therefore, in such a case, the reconciliation of the two conflicting rights does not favour copyright. Even if the photographer has transferred the economic copyright, it will still not be possible to use the photograph without the depicted person's consent.

Even though the reconciliation of copyright with the right of personality and data protection is not always easy, a precedence should be given to the latter in instances where one's personal data have been photographed without any kind of authorisation and form the main theme of a picture. In particular, in cases of photographs of no particular aesthetic value depicting, for example, persons performing their everyday activities, it is difficult to detect the personal connection of the author with the work, so as to grant him/her the moral rights stemming from the copyright⁵². Further to that, if it was accepted that the photographer in similar cases is entitled to copyright protection and precedence was given to copyright, s/he would be empowered to decide when, where and how his/her creation would be made accessible to the public (moral right of dissemination), undermining the rights of the data subject-person portrayed enshrined in national laws on personal data protection.

⁵¹ DPA, Opinion No 30/2002. The Court of First Instance of Athens was based on this opinion before issuing its decision No 4661/2004.

⁵² B. Markousi-Banti, *The relation of data protection with copyright within the internet*, Athens, Nomiki Vivliothiki Publications, 2012, p.198.

In case the balancing finally favours the right to personal data protection and the right to personality of the person photographed, that does not mean that the photo will not be protected by copyright if it is original. Works can be copyright protected irrespective of their illegal or unethical character. Nevertheless, the author of the picture will not be able to exercise any of the economic rights that s/he would normally be entitled to, without that leading to the conclusion that the work should be destroyed, as this would constitute violation of the moral right to integrity. Other solutions should be found, such as the storage of the artwork in a place that cannot be easily accessed by others⁵³.

In conclusion, it is worth making a reference to a specific provision of the British Copyright, Designs and Patents Act 1988 concerning the right to privacy in relation to commissioned photographs. As it was stated before, when someone commissions a photograph, the photographer gets the ownership of the copyright as creator of the work. Therefore, s/he could use the photographic negatives for all kind of purposes, without the consent of the commissioner. However, pursuant to Section 85 of the Act, a right to privacy is granted to the commissioner empowering him/her not to allow copies of the contested photo to be issued and exhibited to the public or be included in a broadcast, provided that two requirements are met: the picture qualifies for copyright protection and has been commissioned for private and domestic purposes only. Interestingly, this right is given to the commissioner rather than the depicted person, whose privacy could be at stake. Yet, the problem obviously only arises when the commissioner is not the person portrayed in the photograph. Most probably, this rule was adopted on the basis that very often it is much easier to identify and contact the commissioner, while there are also instances where there is only one commissioner and many persons depicted in a photograph⁵⁴.

2.6. Lawful dissemination and protection of photographs on the internet

The increasing number of photographs circulating online brings new challenges to the protection of (professional) photographers' and copyright owners' interests. It is so easy to duplicate near-perfect copies of photographic works, use them and even commercially exploit them, that the end-user can potentially become a competitor of the original author

⁵³ O. Garoufalia, *Legal protection of works of art*, p.218.

⁵⁴ P. Torremans (ed.), *Holyoak & Torremans Intellectual Property Law*, 5th edition, Oxford University Press Publications, 2008, p.228.

or the right holder. That is why the exclusive powers deriving from copyright need to be strongly and effectively protected. Given that the enforcement of these rights can be really complicated when a violation actually takes place on the internet due to several legal obstacles, such as the issue of jurisdiction and applicable law described above, other means of safeguarding copyright need to be found before an infringement occurs.

First of all, authors can ensure the lawful wider dissemination of their photographs online by using *Creative Commons* (CC) licences. Creative Commons is a non-profit organisation that enables the sharing of copyrighted material through free legal tools, the CC licences. The licences released under this label aim at providing a simple, fast and standardised way of authorising the public to make specific uses of artistic, literary or scientific works that creators publish online. More precisely, there are 6 main types of such licences that allow creators to communicate in detail which rights they reserve and which ones they waive for the benefit of internet users and other creators. For instance, the most accommodating of CC licences offered lets end-users to distribute and build upon a copyright protected work, even commercially, as long as the author of the original creation is attributed.

CC licences replace the individual negotiations that would normally be required for the conclusion of an agreement between a copyright owner (licensor) and a licensee, in order to grant specific powers to the latter. When such a licence is acquired, internet users may freely exploit a copyrighted work, provided that the conditions of use that the author determined with the chosen CC licence are complied with. Therefore, there is a move from an "all rights reserved" copyright management to a "some rights reserved" management employing standardised licences, where no commercial compensation is sought by the copyright owner. Creative Commons are not an alternative to copyright but they work alongside to it⁵⁵. If a user does not respect the terms of a CC licence used for a photographic work, s/he is considered to be a copyright infringer and is liable under copyright law.

Then, as for the control and prevention of unauthorised uses of copyrighted photographs, the implementation of *Digital Rights Management* (DRM) constitutes an effective solution. More precisely, DRM is commonly understood to be the generic term for a set of technologies used for the protection of copyrighted material in digital form. DRM

⁵⁵ <https://creativecommons.org>

systems comprise two key elements: (a) *Rights Management Information* (RMI) and (b) *Technological Protection Measures* (TPM)⁵⁶. Provisions regarding both of them can be found in Articles 11 and 12 of the WIPO Treaty, as well as Articles 6 and 7 of the InfoSoc Directive and the national laws that transpose it.

With reference to RMI, this is any information concerning a photograph that is provided by the copyright owner and which identifies the work, its author or any other (related) right holder, the terms and conditions of its use, as well as any numbers or codes that represent such data. There are various ways to identify a copyrighted photograph. For example, by labelling the digital content with a copyright notice such as “may be reproduced for non-commercial purposes only”, or by including a copyright statement on every page of a photographer’s website determining the terms of use of the photographic content of each page. According to Article 66B of the Greek Copyright Act, any attempt to interfere with this information (alter it), remove it or transmit a copyright protected photo without it constitutes an offence, in case that someone performs those actions without authority and despite the fact that s/he knows or has reasonable grounds to know that by doing so copyright and related rights infringement will be facilitated.

As for TPMs, these are technologies employed either to control the access to or prevent the use of copyrighted works. More specifically, ‘technological measures’ could be any technology, device or component that, in the course of its operation, is designed to prevent or restrict acts which are not permitted by the right holder of any copyright or related right. Depending on the nature of the copyrighted works, the most appropriate measures/techniques should be designed and applied in order for the protection to be effective. TPMs could be categorised either based on the form of the protection adopted (e.g. controlling the access to a photograph itself or once access has been provided, controlling its use and reproduction) or the nature of the technical method applied (e.g. measures making use of hardware or software)⁵⁷.

Pursuant to Article 66A of the Greek Copyright Act, circumventing TPMs also constitutes an offence. TPMs are protected as such, irrespective of the fact that they practically aim to enhance the protection of something else, i.e. the copyrighted works. The purpose of

⁵⁶ P. Pedley, *Digital Copyright*, 2nd edition, Facet Publishing, 2008, p.49-50.

⁵⁷ S. Stavridou, *Technological measures for the management and protection of copyright* in M. Marinos (ed.), *Information Society and Intellectual Property*, Sakkoulas Publications, 2001, p.95-7.

this provision is twofold: protect the technological measure itself and, at the same time, prevent the application and distribution of technologies that would contribute to its circumvention⁵⁸. Consequently, so as to be able to download and view pictures protected by TPMs, internet users will have to enter into DRM agreements with the right holders and, after paying the respective fee, get the licence with all the necessary information (e.g. password). Obviously, in such a case, the software of the respective DRM system will have to abide by the terms of the given licence⁵⁹.

It has to be underlined that the above provision only applies when effective TPMs are adopted. According to Article 6(3) of the InfoSoc Directive, TPMs meet the requirement of 'effectiveness' when the use of a copyright protected photograph is controlled by the right holder "through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or a copy control mechanism". More precisely, it is sufficient that a measure simply ensures the control/avoidance of unauthorised uses of a photograph by third parties and only a minimum of effectiveness is required, without that meaning that measures that are very easily circumvented (e.g. just by clicking on them) will be protected⁶⁰. Examples of effective for photographs TPMs include anti-copying measures that make their duplication more time-consuming, expensive, difficult or even impossible, as well as techniques that 'lock' a file containing a copyrighted work in such a way that the end-user can only open and access it by means of a 'key'.

⁵⁸ In particular, Article 66A(2) of the Greek Copyright Act stipulates that it is not allowed to tamper a TPM without the authorisation of the right owner, when such act is made in the knowledge of or with reasonable grounds to know that the objective of circumvention is pursued. Whereas, Article 66A(3) provides that it is also prohibited to manufacture, import, distribute, sale, rent or possess for commercial purposes devices, products or components that are designed to facilitate or are marketed to enable the circumvention of TPMs.

⁵⁹ Reinout Van Malenstein, DRM, TPM and the private copy exception (<http://www.coreach-ipr.org/documents/Reinout%20van%20Malenstein%20%5BCompatibility%20Mode%5D.pdf>)

⁶⁰ T.-E. Synodinou, *Copyright and New Technologies: the relation of the user with the author*, p.160-3.

3. Specific issues regarding the copyright protection of photographs

3.1. Photographs published in the mass media

Photographs are increasingly published in the mass media for information purposes, as they contribute to the storytelling process and help readers/viewers to become immediately involved with the news transmitted. Due to the extensive use of photographs in such a context, the Greek Copyright Act provides for specific rules in order to safeguard the rights and highlight the obligations of photographers publishing their pictures in newspapers and periodicals (including their online version), as well as the television⁶¹.

Article 38 of the Greek Copyright Act refers to the publication of photographs in the mass media. Photographers need to consent to the transfer of their economic right to media companies through contracts and licences, in order for the latter to have the right to exploit their photos, after paying the royalties that have been agreed upon. Even when the photographer is employed by a newspaper/periodical, the owner of the media company needs to ask for the employer's consent before publishing his/her pictures in a book or album publication different from the standard publications of the mass media.

The terms governing the exploitation of the photographs, as well as the relationship of the photographer with the mass media, should be described in detail in the respective contract/licence (e.g. duration of the contractual relationship and specific sub-powers transferred). Most importantly, it should be clarified whether the transfer in question refers to exclusive or non-exclusive exploitation. In the first instance, it might be agreed that the picture cannot be used by any party other than the transferee, not even by the photographer him/herself. In the second case, the photographer could also maintain the power of transferring the economic right to third parties. If the transfer is not further specified in writing, it will be considered to be a simple publication licence, solely given for: (a) publishing the picture(s) only in the particular media company designated in the contract/licence and (b) maintaining a copy in its archives.

In the absence of an agreement to the contrary, permission is given for the publication of photographs exclusively in the newspaper, periodical, TV channel stipulated in the contract/licence and not in any other mass media controlled or owed by the same

⁶¹ The radio is not of any importance in this case, as the verbal description of a photograph on the radio does not fall under the exclusive power of its creator to exploit his/her economic right.

company or group of companies⁶². In particular, the fee paid to the author only concerns a unique publication of the picture. Every subsequent act of publication is subject to a separate fee, equal to the half of the royalty that would be paid at the time of the new publication for photographs of the same type that are used for similar purposes⁶³. However, media companies reserve the right to transfer their archive to other such companies. In this case the receiving entity retains the power to publish the pictures in question after paying the adequate fee and provided that the name of the photographer and the mass media in whose archive the photos were initially placed are also mentioned. Except if it is provided differently, the transfer/contract made or the licence given does not comprise the publication of the respective pictures in the online version of the newspaper or periodical, as the internet is considered to constitute a different media that is addressed to a new public⁶⁴.

With the exception of cases where the date and format of publication is specifically defined in the contract/licence, mass media are not obliged to publish the photograph in question. On the one hand, if the publication is finally decided, the media company is entitled to determine the conditions under which the picture will be published, depending on the specific needs of the newspaper, periodical or TV programme and provided that these do not clash with the personal interests of the author in his/her work. Therefore, in the case of a photographer famous for his/her active involvement in the protection of the rights of immigrants living in Greece, the moral right of publication would, most probably, be infringed if his/her pictures were published along with an article praising the tactics of the Greek extreme right party against them, in such a way that the reader assumes that the author of the photograph has the same ideology. The same would apply to any subsequent publication of the picture. On the other hand, if no publication is made, the photographer may request the return of the photo that has remained unpublished for 3

⁶² L. Kotsiris, *The journalists as authors* in I. Stamatoudi (ed.), *Journalists and Mass Media Publishers: Copyright Law Issues*, p.8.

⁶³ When a media company owing a newspaper, periodical or TV channel is *succeeded* by another such entity, the royalties due in case of republication by the latter of a picture whose exploitation was permitted to the first would be equal to the half of the current fee. However, in case the archive of the mass media is *sold* to another media company, even belonging to the same group of companies, the fee paid for the reuse of the respective photograph by the new owner should be equal to the entire current fee and not the half of it, see I. Stamatoudi, *Photographers' Rights and Publication of Photographs on the Media* in I. Stamatoudi (ed.), *Journalists and Mass Media Publishers: Copyright Law Issues*, p.295-6.

⁶⁴ T.-E. Synodinou, *Mass Media and Culture. The protection of journalists by copyright: from the provision of information to the creation of culture*, *Mass Media, Information & Communications Law Journal*, 2007, p.207-8. However, the opposite opinion has also been maintained.

months without having the obligation to return the royalties paid to him/her, as these concerned the possibility of the mass media to use the picture, regardless of whether this was actually used or not⁶⁵.

Photographers' moral rights should definitely not be undermined when their photos are published in the mass media. As for the protection of the right of paternity, each act of publication has to be accompanied by a reference to the photographer's name. As for the right to integrity, the nature and the specific characteristics of the respective exploitation/publication should be taken into account in order to assess the lawfulness of any possible alteration of a picture. In certain instances it is impossible to use a photograph without making some minor modifications. Therefore, a photographer could not really claim that, even though s/he provided the mass media with a high-quality copy of his/her work, the picture was finally published in a much lower quality after enlarging or diminishing its dimensions or due to the quality of the paper used. Modifications justified by the principle of proportionality and dictated by the needs of the particular publication should be deemed necessary and, thus, be accepted.

With reference to the photographer's economic copyright, limitation to the rights of reproduction and communication to the public constitute two powers that the Greek Copyright Act specifically awards to the mass media, enabling them to reproduce photographs without paying any royalty and without prior consent of the author. The first is found in Article 25(1)(a), stipulating that "for the purpose of reporting current events by the mass media, the reproduction and communication to the public of works seen in the course of an event" is permissible. Article 26 is the second, providing that "the occasional reproduction and communication by the mass media of images ... of photographs ..., which are sited permanently in a public space ..." is also allowed.

Both exceptions have been added in order to facilitate the smooth operation of the mass media and satisfy the strong interest of the public to be informed⁶⁶, as there are instances where it is impossible to show a space where a newsworthy event takes place without the simultaneous presentation of the artworks located there. Therefore, the mass media concerned are able to transmit the news on time and skip the obligation of finding the photographer or his/her heirs in order to get their permission for the reproducing of the

⁶⁵ G. Koumantos, p.347.

⁶⁶ T.-E. Synodinou, *Copyright and New Technologies: the relation of the user with the author*, p.203.

work, as long as they aim to serve the public's right of information. These exceptions do not only apply to traditional types of media, but are also relevant to online mass media platforms.

The main precondition for the application of Article 25(1)(a) of the Greek Copyright Act is that the reproduction of copyrighted picture(s) is made for reasons of informing the public about current incidents. As regards the notion 'current', this refers to news that are published in such a moment, that the public will be informed about them in a timely manner. The timely transmission of an event depends on the media in which it is published, as well as the purpose for which the copyrighted work is shown to the public⁶⁷. Untimely use of photographs does not fall within the scope of this provision. Every publication of photographs made in such a context should be accompanied by an indication of the name of the author, provided that: (a) finding the identity of the photographer is not practically difficult; (b) the medium on which they appear allows such a reference and (c) the pictures are not published in an indirect, brief or imperceptible way during the transmission of the main event (e.g. the photographs in question are only shown for a few seconds).

In order for such photos to be freely used, they should be just noticeable in the course of the description of another current event and not be themselves the current event or the main topic of the description. In addition to that, the information of the public about the particular newsworthy incident should not be feasible without the display of the photos. For example, reference of the mass media to the opening of a photography exhibition that is accompanied by images/videos of the space where the event will be hosted, in which (images/videos) some of the photographs exhibited can be discerned in the background, would be lawful⁶⁸. On the contrary, the publication by the media of some of the works of the photographer organising the above exposition, in order to inform the public about his/her photographic style and attract more audience, would be illegal if the artist's

⁶⁷ In order to define the meaning of 'current' the following distinction is made: (a) As concerns events published in newspapers and the daily news broadcasted on the TV or the radio, they are deemed to be current as long as they took place within the last 48 hours before the transmission of the incident; (b) In relation to weekly and monthly periodicals or informational TV programmes, current are also considered to be events that took place from a week up to 3 months before, see I. Stamatoudi, *Mass Media, Information & Communications Law Journal, Commentary on the decision No 1493/2005 of the Court of First Instance of Athens*, 2005, p.251.

⁶⁸ I. Stamatoudi, *Photographers' Rights and Publication of Photographs on the Media* in I. Stamatoudi (ed.), *Journalists and Mass Media Publishers: Copyright Law Issues*, p.292

consent had not been given and the corresponding for the publication fees had not been paid.

As concerns the application of Article 26 of the Greek Copyright Act, two preconditions should be met: (a) the copyrighted photographs have to be permanently located in a public place and (b) their reproduction and communication should be occasional. As for the notion 'public', this does not necessarily refer to spaces owed by the state but also comprises spaces that are freely accessible by everyone, even when an entrance fee has to be paid (e.g. museums and galleries). Thus, this definition covers photographs that one can easily see in or from the street or any other public place under normal circumstances, namely without being assisted by any means (e.g. a ladder) and without accidental facts having occurred (e.g. the window of a building not accessible to the public is open and the pictures can be viewed from the outside)⁶⁹. Furthermore, the photographs appearing in such a public space should be situated there permanently, in the sense that their creator does not intend to move them after some time, except if they are relocated in another public place for reasons of preservation or protection. Consequently, the photos should be displayed in such a way that they constitute an integral part of the respective public area and any presentation of the latter would lead to the reproduction of the artwork too.

As for the second requirement of Article 26, an occasional reproduction and communication of images of the photographs fulfilling the above criteria should take place. Two different interpretations have been given to the notion 'occasional'. According to the first, the reproduction and presentation of the copyright protected photograph should not constitute the basic theme of the image in which it appears, but should rather have a secondary, non-commercial or promotional character⁷⁰. Whereas, pursuant to the second, occasional is a transmission of a picture that is transient⁷¹. It has to be underlined that the reproduction is permitted only if it is done by taking pictures of the copyrighted photographs. In order for the mass media to benefit from the exception of this provision, the reproduction itself does not necessarily need to be performed by the mass media but also by third parties⁷². However, the communication/transmission to the public has to be

⁶⁹ M. Papadopoulou, *Commentary on Article 26 of L. 2121/1993* in L. Kotsiris & I. Stamatoudi (eds), *Commentary on the Greek Copyright Act*, p.578-9

⁷⁰ D. Kallinikou, *The Protection of Journalists by copyright*, *Private law Annals*, 2001, p.293.

⁷¹ G. Koumantos, p.304.

⁷² I. Stamatoudi, *Photographers' Rights and Publication of Photographs on the Media* in I. Stamatoudi (ed.), *Journalists and Mass Media Publishers: Copyright Law Issues*, p.294.

made only by the mass media. Finally, it is worth mentioning that the commercial exploitation of the pictures (of the photographs) produced is not excluded *a priori* and each such case should be examined *in concreto*.

3.1.1. Photographs appearing in the social media

Social media constitute a subcategory of mass media. They are online communication channels built on and dedicated to community-based input, interaction, content-sharing and collaboration. While traditional mass media focus on informing the public while operating in a monologic transmission model (one source with many recipients)⁷³, social media disseminate information mostly on the basis of internet users' interaction and the creation of online relationships (many sources with many recipients). The most famous and vastly used social media include Facebook, Google+, Twitter, LinkedIn, Instagram and Pinterest, which are mainly based on the sharing of photographs.

Given that the pictures found on such platforms could be copyright protected, the rights of the copyright holders need to be adequately respected. First, royalties should be paid, except if the latter are the ones to upload the respective photo. Second, moral rights should be also duly respected by making reference to the photographer's name, maintaining the integrity of the work and taking into consideration the right of first publication. However, apart from complying with the copyright legal framework, other rights deriving from photos should also be respected within this environment, such as the right to determine one's own image or the right to protect one's personal data. For instance, the Court of Appeals of Athens held in its decision No 5336/2015 that the subsequent use/broadcast by a TV channel of pictures initially published/uploaded on a Facebook user's personal account without the authorisation of the depicted person, constitutes violation of the Greek Law 2472/1997 on the protection of personal data.

Nonetheless, the speed at which information can be shared on the internet and the particular terms of use of several social media platforms frequently result in users losing control over the content they post there. Consequently, more and more photographs and videos find their way to a wider audience than may have been initially anticipated, usually

⁷³ S. McIntosh & J. Pavlik, *Converging Media: A New Introduction to Mass Communication*, Oxford University Press, 2015, p.189.

without the photographers' copyright being respected⁷⁴. A very illustrative relevant example concerns the popular photo sharing application Instagram. Few years ago, Instagram provoked uproar after publishing proposed revisions to its terms of use, as the changes suggested that it would be entitled to sell user-generated content to third parties without any onward payment to the service user. In response to that, celebrities and members of the public turned to Twitter and other social media to vent their outrage, threatening that they would no longer use Instagram.

3.2. Application of the common law principles of fair use⁷⁵ and fair dealing in photographs.

Fair use and fair dealing are similar copyright principles applied in common law countries. They constitute exception and limitation to the exclusive economic rights granted by copyright law to the author of a creative work and allow for the use of such works without the authorisation of the copyright holder. Like the exceptions of the Greek Copyright Act described before, they recognise that certain types of use of copyrighted material do not require the consent of the copyright owner, as they do not unreasonably interfere with his/her right to reproduce and otherwise use his/her work. Focusing on works of photography, recourse has repeatedly been made to these two doctrines in order to decide whether reproductions performed by third parties without any licensing could be considered fair.

The principle of *fair use* was introduced in the United States of America based on the belief that the public is entitled to freely use parts of copyrighted works for the specific purposes provided in Section 107 of the US Copyright Act and the well-developed respective case-law. More specifically, fair use is any partial reproduction of copyrighted material, on the condition that it is done for a limited and transformative purpose. Even though it constitutes the very substance of the fair use doctrine, there is no clear definition of 'transformative' use. The American Supreme Court only explained in case *Campbell v. Acuff-Rose*⁷⁶ that there is transformative use when the new work alters the original work

⁷⁴ A. Hall, *Image problem: Controlling intellectual property rights on social media platforms*, Solicitors Journal, 2013, vol.157, p.10-11.

⁷⁵ <http://fairuse.stanford.edu/overview/fair-use>

⁷⁶ *Campbell v. Acuff-Rose Music*, US Supreme Court, 1994.

while adding to it a new expression or message. Yet, most fair use analysis recognises two categories of transformative works: (a) commentary or criticism and (b) parody.

Four factors are mainly examined in order to determine whether the use of a copyright protected work is a fair one⁷⁷: (a) the purpose and character of the use, including whether such use is of a commercial nature or was made for non-profit educational purposes; (b) the nature of the copyright protected work, meaning whether it is a creative or informative work, published or unpublished; (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole and (d) the effect of the use upon the potential market of the copyrighted work. Nevertheless, these factors are only guidelines for the courts to consider, as judges have a great deal of freedom and a wide margin of appreciation when making a fair use assessment and the outcome in any given case can be hard to predict.

More limited than the doctrine of fair use, *fair dealing* is applicable in Commonwealth countries, such as Australia, Canada and the UK. As specifically concerns the UK, the fair dealing exception originates in Sections 29 and 30 of the British Copyright, Designs and Patents Act 1988 and requires infringers to show not only that their copying falls into one of the three categories exhaustively stipulated there, but also that they sufficiently acknowledge the original author. In particular, as opposed to the respective American principle, fair dealing is strictly limited to the following purposes: (a) non-commercial research and private study; (b) criticism, review or news reporting and (c) parody. However, the factors usually taken into account when deciding the 'fairness' of the copying are similar to the ones assessed in the context of fair use doctrine.

It is worth mentioning that, as regards reproductions made for the purpose of news reporting, there is an explicit exception that there may be no fair dealing if the copyrighted work is a photograph⁷⁸. Commonly cited explanations for this refer to the special impact of photos, as well as the economic vulnerability of press photographers given that they

⁷⁷ G. Morris, *When artists use photographs: Is it fair use, legitimate transformation, or rip-off?* in J. H. Merryman, A. Elsen & S. Urice, *Law, Ethics and the Visual Arts*, 5th edition, Wolters Kluwer Publications, 2007, p.567.

⁷⁸ Section 30(2) of the British Copyright, Designs and Patents Act 1988 provides that "fair dealing with a work (*other than a photograph*) for the purpose of reporting current events does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement".

usually operate on a freelance basis⁷⁹. Thus, if such an exception did not apply, a picture published by a newspaper could be appropriated and used by any other mass media with the excuse of fair dealing. Or, the newspaper retaining the photograph in its archives could, many years after the picture had been taken, retrieve it and reuse it in a different news story, without paying the photographer. However, it could be argued that such a provision is too restrictive, as it interferes with the constitutionally enshrined freedom of expression.

A characteristic example regarding the transformation of copyright protected photos under the excuse of fair use, is the creation of the so called Canal Zone by the American appropriation artist R. Prince. French photographer P. Cariou published a book in 2000 named "Yes Rasta", featuring portrait and landscape photographs taken in Jamaica. Prince used several of these pictures to create "Canal Zone", a series of paintings and collages, without ever seeking any licence from Cariou. The portions of "Yes Rasta" photos used varies significantly from piece to piece, however, the artistic outcome was in total substantially different to the initial work. In particular, Prince enlarged Cariou's photographs, cropped some of them, painted over the faces and bodies of the persons portrayed in others, or used some others almost entirely. Thereafter, "Canal Zone" was exhibited at the Gagosian Gallery in New York, where an exhibition catalogue reproducing Prince's artworks was also published and sold. Cariou sued Prince and the Gagosian Gallery for copyright infringement and the defendants raised a fair use defense.

Apart from evaluating the four factors described before, both the Court of First Instance and the Court of Appeals placed emphasis on the analysis of the requirement of transformative use, in order to assess whether the original photographs had been fairly used⁸⁰. The Court of Appeals finally concluded that all but five of Prince's works constituted fair use, since Prince did not reproduce the same material in a different manner, but he rather added something new and presented images with a fundamentally distinct aesthetic. On the basis of that, the Court of Appeals continued that the more transformative the new work is, the less the significance of other factors will be in finding against fair use. Thus, even though the commercial purpose of Canal Zone is obvious,

⁷⁹ C. Kelly, *Current events and fair dealing with photographs: time for a revised approach*, Intellectual Property Quarterly, 2012, vol.4, p.242.

⁸⁰ P. Cariou v. R. Prince, US Court of Appeals, 2nd Circuit, 2013.

Prince's audience is very different to that of the original photographs and there is no evidence that his work ever affected either the primary or the derivative market for Cariou's pictures. Moreover, although Prince used key portions of certain of Cariou's photographs, he transformed them into something new and different.

With reference to fair dealing, an old but very interesting case concerned the creation of a painting on the basis of a copyright protected photo portraying a Cuban cock fight⁸¹. The competent English court was divided on the question of whether the painting had infringed the copyright in the picture by reproducing a substantial part of it, since the painter reproduced the positions of the birds exactly as they were depicted in the photograph. By a 2-1 majority, the court found that there was no infringement because what was copied was merely the positioning of the birds in the picture, an incident that was beyond the photographer's control. However, it is submitted that the reasoning in this case is doubtful, as capturing a fast-moving event like a cock fight requires a level of skill in respect of the composition of the photo and the decision as to when to take it. Although the respective positions of the animals were not the work of the photographer, capturing them in a particular way may form part of the originality of the work⁸². That was the reason why the dissenting judge took the view that a substantial part of this picture had been reproduced. It is worth mentioning that in the similar case *Rogers v. Koons*⁸³ brought before the American courts, the argument of fair use by parody put forward by the defendant was finally rejected.

Another illustrative example of fair dealing of photographs comes from a case involving the famous Beckham family⁸⁴. Here the court found that the requirements of fair dealing were met, as it was demonstrated that the contested photographs had been used for the purpose of criticising the tabloid press⁸⁵. More specifically the defendants, the producer and the broadcaster of a TV programme called "Tabloid Tales", reproduced 14 photos of David Beckham and his family. Even though the copyright owner of the photos and the photographer of all but one of them had been asked if they could be used, permission had

⁸¹ *Bauman v. Fussell*, County Court of Appeals, 1953.

⁸² C. Michalos, *The law of photography and digital images*, Sweet & Maxwell Publications, 2004, p.100.

⁸³ US Court of Appeals, 2nd Circuit, 1992.

⁸⁴ *Fraser-Woodward Ltd v. BBC & Brighter Pictures Ltd*, London High Court, 2005.

⁸⁵ A. Sims, *Strangling their creation: the court's treatment of fair dealing in copyright law since 1911*, *Intellectual Property Quarterly*, 2010, vol.2, p.209.

been refused. Criticism was finally founded on one of the programme's themes at the day of the broadcast, the question whether Mrs Beckham controlled the media or whether she was controlled by them, since it was revealed that she provided photographers with information about where her family would be, allowing them to take random pictures where the Beckhams appeared to be caught off guard, while in fact these were rehearsed and pre-arranged.

3.2.1. The example of thumbnails

Thumbnails constitute a particular example involving the fair use and fair dealing of photographs and is worth examining them in a separate section. These are pictures reduced in size which not only serve as icons of the initial larger images, but also allow multiple photos to be viewed on a screen simultaneously or be transmitted more rapidly.

The use of digitally stored thumbnails by internet search engines was examined in the well-known in the American copyright law case *Kelly v. Arriba Soft*⁸⁶. The claimant, the commercial photographer L. Kelly charged the defendant, a search engine company named Arriba Soft, with copyright infringement for using his photos without licence as part of a multi-million image database. In particular, the contested pictures were copied onto Arriba's Soft server, reduced to thumbnail format and then sorted and indexed. Internet users could download a full-size display of the pictures by clicking on the desired thumbnail, which was framed in a way giving the viewers the impression that the full-sized photos were actually housed on the Arriba Soft website. The pictures could then be manipulated, without permission, for commercial or other purposes. Both the competent District Court and the Court of Appeals examined all four factors provided in Section 107 of the US Copyright Act and reached the conclusion that the online use of small reproduction of images is fair, mostly because the potential market for the sale or licensing of the original photos was not undermined. The thumbnails guided people to Kelly's work rather than away from it, as their much smaller size and much poorer quality was making their use unattractive compared to the original photos.

The possible copyright infringement following the use of pictures that are smaller in size than the original ones has also been examined in civil law jurisdictions that do not apply

⁸⁶ *Kelly v. Arriba Soft Corp.*, US Court of Appeals, 9th Circuit, 2003.

the fair use or the fair dealing principle. For instance, Article 19 of the Greek Copyright Act allows the quotation of “*short extracts* of lawfully published works without the consent of the author and without payment, for the purpose of supporting an opinion advanced by the person making the quotation or for criticising the position of the author”. Although this limitation of the copyright holder’s powers is justified by the freedom of expression and the right of everyone to substantiate it⁸⁷, it cannot be used for reporting news. The extracts should be entirely used for supporting a view/criticising the photographer of a copyrighted photo or the photo itself. Therefore, a picture used in the course of the assessment of the particular photographic style employed by its author would fall under the scope of this provision, whereas the reproduction of a photo so as to criticise an object portrayed in it or for reporting a current event would not.

It has been disputed whether thumbnails could be considered as short extracts. In particular, it is maintained that reuse of an entire photograph but in smaller size is not really a ‘short extract’ as Article 19 provides for and could end up replacing the original picture instead of incentivising the viewer/internet user to see it⁸⁸. Nevertheless, Article 28(2) of the Greek Copyright Act allows the reproduction of fine art works in catalogues, to the extent necessary for the promotion of their sale and provided that the interests of the authors are not undermined. A catalogue presenting the works of a photographer could only contain the photographic material in smaller size. Consequently, on the basis of that provision and for reasons of legal consistency, the use of thumbnails should generally be permitted within the Greek legal system, as long as the other preconditions of Article 19 are satisfied. In line with this, the Court of Appeals of Paris⁸⁹ found that the use of photographs in a reduced size (6cm x 4,5cm) is lawful as they constitute short extracts of the original one.

3.3. Photographic reproduction of public domain (art)works

When it comes to photographs depicting other artworks that are either copyrighted or belong to the public domain due to lapse of copyright protection, the main question that arises is whether those pictures are copyrightable. As has already been explained, the

⁸⁷ T.-E. Synodinou, *Copyright and New Technologies: the relation of the user with the author*, p.210.

⁸⁸ O. Garoufalia, *Legal protection of works of art*, p.239.

⁸⁹ CA Paris, 14ème Chamber, 2nd February 2005.

basic precondition for photos to be copyright protected is to be original. However, do such pictures fulfil the requirement of originality? The distinction between an original statue and its copy is well understood, but one cannot easily claim the same about photographs as they are always 'copies', to some extent, of another object, varying from artworks to commonplace objects. This problem becomes even more evident in the case of a photograph whose whole purpose is to capture as accurately as possible all the key features of another artistic work, such as a painting. Besides, well-taken photos of artworks constitute a classic example of 'recreative'⁹⁰ derivative' works, e.g. works derived from or intended to be perfectly accurate copies of antecedent works that were created at an earlier point in history.

3.3.1. Photos of works of art whose copyright protection has expired

This issue was firstly dealt with in a project that took place at the South Kensington Museum in London as long ago as 1859. The so called "South Kensington experiment" concerned the sale of photographs of artworks to the public at cost price for purposes of art education. The museum did not limit to photographing only its own collections and exhibitions, but also extended to artefacts exhibited elsewhere. It was stated that "there is in photography a discovery which is to art what the printing press was to literature", as "the photographic art is calculated to be of extraordinary utility in extending the influence of museum's collections"⁹¹. Yet, the question of copyrightability of the pictures of the artistic works photographed was not clearly answered. Shortly after, the matter was brought before the courts.

In 1869, English courts found in Graves' case⁹² that a photograph of an engraving, which had itself been made of a painting, was entitled to copyright. In this case, a publisher of art reproductions had registered photographs of engravings to obtain protection under the Fine Arts Copyright Act of 1862. The defendant, who had sold pirated copies of these reproductions, was charged with copyright infringement and applied to the court to delete the entries in the register, arguing that there was no copyright in the pictures. This

⁹⁰ Recreative works are essentially a particular subcategory of derivative works, see B. Ong, *Originality from copying: fitting recreative works into the copyright universe*, *Intellectual Property Quarterly*, 2010, vol.2, p.166.

⁹¹ R. Deazley, *Photography, copyright, and the South Kensington experiment*, *Intellectual Property Quarterly*, 2010, vol.3, p.294-5.

⁹² H. Graves v. J.B. Walker, Court of Queens Bench, 1869.

old case is usually cited as authority for arguing that a photograph of a pre-existing work of art is itself protected by copyright, irrespective of the copyright status of the artwork that is being photographed. In particular, this judgment has remained sound within the common law legal context, probably because it is thought to be consistent with the fundamental position that an original copyright work is produced through the exercise of substantial independent skill, labour and judgment. And, undoubtedly, all these elements are needed in setting up the equipment to get a good photograph, especially with the rather primitive materials available in those days.

Nevertheless, in a more recent case, usually cited as illustrative example on the matter of copyrightability of photographs of artworks, the *Bridgeman Art Library* case⁹³, the competent American court applying English copyright law, reached the opposite conclusion. More specifically, the *Bridgeman Art Library Ltd*, an English company with offices in New York, had assembled a substantial library of large-format transparencies of well-known works of art, which already formed part of the public domain and many of which were on view and belonged to museums and galleries around the world. *Bridgeman* distributed CD-ROMs containing a digital catalogue of the transparencies in the form of low-resolution images, making its high-resolution transparencies available to clients who entered into licensing arrangements with it. The court finally concluded that a photograph of a painting is not entitled to copyright due to lack of originality, despite that evidence showed that in order to produce faithful and high quality photos of such works of art (some of which were over 3 meters tall), photographers needed to use considerable skills and technical judgment and although it was demonstrated that museums and galleries provided strictly limited access to the original works.

This ruling has been extensively commented and criticised. On the one hand, those favouring the copyrightability of pictures depicting works of art claim that the photograph of a painting is different in quality and character from the painting itself, as it has different attributes and uses: even though it conveys the same visual information, it conveys it by a different means. However, the main argument in favour of the copyright protection of such photos is that it should make no difference if the picture portrays a human being, a naturally occurring object or an antecedent artistic work. As it would be reasonable to

⁹³ *The Bridgeman Art Library Ltd v. Corel Corp.*, District Court for the Southern District of the State of New York, 1999.

grant authorship to a photographer engaged in aerial topographical photography, where his/her goal is to create photos reproducing the geographical features of a landscape as realistically as possible, the same would apply to photographers using their skills in order to capture artworks as accurately as possible⁹⁴.

On the other hand, four main objections are commonly put forward by those who do not consider pictures of artistic works original⁹⁵. First, a person replicating an antecedent work is not an author in a copyright sense, as the act of perfectly copying a preexisting work in its entirety lacks completely the creativity that is required, even in its most plain form, for affirming the existence of originality. Second, recognising originality, and hence copyrightability, to such recreative photographs would allow the misappropriation and commercial exploitation of a subject-matter that should normally remain firmly linked with the public domain. Third, allowing copyright to be claimed over such derivative works would not serve the public interest, as this could result in diminishing the accessibility of the original ones. Fourth, even though it could require great abilities to make a good photo of a painting, skill, labour and judgment merely applied in the process of photographing cannot confer originality. There must additionally be some kind of material alteration and elaboration that would make the visual impression produced by the photo different to the one caused by the original work⁹⁶.

In a similar case brought before the British courts, the Antiquesportfolio case⁹⁷, photos of three-dimensional antiques (as opposed to two-dimensional paintings in *Bridgeman* case) were granted copyright protection. More precisely, the claimant in this case, wishing to launch a business advertising and selling antiques over the internet, assigned the defendant the creation of the website, the business cards and the logos of the company, when it was discovered that several of the images used by the latter were copies of copyrighted photographs and he was brought to courts. The defendant claimed that the contested pictures did not qualify for copyright protection, however, the judges finally found that they are copyrightable as they appeared to have been taken with a view of showing special aspects and features of the artefacts, such as the colour, the glaze and

⁹⁴ K. Garnett, *Case Comment: Copyright in photographs*, *European Intellectual Property Review*, 2000, vol.22 (5), p.237.

⁹⁵ B. Ong, p.174.

⁹⁶ R. Deazley, *Photographing paintings in the public domain: a response to Garnett*, *European Intellectual Property Review*, 2001, vol. 23(4), p.185.

⁹⁷ *Antiquesportfolio.com Plc v. R.Fitch & Co Ltd*, London High Court, 2001.

other details, while the angle chosen, the lighting and focus were also deemed to be particular⁹⁸.

3.3.2. Photos of artworks located in public spaces

Apart from the artefacts whose copyright protection has expired, the notion 'public domain' artworks (or *public art*) also refers to works of art situated in public spaces, either these are copyright protected or not. Obviously, the issue of copyrightability also arises in relation to photographs portraying those artistic works. The shift to digital technology in combination with the easy accessibility of such works has significantly increased not only the number of people photographing them, but also the commercialisation of the pictures portraying them. Thus, taking and reproducing photos of artworks of the public domain could also infringe, *prima facie*, the author's economic rights of reproduction, distribution and communication to the public.

Nonetheless, there is an inextricable link between public art and the public's view of many public spaces, in the sense that a picture depicting a public area that fails to incorporate the artworks located there, may be considered not to represent the place realistically⁹⁹. That is why photographers frequently take pictures of public art, normally after acquiring the respective licence from copyright holders. Yet, people can nowadays capture scenes and moments in ways previously reserved only to professionals: camera-phones allow taking photos easily and at a zero cost, digital cameras can produce high-quality photographs, printers and photo-editing software may create high-quality prints for sale, while internet can distribute photographs to a worldwide audience. Consequently, the likelihood of conflict between users and authors of public art has increased so much that the latter need to take all the necessary steps (either technical or legal) in order to safeguard their rights.

More specifically, in order to portray copyright protected artworks (and copyrighted items in general) in photographs, either these are located in public spaces or not, the consent

⁹⁸ It is submitted that the Bridgeman photos would be likely to benefit from copyright protection in the UK in light of this case, as the court could hardly be able to make a distinction between photographs of two and three-dimensional objects, after considering that the necessary labour and skills regarding the angle, shutter speed and lighting are common to both sorts of pictures, see in S. Stokes, *Art and Copyright*, Hart Publishing, 2003, p.113.

⁹⁹ J. Kwong, *Photographs of public art in the digital environment*, European Intellectual Property Review, 2014, vol.36(7), p.430.

of the copyright holder has to be taken, royalties need to be paid and moral rights ought to be respected. Photographing a copyrighted work of art amounts to reproducing it and only the copyright holder has primarily the exclusive right to do so. Therefore, so as not to violate the economic rights deriving from the copyright on the object photographed, licensing is required for any kind of exploitation (e.g. making prints and supplying copies of the respective picture to the public, exhibiting it in a gallery, putting it on a website or sending it via e-mail). Even when only part of a copyrighted work is photographed or this work occupies only a very small amount of space in the photo taken, consent should be granted as well¹⁰⁰. Moreover, the name of the author of the artefact should be attributed in any kind of reproduction and the integrity of the work must always be preserved. Addition of new artistic elements (e.g. presentation of the artwork in colours different to the ones of the original) or reproductions of the photograph performed in a way that violates the personality of the artist or in a context that is not consistent with his/her ideology (e.g. reproduction of the photo of a religious sculpture in a pornographic magazine) would constitute copyright infringement without the author's permission.

However, it has to be admitted that copyright considerations place enormous restraints on photography, since in many instances it is impossible to avoid the inclusion of copyrighted artworks in pictures. For that reason, in several states authorisation is not required for photographing certain artistic works displayed in public places, such as parks. These photos may be published or even commercialised without infringing copyright¹⁰¹. In particular, in most instances, it is through specific exceptions that the photographic reproduction of such objects is allowed without the copyright holder's permission. These exceptions differ from country to country and either have the form of limitation to the economic copyright, like the ones provided in Articles 25 and 26 of the Greek Copyright Act, or rely on the concept of fair use and fair dealing.

As far as the European Union is concerned, a relevant exception commonly referred to as *panorama exception* or *freedom of panorama* can be found in Article 5(3)h of the Infosoc

¹⁰⁰ For example, if from René Magritte's painting titled "The Son of Man", depicting a man whose face is obscured by an apple, only the face with the apple was used, permission would still be required. While, in fact, this is only a small part of the total painting, it is seen as a vital or recognisable part of it, see in L. Verbauwheide, *Legal Pitfalls in Taking or Using Photographs of Copyright Material, Trademarks and People*, p.2 (http://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_photography.pdf).

¹⁰¹ *IP and Business: Using Photographs of copyrighted works and trademarks*, WIPO Magazine, April 2006, p.19.

Directive. This provision stipulates that Member States may provide for limitations to the rights of reproduction and communication to the public in the case of “use of works, such as works of architecture or sculpture, made to be located permanently in public places”. The incorporation of this provision into the national copyright laws varies. With reference to Greece, the panorama exception has been regulated only in relation to mass media taking and using such pictures. In particular, Article 26 of the Greek Copyright Act analysed before also applies when the mass media use images of architectural works, fine art works, as well as works of applied art permanently situated in public spaces.

The enactment of a legislative text harmonising the application of this exception in all EU countries would be really useful. The European Parliament has been changing its stance towards this matter: even if some of its members initially seemed to approve the removal of all authors' rights on photography and video footage of works in public places, it subsequently supported the view that no commercial use should be performed without the author's consent and finally left it open for Member States to keep their national tradition on this matter. Nevertheless, the European Commission in a recent Communication¹⁰² emphasises its intention to regulate this exception in the near future, since its heterogeneous implementation across the EU has provoked legal uncertainty to internet users.

A limitation common in all jurisdictions is the exception of *private use*. Greek Copyright Act also includes it in Article 18, which stipulates that the reproduction of a lawfully published work for private use is permissible without the consent of the author and without payment. Such a provision does not cause any damage to the rights of the artist whose work is being reproduced, while individuals have the possibility to enjoy artistic works at the same time. Although no definition is given to the term ‘private use’, it is clarified that this does not include uses made by enterprises or organisations. Therefore, this exception only refers to individuals and a circle of persons that is not larger than the narrow circle of family and friends or one's immediate social environment¹⁰³. That means that the photographic reproduction of a sculpture displayed at a museum, aiming to be commercially exploited, does not fall within the scope of this exception, nor does a picture

¹⁰² COM(2015) 626 final, *Towards a modern, more European copyright framework*, Brussels, 9.12.2015, p.7-8.

¹⁰³ O. Garoufalia, *Legal protection of works of art*, p.230.

of a celebrity taken in front of a painting during an interview, if it is subsequently published in a magazine.

3.4. EU digital initiatives in relation to photographs

Even though digitisation raises a lot of technical, legal and financial issues, it also opens up new opportunities for the communication, use and preservation of cultural and artistic material. That is why the European Union lately launched two initiatives which take advantage of the possibilities that digital technologies offer, the orphan works and the Europeana initiative. Since both projects involve the use of photographs, the possible implications in the copyright protection of the latter should be examined.

3.4.1. Orphan photographs

Orphan works are copyrighted works whose rights owner(s) are either unidentifiable or untraceable. Examples of orphan works also comprise photos. Internationally accepted identifiers have been put in place for books and journals (such as the International Standard Book Number (ISBN) and the International Standard Serial Number (ISSN) since many years, but this is not the case for photographs, frequently making it extremely difficult to identify and locate their right holder. Even if one is able to find some information about the photographer, this may not be sufficient for identifying the current owner of the copyright. Directive 2012/28/EU (Orphan Works Directive), which provides for certain permitted uses of orphan works and Article 27A of the Greek Copyright Act, which transposes the first into the Greek legal order, are the main legal instruments in this field, setting specific preconditions for the use of such pictures.

Before the Directive came into force several practical problems were arising with respect to orphan photographs. Even when the name of the right holder and his/her contact data were available, often s/he could not be traced because the information was outdated. In addition to that, libraries, archives and museums were seldom in position to evaluate whether photographs in their collections fulfilled the requirement of originality and hence decide whether they had become public domain due to lapse of the copyright or related right protection period. That is why some institutions, afraid of getting negative publicity from claims of copyright infringement placed against them, used to adopt the position

providing the most legal certainty, namely, in the absence of evidence to the contrary¹⁰⁴, they considered all orphan works as copyright protected.

It should be clarified that the orphan works legal framework does not address the wider issue of the financial exploitation of orphan photos by commercial entities and only regulates their use by particular *publicly accessible institutions* (the so called “beneficiary institutions”, i.e. libraries and archives, educational establishments, museums, as well as film and audio heritage institutions) *in pursuance of their public-interest missions*. The number of orphan works in possession of these types of organisations around Europe is vast. A survey amongst museums in the UK found that the right holders of 17 million photographs (that is 90% of the total number of collections of photographs held in UK museums) could not be traced and only in 10% of the cases could be identified¹⁰⁵. It is worth mentioning that it is questionable whether the Orphan Works Directive should apply both to private and public institutions, on the basis of the consideration that the crucial point for its application is the non-profit and non-commercial use of orphan works that both types of institutions might be involved in.

Furthermore, the Orphan Works Directive only applies to: (a) photographs published “in the form of books, journals, newspapers, magazines or other writings”, which are contained in the collections of the beneficiary institutions (like photography books) or (b) photographs “embedded or incorporated” in such literary works, either they have been published or not (such as a science fiction book that incorporates photos). Given that the focus of this Directive is the print sector¹⁰⁶, it does not apply to photographs that are not print-bound and stand alone as distinct works. Thus, pictures fall under its scope only as works embedded in the above enumerated literary works. However, according to Article 10 of the Directive there is a real possibility that stand-alone photos will be also included in the near future¹⁰⁷.

¹⁰⁴ A. Vuopala, *Assessment of the Orphan Works Issue and Costs for Rights Clearance*, European Commission, 2010, p.29.

¹⁰⁵ Source: The Gowers Review of Intellectual Property, 2006.

¹⁰⁶ European Commission, *Impact assessment on the cross-border online access to orphan works*, SEC(2011) 615 Final, p.6-7.

¹⁰⁷ In particular, it is stipulated there that “the Commission shall keep under constant review the development of rights information sources and shall by 29 October 2015, and at annual intervals thereafter, submit a report concerning the possible inclusion in the scope of application of this Directive of publishers and of works or other protected subject-matter not currently included in its scope, and in particular *stand-alone photographs* and other images”.

In order to be given the status of orphan works, the copyright owners of such photos should first be researched. More precisely, diligent and in good faith search needs to be carried out in the Member State of first publication of the picture, by consulting the 'appropriate sources' for this kind of artistic works¹⁰⁸. Thereafter, the institutions using the orphan photographs will have to communicate the results of their inquiries to the competent national authorities, in order for the latter to take all the necessary steps for transmitting this information to the 'Single Online Database' established and managed by the Office for the Harmonisation of the Internal Market (OHIM). A picture characterised as orphan in one Member State retains this status in all Member States and new search is not required if this is subsequently used in a different Member State. Yet, if the copyright holder of a photograph is finally found, this will cease to be orphan and the first will be entitled to ask the beneficiary institution not only to stop using the picture, but also to pay compensation¹⁰⁹ for the uses that had already been made.

Taking into account all that, it is worth stating that if the Directive finally becomes applicable to stand-alone photos, searching pictures in the central database of the OHIM will most probably be problematic, as each picture will have to be displayed individually. In particular, in order for a searcher to determine if a specific photograph classified as orphan is actually one of his/her works, either the searcher will have to upload this photo to OHIM's database and the latter will have to perform comprehensive photo comparison and verification, or the searcher will have to download photos from this database and do the comparison himself/herself. Yet, due to the vast number of orphan photos, such a central database has the potential to become the largest photographic database in the EU ending up facilitating copyright infringement¹¹⁰.

Once a photograph is classified as orphan, the beneficiary institutions can only use it in specific ways: (a) reproduce it (by any means and in any form) or (b) communicate and make it available to the public. As particularly concerns reproduction, orphan photos can

¹⁰⁸ For example, the appropriate for photographs sources include the sources listed for published books, newspapers, magazines, journals and periodicals, as well as the databases maintained by photo agencies and collecting societies for photos.

¹⁰⁹ More specifically, Article 27A(9) sixth indent of the Greek Copyright Act provides that this compensation "shall amount to half of the remuneration that is usually or according to the law paid for the kind of use that has been made by the beneficiary and the payment of such compensation shall be made within two months from the end of orphan work status".

¹¹⁰ M. I O'Flanagan, *Copyright reform: a modernisation or the start of the death of copyright for photographers? Part 2*, Communications Law, 2015, 20(1), p.21.

only be reproduced for the purposes of digitisation, indexing, cataloguing, preservation or restoration, as they are related to the public-interest missions of the institutions. The beneficiaries may even generate revenues in the course of such activities, but only for the exclusive purpose of covering the costs of digitising the orphan works and making them available to the public. In case right owners and authors have been identified but not located, their names should be indicated every time the respective photos are used.

In conclusion, it should be clarified that national provisions governing the works of authors who deliberately publish their work either anonymously or under a pseudonym will not be prejudiced by the Orphan Works Directive. Most Member States have their own specific guidelines on how to establish the identity of such authors and how licensing should be acquired from them. Therefore, the concern for a publicly accessible institution using photographs whose right holders cannot be found should first be to establish whether a photo has been published under these nationally governed provisions or it is truly orphaned. Yet, this issue may be very difficult in relation to digital works, since many contributions on the internet are either unidentified or deliberately published under a false identity so as to protect the author's privacy¹¹¹.

3.4.2. Europeana

Besides Orphan Works Directive, another EU initiative that aims to make Europe's cultural resources available to the broader public is *Europeana*. Launched in 2008, Europeana was designed as a webpage¹¹² that would serve as a single access point to the collections of different types of heritage institutions, such as libraries, archives, museums and multimedia collections. It constitutes a research tool giving access to a variety of content, comprising books, paintings and other museum items, films and other audiovisual material, as well as photographs¹¹³. In particular, more than 20 million digital items are currently accessible, originating from over 2.000 institutions in several Member States.

¹¹¹ U. Suthersanen & M. Frabboni, *Commentary on The Orphan Works Directive* in I. Stamatoudi & P. Torremans (eds), *EU Copyright Law - A Commentary*, p.667.

¹¹² www.europeana.eu

¹¹³ For example a project concerning photographs was *EuropeanaPhotography*, running from 01/02/2012 to 31/01/2015 (www.europeana-photography.eu). It prepared, quality-assured and contributed over 430,000 photographic items to Europeana, representing a selection of masterpieces from the very beginning of photographic history.

In many respects, the Europeana initiative reflects the goals and principles of the South Kensington experiment previously described. It anticipates not only benefits for the cultural education and the preservation of cultural materials, but also the inspiration of new creative endeavours that will be prompted by the access to the materials hosted there. The difference is that Europeana is based on the transformation of tangible cultural objects into digital signals and the free subsequent dissemination of the cultural information via the internet, whereas the South Kensington Museum, due to the limited means available at that time, only produced photographic reproductions that were then sold at a very low price.

The digital objects that users can find in Europeana are not stored on a central computer, but remain with the cultural institution where they are physically displayed and are hosted on its networks. Among the works that need to be digitised (or have already been digitised) in the context of this project, there are several that are still under copyright protection. This is frequently the case with photographs, as photography was introduced relatively recently. Even though the digital portals of artistic and cultural institutions are not normally suspects for economic and moral rights infringement, it cannot be precluded *a priori* that unintended violations may occur¹¹⁴.

When copyright protected pictures are involved in the digitisation process, exploitation of their reproduction right is implied. That means that, in order for the reproduction to be lawful, apart from the copyright holders' consent, the respective royalties need to be paid to them, as they are the only ones entitled to reproduce their works. Yet, given that libraries and other cultural institutions collaborating with Europeana usually own only the physical copies of works and cannot obviously claim copyright in their collections, digitisation of copyright-protected photographs can be really difficult, especially with respect to orphan ones, as the right owners cannot be found. So as to overcome this obstacle, cultural institutions proceeding with the digitisation of their collections rely on

¹¹⁴ J. Purday, *Intellectual property issues and Europeana, Europe's digital library, museum and archive*, Legal Information Management, 2010, vol.10(3), p.179-181.

specific exceptions¹¹⁵, especially provided for preservation purposes, such as Article 5(2)c of the InfoSoc Directive¹¹⁶.

Furthermore, since the very purpose of Europeana is to make the digitised works accessible online, the rights of communication and making available to the public of the copyright holders could also be undermined. But, artistic institutions increasingly want to provide their collections on the internet, irrespective of their participation in the Europeana project. Not only do they want to give internet users a broad and easy access to knowledge, but they also consider that the online accessibility of their collections is an indispensable part of the preservation of the latter. Therefore, cultural organisations wanting to publicly display the photographs they have digitised or post them on their online platform need to obtain a prior consent, unless an exception applies. The InfoSoc Directive provides for such an exception in Article 5(3)n¹¹⁷.

Regardless of the differences existing in the various copyright systems across the EU, cultural institutions need to make sure that their digitisation activities do not conflict with photographers' moral rights, especially if we consider that these are closely related with their authenticity. As has been already explained, there are certain issues that raise concern. As for the right to integrity, the digitised version of a picture may be of lower quality and is generally more vulnerable to alterations, additions or distortions. For example, infringement could occur if the logo of a library appears on the photo in an unjustified way¹¹⁸. As for the right to paternity, the recognition of the author might be

¹¹⁵ However, it is highlighted that such limitations should not lead to the award of any commercial profit. Thus, in case that libraries seek private sponsoring in order to be facilitated in the digitisation process, or want to enter in public-private partnerships in order to deliver this project, permission of the right holder could be required, see in N. Klass & H. Rupp, *Europeana, Arrow and Orphan Works: Bringing Europe's Cultural Heritage Online* in I. Stamatoudi & P. Torremans (eds), *EU Copyright Law - A Commentary*, p.967-8.

¹¹⁶ As it is stipulated there, "Member States may provide for exceptions or limitations to the reproduction [...] in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives which are not for direct or indirect economic or commercial advantage". However, parag. 5 of the same Article continues that this exception "shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder".

¹¹⁷ This provision states that Member States may provide for exceptions or limitations in the case of "use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections".

¹¹⁸ A. Papadopoulou, *Digitisation of the contents of digital libraries: Moral rights and limits* in I. Iglezakis, T.-E. Synodinou & S. Kapidakis (eds), *E-Publishing and Digital Libraries: Legal and Organisational Issues*, p.187.

more difficult in cases of linking¹¹⁹, framing¹²⁰ or other similar activities that are common in the digital environment.

While the transformation of hardcopy literary works into digital format is unlikely to generate copyright protection for the latter due to the lack of independent originality, this is not the case for the digitised versions of other types of works like paintings and sculptures. Normally such works should first be photographed before being converted into a digital form. But, the pictures used in/resulting from the digitisation process may also qualify for copyright protection, despite the fact that they are not sufficiently original, provided that the Member State where digitisation takes place recognises the protection of such plain photos (for example by a related right). In line with this, as was analysed before, photographic reproductions of two- and three-dimensional cultural objects could be protected by exclusive rights, even copyright. Consequently, the respective national provisions on the protection of such photographs will have to be complied with.

Finally, another issue that arises from the digitisation and the subsequent online dissemination of photographs, is the possible publication of works that have remained unpublished up until that time. According to Article 4 of the Term Directive, works that have not been made accessible to the public since their creation may (again) acquire copyright protection at the moment they will first be published. The person/entity that lawfully publishes or communicates such photographs to the public is granted powers equivalent to the economic rights of the author for a period of 25 years from their first dissemination. Thus, the public/internet users will be excluded from the free use of these pictures for a limited time. Even if this might seem unfair, in any case, it cannot be claimed that the public domain is deprived of these artistic items, as they are first introduced to the public after being made available on the internet through the Europeana portal.

^{119,120} (a) *Linking* is a generic term, which refers to technologies used on the internet in order to facilitate the public's access to third parties' content or enable the reproduction by the public or communication/distribution to the public of content in which they do not have proprietary rights; (b) *Framing* refers to third party content initially found in that party's original site, which is however incorporated into another party's frames (i.e. looks of its site) and which appears in most cases as being part of that other party's website, see in I. Stamatoudi, '*Linking*', '*Framing*' and '*Browsing*'. *The EU Court of Justice's recent case law*, ATRIP 2014 Congress, Montpellier.

4. Conclusions

Photography has a significant inner power. Photographs can leave people speechless with their beauty, send a message to the audience and provoke a variety of feelings. That is why special copyright protection is awarded to them, not only as compensation for the effort photographers make and the time and money they spend, but also as a means of ensuring their preservation. To this end, several measures have been adopted and cultural initiatives have been carried out, aiming both to enhance the legal protection of photos and emphasise their importance as a form of art.

Photographers face certain risks when taking and publishing photographs. First of all, given that different copyright regimes have been adopted worldwide, the effectiveness of the rights awarded to them varies depending on the jurisdiction where protection is sought. More precisely, most discrepancies concern moral rights' regulation. In addition to that, the wide range of possibilities that digital technologies offer nowadays result in the constant manipulation of photographs within the digital and online environment and the respective violation of photographers' both moral and economic rights.

Moreover, authors and users of photographs also need to overcome certain problems. As for the first, even if the relevant European and American legal frameworks regulate copyright holders' rights in detail, these are being slowly eroded through an expansion of the types of exceptions which permit the use of copyrighted photographs. As for the latter, getting the necessary copyright clearance that will allow the lawful use of copyrighted pictures can be extremely time-consuming, as it is highly likely that there will not be any information about the photographer even on the picture itself.

Despite these obstacles, it should be recognised that the EU legal framework (and, therefore, the Greek one as it was created based on the respective EU Directives) on the copyright protection of photographs is comprehensive, in several instances, very specialised, offering photographers and the other copyright owners a variety of legal powers. By taking the appropriate steps they can prevent their copyright from being undermined and safeguard their creations and rights when an infringement actually takes place in a pretty satisfactory and effective way.

Nevertheless, even though the necessary legal provisions exist, their application becomes more complicated on the internet, due to its globalised and open-access character. Given

that photographs can be modified rapidly and effortlessly even by non-proficient users of new technologies, and without that being easily detected, there is an urgent need for the adoption of new EU legislation tackling the problem of copyright violations more actively. In particular, this legislation should place a duty on Member States to adopt measures specifically for the avoidance and sanctioning of copyright infringement of photographs on the internet.

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