PHOTOGRAPHY AND INTELLECTUAL PROPERTY: ARE CREATORS PROTECTED BY LAW?

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Abstract. This paper addresses the issue of copyright infringement and protection in the market of digital photography, given the fact that people often misapply the concept of fair use. Nowadays, when the average internet user is also a creator, we need to find a way to protect our content and respect the rights of the rightful creator. In our theoretical framework, we noticed the fact that laws are not enough to protect the work of said creators. To check if this is the case, we interviewed Octav Ganea, the managing partner of Inquam Photo Agency, and analyzed four watermarked photographs of the agency by using the reverse searching engine in order to investigate whether publications are using the images correctly or not. As Octav Ganea stated in the interview we conducted, a clearer regulation could help diminish intellectual theft and unfair use but much more is required, as for example, notifying the redactions for their wrongdoings. It turns out that laws are not enough and the efforts should go into educating people and change their behavior while working around with pictures.

Keywords: copyright; infringement; intellectual property; fair use; public domain

A new way of making journalism

A new way of making journalism is emerging from the instant gratification era. Citizen journalism, freelancers, and stock photographers have changed the workflow of classic redactions. Evelyn Runge describes this phenomenon the following way: „The fact stock images conform to different contexts can be regarded as a strength and a weakness at the same time. A strong stock photo is an ambiguous one that allows to sell it repeatedly in constant de- and recontextualisation. Simultaneously this is a stock photo’s greatest weakness: the prerequisite for its saleability is an economics of forgetting.”1 This means that a picture is not dependent on the location it was taken and it can be used in various publications regarding different topics. For example, during the COVID-19 pandemic, news outlets have been using stock photography to illustrate journalistic materials on doctors wearing protective gear, people wearing masks and so on, yet the location in which those shots were taken does

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not resemble the one in which it ended up being used, etc. If we were to use Getty Images, one of the most used stock photography websites, and type in the keywords doctor covid, we can see over 40,000 images regarding this topic.\(^2\) All pictures are available right away, making it useless to hire a photojournalist to go on the field and take relevant pictures from the proximity. The usage of stock photography also brings up a copyrighting problem as it makes it hard for the internet user to check the origins of the original photograph. When photographers submit their work to stock agencies, they are losing the rights of their work. As Evelyn Runge exemplified, after Getty Image bought the photo collection from Corbis, they stopped showing the author’s name on an emblematic picture of eleven workers eating at the top of a skyscraper. The work was attributed to Lewis Hine but in the current collection, no author can be seen.\(^3\)

Furthermore, citizen-journalism is also adding some weight to the decline of professional photojournalism. Citizen photojournalism might not have a direct impact on the copyrighting issue, it rather has to do with the way images spread in the online space, being available to everyone with an agenda.\(^4\) Tara Mortensen published several studies regarding the decline of photojournalism and the solutions found by news agencies in order to survive. In one of her studies, she analyzed how the lay-off of photojournalists are affecting the quality of the publication. The study focused on the images published six months before and six months after the photojournalists were laid off. The pictures were divided into two categories: professional (signed by the staff) and non-professional (citizen journalism). The study showed that the non-professional pictures were highly informative but were lacking emotional impact and general visual impact.\(^5\) In our opinion, we can’t change these facts, citizen-journalism is rapidly growing with the help of the new technologies emerging. Photojournalism can survive with all three factors previously mentioned, but it won’t survive if the news agencies will keep stealing the work of photojournalists, and benefit from their work without repaying them, as we will point out in our case study.

**Copyright concerns and fair use**

Such as the majority of rights, the right of copyrighting your work was not a given. Photographers had to fight to protect their work. Matthew Brady was ahead of his time as he started to register his images before it was even possible doing so. According to Jason Lee Guthrie, „Brady paradoxically used copyright as an intimidation tactic and as a moral appeal, although the strength of that appeal would have been severely undercut to anyone who was aware of Brady’s own piracy”\(^6\). Even that

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wasn’t enough for Matthew Brady to protect his work, as the study concludes, from the fortune and fame which the copyrighting process should have brought him, Brady gained only the fame.7

Figure 1. Matthew Brady, James T. Brady, watermarked directly onto emulsion: Brady NY. (Between 1855/1865), Library of Congress, item 2017897705, https://www.loc.gov/pictures/item/2017897705/

According to some scholars, „an author is an individual who is exclusively responsible for the production of a unique, original work.9 The signing of these photographs by Brady would be enough to satisfy the function of authorship.

Human beings made a huge transition, from content consumers to content creators. Roughly 1.4 trillion pictures will be taken in 2020, to emphasize the humongous amount of pictures, a tech-company made some exaggerating comparisons, for example, if you take a picture every second it would take 45,544 years to snap the number of photos humans will take in 2020.10 In our opinion, it is mandatory to teach people what copyright infringement means, and why not everything we find on the internet is free to use as we please. According to a study „reading only the privacy policy of every site visited would take the average Internet user over 200 hours per year, it is not surprising that many do not take the time to read often complicated terms and conditions.”11

The average internet user has become a prosumer, which means that not only is he consuming content, but also creating his own. According to another study, „appropriation and redeployment of copyrighted materials in the creation of new works has drawn creators and right holders into conflict. [...] copyright owners seek to maintain control over information flows, whilst prosumers make (what they consider to be) fair uses of elements harvested from the media-saturated environment.”12 A photojourna-

7 Ibidem
list posting some impactful pictures on his Facebook page and other users, instead of sharing his work, start re-uploading the pictures writing another caption and sometimes not even mention the author, would be an adequate example.

Copyright relies on truthfulness in order to work properly. This brings us to a very absurd situation in which a person is infringing the intellectual property even though he is buying a photograph with full rights. We have found a relevant example to illustrate this issue. In 2010, a professional photographer from Haiti posted some images of an earthquake that struck the island. Somebody sold the pictures to France Presse. Later on, the pictures circulated in hundreds of publications, and the credit was given to Agence France Presse, Getty, and the person that has stolen the pictures. The photographer claimed ownership of the photographs and went to court. Agence France Presse was found guilty of copyright infringement.13

Public Domain

According to the Merriam-Webster dictionary, public domain is „the realm embracing property rights that belong to the community at large, are unprotected by copyright or patent, and are subject to appropriation by anyone.”14 In our opinion, this definition is not enough to cover the depth of this concept. We need to know what kind of works can fall into public domain and how we can benefit from them. According to the Copyright Law of The United States, „Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author’s death.” and if the author of the work is anonymous or published under a pseudonym the copyright lasts for 95 years after the first publication or 120 years from its creation.15 Adding to that, there is another way to find contemporary content when authors are ceasing their rights right away. In order to give out their rights, authors can use the tool from Creative Commons to mark their works as free to use. For example; Metropolitan Museum of Art, Europeana, Open Goldberg Variations and figshare are using CC0 (Creative Commons Tool) to mark their work for as free to use.16

The covid pandemic has brought with it numerous online exhibitions and courses, museums having put their work up on display and stating that a new era is emerging while making their collections available for anyone.17 Creative Commons’ mission is to make knowledge available for anybody around the globe. However, not everyone is using these works for recreational or researching purposes. Although the laws should protect these works, due to cultural differences, it seems that justice can’t be made in some cases, making it easy to benefit from the free resources museums are giving out. We have found a relevant example to illustrate this issue.

mer Culture 10 (1), p.38.

16 https://creativecommons.org/share-your-work/public-domain/cc0/, accessed 29.10.2020
In 2009, Derrick Coetzee designed a program that helped him download around 3,300 high-quality images from the National Portrait Gallery (NPG) and transfer them to the Wikimedia Foundation. Later on, he received a letter from NPG in which he is informed that the gallery lawyers will take legal action against him, on the grounds of copyright infringement. He was both wrong and right at the same time. Coetzee considered the works to be obsolete, as per the law we previously mentioned, and decided they are suitable for public domain use in the United States. From this point of view, Coetzee had the right to upload the images as a contributor to Wikimedia Commons’, but not from the galleries’ perspective. In the legal threat letter made public by Coetzee, we can see a long list of claims made by the NPG. According to the UK legislation, Derrick Coetzee has committed acts infringing database right.

“(1) Subject to the provisions of this Part, a person infringes database right in a database if, without the consent of the owner of the right, he extracts or re-utilizes all or a substantial part of the contents of the database.

(2) For the purposes of this Part, the repeated and systematic extraction or re-utilization of insubstantial parts of the contents of a database may amount to the extraction or re-utilization of a substantial part of those contents.”

The group of lawyers representing the gallery stated the following: „By downloading over 3,300 of our client’s images and then uploading them to the Wikipedia website in breach of our client’s website terms you have breached our client’s database right under s.16 of the Regulations”

After generating a storm of online reactions, the matter never went to court and we can still see the collections on Wikimedia. In our opinion, access to knowledge should be basic human rights, but institutions should also survive, as they are making great efforts in the digitalization process. It’s hard to establish who is wrong and who is right when the law is heterogeneous. We should be aware that museums are making huge efforts to release their collections, and copyright frauds are just making their efforts useless.

Legal Framework in Romania

We previously discussed some differences between the laws regarding intellectual property in the United States and the United Kingdom and we noticed how dissimilar the legislation is. It is time to get into the Romanian legislation. When it comes to existing laws in Romania, intellectual property is guaranteed by the Constitution Article 136 (5): Private property is inviolable, in accordance with the organic law. The fundamental law regarding intellectual property in Romania is Law nr. 8 from 14

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March 1996 (republished) which contains 212 articles.\textsuperscript{23} Besides the domestic law, Romania also makes part of the Bern Convention, where they adhered to in August 28, 1926.\textsuperscript{24} According to the Constitution Article 11, section (2), the treaties ratified by the Parliament belong to domestic law.\textsuperscript{25} Given the fact that the Bern Convention is an international treaty, we are going to point out some of the most important stipulations. The first question that needs to be answered is, what kind of works benefit from copyright protection? According to the European laws, following categories benefit from protection:

- literary works such as novels, poems, plays, newspaper articles;
- computer programs/software, databases;
- films, musical compositions, and choreographies;
- artistic works such as paintings, drawings, photographs, and sculptures;
- architecture, maps, plans, technical drawings;
- sketches and three-dimensional works relative to geography, topography, architecture or science;
- advertisements, sometimes applied art;
- flyers, commercial material,
- slogans, brochures and user manuals.\textsuperscript{26}

The most important stipulation of the Berne Convention is that: „Protection must not be conditional upon compliance with any formality (principle of “automatic” protection)”\textsuperscript{27} which means no legal action of the creator is necessary.

\textbf{Case study}

Our working hypothesis for this study is that copyright laws are not enough to protect intellectual property. To see how far the legislation could be helpful, we interviewed Octav Ganea, the managing partner at Inquam Photos\textsuperscript{28}, a popular photojournalism agency in Romania. Furthermore, we are going to use the Reverse Search Engine offered by Google to find stolen pictures published by the agency and used without permission by news publications. The first question we asked was regarding the decline of photojournalism. As we have seen in our theoretical frame, copyright laws didn’t seem to fully help the creators. We need to know what’s the point of view of the media specialists facing the problem directly.

1. The decline of photojournalism is caused, in part, by the fact that the author/authorship has a weak regulation. Do you think that a clearer regulation of this aspect would be able to save/rehabilitate press photography/photojournalism?

The decline of photojournalism has multiple causes. Among these, one stands out as the weak regulation (more precisely, the law should be updated into this century)

\begin{itemize}
  \item \textsuperscript{24} https://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 accessed 29.10.2020.
  \item \textsuperscript{26} https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-copyright_essentials.pdf, accessed 29.10.2020.
  \item \textsuperscript{28} https://inquamphotos.com, accessed 29.10.2020.
\end{itemize}
and it has an important role, but not defining for the problem as a whole. If we look closely, we can see how even in the absence of any updates upon the existing laws, the ones that were interested in protecting their work succeeded in doing so most of the time. From my point of view, the problem lies in how the main producers of photojournalistic content understand the protection of their employers’ and collaborators’ work. Another issue lies in the fact that the ones that get a hold of the content lack the education on how to fairly use them. A clearer regulation could help in the reduction of intellectual theft and unfair use. However, the results wouldn’t be visible immediately as it would take some time to educate the local and national redactions, the journalism graduates and so on. It would require educating everyone that posts news on social media, often accompanied by recent photographs. As of now, this is what we, from Inquam Photos, are trying to do. We try to warn and inform the redactions about this unfair and unlawful use.

2. How does Inquam protect its intellectual property? What are the most efficient measures you employed to fight intellectual theft?

In recent years, Inquam carried out a campaign that aimed at educating redactions. The campaign started with notifications, continued with warnings and will shortly end with the taking to the court of some. At the same time, we make the redactions that became our clients more responsible through making them sign our photographs. Through this, we aim to reduce the chances of another publisher not knowing that the image is under copyright. During this time we also tried to raise the coverage of our agency across the country, while dealing with every major topic as fast as possible.

3. To what degree do you think that photographs put up for sale by an agency benefit from fair use? Could you give an example?

If we talk about fair use bound by a contract, the terms of use are stated in the accord established between the provider and the redaction. If we talk outside a contract, then this is covered by the copyright law. It states that there are two main types of use, both connected with the artistic product itself: critique or satire, case in which the use is permitted, and the use of the content for educational purposes. The Inquam redaction feels that if an image has a major relevance for the rapid information of the public regarding a critical situation, there won’t be any reaction from us and the use will be permitted, even if it infringes on the copyright law. The photo, however, has to be irreplaceable (An. using other available images), but this case is rare.

4. How are the cases of stolen image solved?

The response of the ones that were notified about their theft differs. Some of them admit their wrong-doing and manage to respect and fulfil our pleas (we cannot guarantee that they don’t misuse some other images). However, in most cases, they fail to respect our wishes given a situation in which they need an Inquam-exclusive shot or one that was published faster by one of our clients. The rest of the answers vary from total indifference to utter rudeness. Even so, in every situation we look after educating the offenders before we take them to court. If we were to make a statistic, out of 10 notifications, 2 become contract or get licenses, 3 go to redactions that are well-informed, 2 go to redactions that eventually go back to their old practices and 3 won’t admit their wrong-doing and will continue stealing.

5. The watermark used by Inquam has a reduced capacity and is not so troublesome, thus a few publications use your photographs with the watermark on
them. Do you think that this benefits the agency as the photographs can reach more people with the watermark on them?

The watermark has the role of protecting the images held by Inquam while also, ideally, making an image thief’s job harder. It is mostly blurry in order to facilitate the finding of the photograph via the image search engines (Google Reverse, Image Search and so on). However, once a client bought the license of an image and used it for his site it doesn’t matter anymore what kind of watermark the image had on the site. Regarding the distribution of a watermarked image, I can say that it doesn’t help much, as the agency already has enough presence on the news market. Basically, Inquam doesn’t quite need publicity (this is what a watermark guarantees), it needs educated redactions that are concerned by the rights of photojournalists.

For our content analysis part, we picked two images where the logo was not prominent, and two where the logo was disturbing. The pictures had to illustrate the same event and be published by the same agency, in our case, Inquam. We are going to look at the following elements generated by the reverse search; how many pages of results Google has generated, how many publications took over the image (if any) and, finally, if the publication has used a watermarked image or not. To make it easier to follow, we are going to use the codes of the images exactly as posted on the agency’s website.

ID: 149514

![Figure 2. Liviu Chirica, Pilgrimage Protest Metropolitan Cathedral, 9 October 2020, Image ID: 149514](https://inquamphotos.com/photos/iasi-covid19-protest-pelerinaj-catedrala-miropolitana-9-oct-2020-149514, accessed 29.10.2020.)

ID: 149514

- The number of Google Pages: 3
- Publications that took over the image: 2
- Watermarked: Yes

We found this picture on Bună Dimineaţa Suceava and Bună Dimineaţa Iaşi, with the watermark still applied to the image, this means that they had no right to use the image. This image has a very hard to distinguish watermark, which in our opinion made it easy to be used in an article without buying the image.

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Figure 3. Liviu Chirica, Pilgrimage Protest Metropolitan Cathedral, 9 October 2020, Image ID: 149518

ID: 149518

The number of Google Pages: 3
Publications that took over the image: 3
Watermarked: Yes

This image was found on three publications, Romania Libera, Romania-Azi and Click, the pictures still had the watermark applied. What we find interesting is the fact that Click, which is major yellow press publication in Romania, decided not to buy the credits for the picture. This image has a very visible watermark, which in our opinion, made it impossible for the publication to use without buying full rights.

Figure 4. Liviu Chirica, Pilgrimage Protest Metropolitan Cathedral, 9 October 2020, Image ID: 149519

ID: 149521
The number of Google Pages: 5
Publications that took over the image: 1
Watermarked: No

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The only publication that used this picture was StirilePROTV\textsuperscript{37}. We think that the fact they bought the credits for the image is not something unexpected because of its reputation. The watermark in this situation might not be as important as in the previous case.

![Image of a protest sign](image)

**Figure 5.** Liviu Chirica, *Pilgrimage Protest Metropolitan Cathedral, 9 October 2020*, Image ID: 149521\textsuperscript{38}

**Conclusion**

This study manages to only touch the tip of the iceberg on a broad topic such as copyright infringement and internet behavior. As we have shown in our theoretical frame, things like authorship and ownership were always debatable and the discussions were never one sided. We were curious about how the fight against intellectual theft looks like and we managed to catch a glimpse into a serious issue. The conclusion we can draw is pretty clear: laws are good but not enough; in order to be more efficient in fighting against this issue, people have to be educated better. As Octav stated, the agency is looking to educate the offenders, rather than taking them to court, and the result is positive. Out of ten notifications, two become contract, three are well-informed, which prevents them from making the mistake again, and the rest will mostly continue their bad practice. The last part of the study is an example of how theft can be discovered by experts or even by people that are curious about where and how their content is used. As we can see, watermarks are not necessarily efficient, publications are still stealing pictures. We hope this study will spark the interest of people in need to protect their content and draw researchers into further studies.

\textsuperscript{37} https://stirileprotv.ro/stiri/photo-of-the-day/proteste-fata-de-decizia-guvernului-romaniei-de-a-interzice-pelerinajul-la-moastele-sf-parascheva.html, accessed 29.10.2020

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