COPYRIGHT PROTECTION OF PHOTOGRAPHS PUBLISHED ON SOCIAL MEDIA THROUGH THE COURT PRACTICE IN NORTH MACEDONIA

Ana PEPELJUGOSKA
Ph.D. Attorney at Law/Partner at Law Office Pepeljugoski
E-mail: apepeljugoska@pepeljugoski.com.mk

Angela JANKOSKA
LL.M. Attorney at Law/Associate at Law Office Pepeljugoski
E-mail : ajankoska@pepeljugoski.com.mk

Abstract

In the 21st century, the expansion of the Internet and the emergence of the social media changed the world we know. The social media, originally intended to serve as a tool to facilitate communication among peers, in the last 15 years completely redefined the everyday communication and created the digital cultural norm of sharing. The social media made it easier to access endless displays of content, images, photographs, gifs and videos, and made the oversharing the new normal in the digital world. But is the content shared on social media platforms considered intellectual property? In this online world, how free is free?

As the content becomes more accessible on the Internet, and particularly on social media, the line between ownership, originality, sharing, downloading, and posting has been blurred. Although the Internet creates an illusion that everything online is free, one cannot just take photographs or content from a social media feed and use it as their own. However, the modern culture of sharing makes the detection of the copyright violations more difficult.

The aim of this paper is to analyze the most recent court practice in North Macedonia in the field of the copyright infringement on the social media. The authors will study the reasoning of the courts within respect to the protection of the copyright holders and establishing that their right has been infringed *vis a vis* the user and its rights. Finally, the liability of the social media providers will be elaborated and compared to the traditional liability of publishers.

Keywords: *Copyright, Court Practice, Intellectual Property, Infringement, Social Media*

Introduction

The internet and the world wide web, since their inception, were used to facilitate social interaction. However, the emergence and rapid diffusion of Web 2.0 technologies during the first decade of the new millennium enabled an evolutionary leap forward in the social component of web use. In short, the Web 2.0 technologies enabled the shift from user as a consumer to user as a participant. Therefore, one can easily conclude that the user generated content is the lifeblood of social media (Obar, 2015, p. 4-7).

With the continued growth of social media, it has become increasingly important for individuals and businesses to augment their plans to protect their intellectual property by developing a strategy for addressing violations of intellectual property rights that take place on social media websites. There is a wide range of concerns stemming from the emergence of the social media, especially from the point of view of copyright protection.

It is therefore important to bear in mind that not all infringements are of equal concern. Some of them have a short life span, while others have a long run and are very influential. For these reasons the companies are introducing social media monitoring, to obtain real time information and react urgently. The nature of social media is both a curse and a blessing for rights holders. The blessing is that content that violates rights might be deleted from social media sites before they have been widely viewed, downloaded or shared. The curse is that it can be very difficult to prove, at a later date, that a violation that took place (Pepeljugoska, 2013, p. 27).

1. Social media defined

The internet provides unparalleled opportunities for self-expression. In its relatively brief history, the internet has already become a powerful medium for political, social and cultural expression.

The development of the media in general and especially the social media always tended to the point of being a "mass media". The internet is among the last steps of the media expansion. In its early days we could sense the presence of social media forming in blogs. Bloggers were able to spread their opinions to millions of users for low or no cost. Then, the function of commenting on the blogs was introduced. Micro societies were formed around unvarnished discourse and social media was born (McGrady, 2011, p.1-3).

The social media concept from today's point of view was created with the evolution of websites that allowed distribution of images and videos together with advertisements (The Interoperability of Social Media, 10.11.2010, http://cdixon.org/2010/11/10/the-interoperability-of-social-networks/).

Social media is "*media created online and is a term used to describe the online interaction of individuals and exchange of user-generated content/information*"(Bettinger, 2012, p. 2) It is distinct from and defined against traditional media such as print media and television where the publication of information goes one way. In social media, with the advancment

of Web 2.0 technologies, such information flows from multiple sources. Everyone with an internet connection can be a publisher (Scheirer, 2011, p. 3).

The primary forms of social media are driven by the substantive nature of the content or the primary means of distribution. In its early days, the primary forms of social media were mixed with the online community, as a whole. However, the online community services are usually group centered, unlike the social media community which is individually centered ((The Interoperability of Social Media, 10.11.2010, http://cdixon.org/2010/11/10/the-interoperability-of-social-networks/)..

The defining characteristic of the social media is the ability for the end user to generate at least part of the content. This characteristic has helped in forming the major categories of the social media: content sharing (these sites are organized around the desire of the end user to share certain content), personal connections (the central idea is to connect friends and acquaintances, but also content sharing), enhanced e – commerce platforms (online retailers have inputted components on social media platforms in order to garner opinions from their customers), "search"+ (the best example being Yahoo! which places content on its home page along with its search function, these content offerings include social media options), social media platforms (these sites provide the tools for others to publish social media websites with no additional infrastructure), and specialty sites (these sites are coalesced around ethnic communities, adult content or sexual connections, religious communities, professional networks and many other themes). There is also another, more resent, division of the social media websites on: micro blogging (Twitter), social networking (LinkedIn, Facebook), social news (Digg, Reddit), social bookmarking (Del.icio.us, StumbleUpon), multimedia (YouTube, Flickr) (McGrady, 2011, p. 7).

Recently, however, these early social media platforms have evolved into a new generation of online information-sharing. The focus of social media is shifting from user-created content to user-found content. This trend is shared by new versions of the original social media powerhouses and recent social media start-ups. For example, both Twitter and Facebook have made it easier for users to integrate photos and videos from the internet into their profiles (McGrady, 2011, p. 9).

However, no matter their defining characteristics, all of these sites have an interactive collaborative element of some kind which allows any number of users to publish, upload, download, stream or otherwise transmit any content in which intellectual property rights may subsist.

2. The regime of copyright and related rights

The copyright law is a branch of that part of the intellectual property law, which deals with the rights of authors. Copyright refers to a particular forms of creativity, by protecting the expression of ideas and not the ideas themselves. The justification of the existence of copyright protection can be expressed through two main approaches: the natural rights approach, each person having a moral right to reap the fruits of their labor, and the utilitarian

approach, an incentive system designed to produce an optimum quantity of works in order to enhance the public welfare. (Hochberg, 2004, p. 9). However, the copyright protection is, above all, one of the means of promoting, enriching and disseminating the national cultural heritage (WIPO, 2003, p. 36).

The purpose matter of the copyright law, as previously expressed, is to protect every production in the literary, scientific and artistic domain, regardless of the mode or form of expression. The copyright laws usually do not provide a comprehensive list of types of works protected by copyright, but all national laws, including the law of North Macedonia, practically provide protection of the following: literary works, musical works, artistic works, maps and technical drawings, photographic works, film works, computer programs, and multimedia programs. (Law on copyright and related rights of the Republic of North Macedonia, art. 12 (2); Berne Convention art. 2 (1)).

The only precondition required in order for a work to enjoy copyright protection is the criteria of originality. The criteria of originality is not defined by the lawmakers, but it should be always viewed in an objective sense. The ideas in the work do not need to be new, but the form, be it literary or artistic, in which they are expressed must be an original creation of the author. Exceptions to the general rule are made in the copyright laws by specific enumeration (Law on copyright and related rights of the Republic of North Macedonia, art. 16; Bern Convention, art 2 (3) (4), WIPO Copyright Treaty art. 2, 3, TRIPS Agreement art 9 (2)).

The initial ownership of the work belongs to the individual who creates the work at his own expense. This individual is always a natural person and is referred to as "the author". However, if the work has been created by several people then they are all considered to be the authors of the work and are referred as "co-authors" (Anastasovska, Pepeljugoski, 2016, p. 104). The moral rights, that protect the personal rather than the purely monetary value of the work, always belong to the author of the work, whoever may be the owner of the copyright.

The owner or holder of the copyright in a protected work may use the work as desired, but not without regard to the legally recognized rights and interests of others, and may exclude others from using it without his/her authorization. Therefore, the rights granted by law to the owner or holder of the copyright are described as "exclusive rights" to authorize others to use the protected work. Such acts requiring authorization of the copyright owner are the following: copying or reproducing the work, performing the work in public, making a sound recording of the work, making a motion picture of the work, broadcasting the work, or adapting the work. The author of the work protected by copyright also has "moral rights" in addition to the exclusive rights of an economic character. The moral rights of the authors are independent of their economic rights and are the following: (not) to disclose, attribution, name/pseudonym, respect of the integrity of the author and the work. The moral and exclusive or economic rights are of absolute nature, which means that they have an *erga omnes* effect (Anastasovska, Pepeljugoski, 2016, p. 119).

Regarding the duration of copyright, it is impossible to determine the minimum duration sufficient to encourage the optimum amount of investment for the vast variety of works of authorship. However, in North Macedonia the copyright term consists of the life of the author plus 70 years. When the work in question is a joint work, the copyright will endure for 70 years after the last surviving author (Law on copyright and related rights of the Republic of North Macedonia, art. 55 (1)).

Unlike the copyright law, the related rights law has rapidly developed over the last 50 years. The related rights are grouped around the copyrighted works and refer to the rights of intermediaries in the production, recording or diffusion of works. The scope of the related rights covers the rights of performers, producers (phonogram producers, film producers), broadcasting organizations, publishers and developers of databases (Anastasovska, Pepeljugoski, 2016, p. 233). The related rights differ from copyright regarding the holders of the right, the subject of protection and the duration. Nevertheless, in most cases they are regulated within the same laws as copyright (Henneberg, 1996, p. 159).

The holders of related rights enjoy moral and exclusive rights as well, which are recognized to the holders without any formalities, such as registration, deposit of copies or presenting a notification, in light of the established automatic protection principle. The exclusive rights usually last for 50 years after the death of the related rights holder (Law on copyright and related rights of the Republic of North Macedonia, art. 127 in connection with art. 117).

Bearing in mind its primary objective, the copyright law has implemented certain exceptions and limitations for the right of the author to prohibit the use of his/her work. These exceptions and limitations are subject to the three step test, "respectively may only cover certain special cases; must not conflict with the normal exploitation of the works or objects of related rights; and must not unreasonably prejudice the legitimate interest of the rights of the holders" (Bern Convention art. 9(2), TRIPS Agreement art. 13, WIPO Copyright Treaty art. 10, WIPO Performers and Phonograms Treaty art. 16, Law on copyright and related rights of the Republic of North Macedonia, art. 51 (2)).

3. Copyright law in the age of internet

The digitalization of the information and the development of computer networks, such as the internet pose a new and far-reaching challenge to intellectual property rights. The main technological challenge behind this "new revolution" is improvements in data storage, manipulation, communication and transmission. With digitalization all kinds of data may be recorded and compressed in the same binary format, and their reproduction can easily be made without any degradation. On the other hand, data transmission is not limited to one-to-one basis, which makes a large computer network such as the internet, (Correa, 2000, p.145).

Given the pace of change in the social media offerings it is very difficult to employ time-consuming regulatory procedures to develop policies for each new social media service as it develops. In that sense when analyzing the behavior on social media, one should always have in mind whether a set of covering principles can be identified and applied in the broadest sense and if a comparison with a parallel offline method of operations should be made. In any case, this rapid development requires amendments to the current intellectual property legal framework, especially the fundamental principle of territoriality, due to the fact that the protection of intellectual property rights online is not contained in the national boundaries or borders (Pepeljugoska, 2013, p. 49).

The recent analysis of the European Union Intellectual Property Office (EUIPO) for the infringement of the intellectual property rights on the social media, shows that 11% of the collected social media conversations relate to possible infringement of intellectual property rights and/or sales of counterfeit goods (EUIPO, 2021, p. 29).

EUIPO found the process of identifying the piracy related to the digital content more challenging than in the offline world. This because both licit and pirated content are frequently offered free of charge to the user, with the platform generating its revenue through advertising or other methods. Therefore, it can be difficult for users to differentiate between licit and illicit content online (EUIPO, 2021, p. 34).

Film is the category of the highest volume of possible infringements is, followed by music. Also, the category of e-books had the highest interaction rate (interaction per mention), followed by TV shows, sports events and video games. This phenomenon indicates that users of social networks have a high level of interaction or reactions towards each of the different mentions (likes, retweets, comments) (EUIPO, 2021, p. 39). The researchers of EUIPO identified 1.5 million mentions of possible copyright infringement from 1 April 2020 to 30 September 2020. Of these interactions, 67% were done on Instagram, followed by Twitter and Facebook. Naturally the predominant language used in these conversations is English (EUIPO, 2021, p. 64).

The COVID-19 pandemic has also influenced the increasing piracy on social media. Piracy-related conversations were analyzed by EUIPO in the context of the pandemic and were found to increase immediately after lockdowns at the beginning of 2020 were implemented, reaching a peak just before the summer.. Levels of piracy-related conversations returned to a more normal level in June 2020 (EUIPO, 2021, p. 43).

It is fair to conclude that copyright is the most high-profile "intellectual property and online/social media" issue and it will likely remain that way. Content exchanged between individuals online is not always "content generated by a user" but, rather, "content created by a copyright holder who has not authorized its generation by the user" (Scheirer, 2011, p. 5). For copyright owners, the ability to exclude others from unauthorized access to their digitally constituted works on the internet is crucial to commercial profitability.

"The copyright infringement online is usually divided into two main types: primary - direct and secondary - contributory infringement. A primary infringement arises when someone is committing the infringement directly or authorizes someone else to do so.. A person is liable for secondary infringement if the person, with knowledge of the infringing acts, induces or materially contributes to the infringing activity of another. The scope of the secondary infringement covers: dealing in infringing copies, providing articles for making infringing copies, facilitation the infringement by transmission, circumvention of protection measures etc". (Reed, 2007, p. 357-363).

"In order to take legal action for copyright infringement on the internet, the copyright owners must address three fundamental issues: (1) who is liable for the infringement; (2) which jurisdiction does he take his action and which national law is applicable in the case; (3) what acts of infringement have been committed under the applicable law" (Leong, Saw, 2007, p. 39-40). However, in light of the strong territorial premise of copyright laws, the localization of the act of the copyright infringement in a particular jurisdiction in a spatial dimension like the cyberspace is a complex and problematic task.

In the United States of America (USA), the Digital Millennium Copyright Act (DMCA) sets down guidelines concerning copyright infringement online, but does not define when a service provider is liable for copyright infringement. However, the DMCA defines the exemption of liability when the provider is acting as a passive conduit for the information, is not producer of the information and has responded expeditiously to remove or disable access to infringing material upon notice of copyright holder.

There are laws in force in Germany, Sweden and Japan which state that the provider is liable only if it is technically possible to prevent the transmission of the infringing material; and the provider knows of the existence of the material and; (i) knows that it is infringing or (ii) reasonably ought to know that it infringes certain copyright. On the European Union (EU) level, the service provider liability is regulated in the Directive on electronic commerce, Section 4, art. 12, which provides "*where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:*

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.

The Republic of North Macedonia, follows the EU principle, which regulates the liability of the social media provider only as an "intermediary" towards the user generated content. Thus, ar. 15 of the Law on electronic trade contains the same conditions as the art. 12 of the E-commerce Directive in respect to the limitation of the scope of liability of the online service provider (treated in the broadest sense and including the social media providers).

The social media web sites such as Facebook, Twitter, LinkedIn, and YouTube are mainly founded and operate under the USA law. Therefore, they require in the terms and services for use, that each user, by posting the content online, explicitly accepts that the user owns all the content and information he posts on the page. On the other hand, the user grants the provider non-exclusive and royalty free license to use the posted content. In other words, the social media web sites have as many rights as possible, without assuming risk of ownership of the content, which could eliminate certain safe harbors under the DMCA, most notably under the *fair use doctrine* (Pepeljugoska, 2013, p. 53).

Consequently, both on social media and in the "offline world", in order to establish *prima facie* evidence in an infringement action, the plaintiff has to prove two elements: ownership of the copyright and copying by the defendant. The courts, when interpreting the law, which is still evolving in this area, will be trying to strike a proper balance between the copyright's goal of "stimulating the creation and publication" and the public's right of dissemination of information (Carpenter, 2012, p.6)

3.1 Analysis of the recent case law in the Republic of North Macedonia

Most internet users have the opinion that every photograph that is publicly available on the internet, is at the same time free and available for downloading, processing, sharing, and reproducing, without having a sufficiently developed awareness that the same photograph is subject to protection..

As explained earlier in this paper, the photographs available online are subject to copyright in the same way as an image hanging in a museum or art gallery. If someone's photo is used on a website, blog, social media or online platform without authorization and permission, the Law on Copyright and Related Rights allows the author of the photo to initiate an appropriate procedure for determining copyright infringement and to seek appropriate compensation. However, the reality shows that although copyright infringement on the internet is common and happens on a daily basis, in reality it is very difficult to prove it in court.

In recent years, before the Macedonian courts there have been more and more cases of copyright infringement, which allows them to create an extensive practice on this issue. As can be seen from the cases that will be subject of analysis in this paper, determining copyright infringement is a complex question that goes beyond simply answering the question of whether the person posing as an author is really the author of the copyrighted work.

The first thought-provoking example from the Macedonian court practice is the position of the Court in regards to publication of a photograph, publicly available on the internet, on a fan page on Facebook. In the case *Zivan Panic v. Inovativa Group*, the defendant is the owner of a fan page on Facebook which promoted a future musical performance of the group Azra by sharing a photograph, a portrait of Branimir Dzoni Stulic, the frontman of the group. In this case, the Court found that although the photograph was undoubtfully a

copyrighted work of the plaintiff, the defendant did not infringe the copyright by posting it on his Facebook page in order to promote the future musical performance of the singer who is in the photograph.

In deciding, the Court referred to Article 52 para. 1 p. 12 of the Law, according to which *it is allowed to use without compensation works in the field of fine and applied arts, architecture, industrial design and photographic works exhibited in public exhibitions or auctions by the organizer, on posters or catalogs made without commercial purposes to the extent necessary to promote the event* (Law on copyright and related rights of the Republic of North Macedonia, art. 52 para.1 p.12).

According to the Court, given that in this particular case, the photograph is publicly available on the internet and can be easily found through the Google search engine, and having in mind the fact that on the photo there is no indication that it is a copyrighted work and the author neither informed the public that he was allegedly the author, nor forbade its use, this cannot be considered a violation of copyright (Zivan Panic v. Inovativa Group DOO Skopje, 2019).

Evident from this stance of the Court, the specificity of the internet and the constant availability of a large flow of information to an unlimited number of users requires the Courts to properly interpret, adapt and apply the traditional legal provisions to very modern situations, appropriate to the new age, in order to satisfy the need for justice and fairness. That is why the Courts in their application of the law leave a high "threshold of tolerance" for the defendants when it comes to copyrighted works that are publicly available on the internet.

This position has been confirmed by the Courts on several occasions. In the case of *Zivan Panic v. Makedonski Telekom AD*, the Court determined that, since a photo of a famous singer was shared on an internet portal together with a text that is of general interest, its sharing falls within the scope of Article 52 para. 1 p. 12 of the Law (Law on copyright and related rights of the Republic of North Macedonia, art. 52 para.1 p.12) and is considered an exception to the violation of the rights, due to the fact that it had been used without commercial purposes to the extent necessary to promote and inform the public. The photo in question can be easily found on the Facebook page of the group Azra, as well as on the Instagram profile of the singer Branimir Dzoni Stulic, whose portrait is in question. So if the plaintiff was indeed the author of the disputed photograph, he was obliged to take measures to protect it from illegal usage. In fact, as confirmed by the Court, because through an internet search one cannot find out who is the author of the publicly available photo, in this case there is no copyright infringement (Zivan Panic v. Makedonski Telekom AD, 2018).

Moreover, in the same case, during the appeal at the Basic Court, the established position regarding the publicly available photographs on the internet which do not have a mark for the author, was reaffirmed and it is emphasized: "*.... at the time of publishing the photo, the defendant neither knew nor could have known who the author of the photo in question was.... Given that this photo was publicly available on social networks without indicating the author and the year of creation, several years before it was included in the text*

of the internet portal from where the defendant took it, hence the conclusion of the court that if the plaintiff is really the author of the photo in question, he did not take the necessary measures to protect the photograph from illegal downloading. By the failure of the plaintiff to take the necessary measures to protect the photograph in question from being taken illegally, the claim of the plaintiff that he is the author of the photograph is questioned. (Zivan Panic v. Makedonski Telekom AD, 2019).

Hence, in accordance with the case law, to enjoy the judicial protection of copyright, a photograph that has been published on the internet and is available to a large number of users the author must take appropriate measures to protect it from illegal download. The photograph should contain a mark that it is subject to copyright, the name of the author, a watermark or should be available online only at a reduced resolution. Otherwise, if the average user without appropriate expertise cannot assess from the form in which it is published that the photograph is subject to copyright, the author will likely not succeed in court to further ensure its protection against persons who downloaded, shared, published and used the photograph for their own purposes.

Moreover, the Court in *Zivan Panic v. Inovativa Group* creates a positive practice in terms of passive legitimizing of the defendant, when it comes to a photo that was published on social media. *"The plaintiff cannot base his claim only on the basis of some post on a Facebook profile with the name of the defendant, as an invitation to the indicated event, without substantiating such a claim with an expert opinion from the relevant area that would confirm the fact that that Facebook profile is property of the defendant. In that sense this circumstance cannot be considered proved in the procedure only by the fact that the Facebook profile bears someone's name"* (Zivan Panic v. Inovativa Group, 2019).

The fact that a Facebook fan page or account bears someone's name cannot be proof of ownership. When proving that the publication of a photo on social media violates the copyright of the author, it is crucial for the plaintiff to prove that the defendant is the one who owns and manages the Facebook profile on which the disputed photo was published, by making an expert opinion in the relevant field.

In the preceding cases, the Court established a legal standard according to which news aggregators, such as Makedonski Telekom AD, who only publish links to another internet platforms or mediums on their website, cannot be held responsible for copyright infringement. Makedonski Telekom AD is not responsible for the editorial content of the news, nor can it be held liable for copyright infringement on a work that is shared as part of the content of that news, because it itself did not use the photograph in question, nor did it have opportunity to influence its publishing. The content is taken from another electronic publication which is neatly stated for the purpose of public information (Zivan Panic v. Makedonski Telekom AD, 2018).

Through the application of the legal provisions, the Court has precisely defined what a claim for copyright infringement should consist of. Thus, if copyright infringement on a photograph posted on the internet is sought, it must

first be stated which moral and material rights the plaintiff considers to have been infringed. Additionally, the plaintiff has to prove how they were infringed, with which actions, what damage was suffered as a result of the actions, how it was suffered and how he/she proposes the damage to be restored, which are the basic preconditions and reasons for filing this type of lawsuit (Zivan Panic v. Inovativa Group, 2019).

In this regard, the Court has found that *"the plaintiff by placing the claim in a way that only seeks to establish a violation of moral and material rights of the copyrighted work, while not emphasizing a claim in terms of elimination of the consequences or possible compensation for any damages from the possible violation of his rights, only abuses such possible rights of his because it is obvious the purpose and his intention to provoke additional proceedings in which any other claims for possible compensation would be raised and only unnecessary additional costs would be created if the plaintiff succeeded in this procedure* (Zivan Panic v. Inovativa Group, 2019).

A similar position has been established by the Court in the case *Zivan Panic v. Color Media Plus*, where the dispute was about publishing the photo of the singer Branimir Dzoni Stulic on the web portal ubavinaizdravje.mk. At the same time, this case is important in terms of creating a positive practice according to which the removal of the copyright infringement before filing the lawsuit, makes the lawsuit unfounded.

Article 166 of the Law stipulates that "the author and other copyright holders have the right to protection of their right which contains a request for termination of the infringement, compensation for material damage, compensation for non-pecuniary damage, increased compensation, marking of the author, return of benefits obtained from illegal use, removal from circulation of the objects and/or prohibition of such or similar action in the future" (Law on copyright and related rights of the Republic of North Macedonia, art .166). Article 167 of the Law prescribes that "the author or the right holder may request from the defendant the cessation of the action that violates the right, as well as/or prohibition of such or similar action in the future" (Law on copyright and related rights of the Republic of North Macedonia, art.167).

In the specific case, the defendant actually published the photograph in question on his portal, without obtaining consent from the author and without paying an appropriate fee for its use. However, upon receipt of a request for damages by the plaintiff, at the moment when the defendant became aware of the violation committed by his side, he posted information on his portal in an identical manner and form as the publication of the photo in question, with content that with the publication of the photo there was an unintentional omission, i.e., the author of the photo was not mentioned and sent a public apology to him. This omission occurred because the image was taken from a publicly available network and the defendant did not know that it was protected as copyright. However, even after the public apology, the plaintiff filed a lawsuit against the defendant, which indirectly points to the conclusion that the

aim of the proceeding was not protection of copyright, but extortion of money in name of compensation.

In this case, the Court found that "in an indisputable factual situation that the defendant before the filing the lawsuit removed the copyright infringement by apologizing to the author and marking the photo, and additionally after filing the lawsuit removed the photo from his web portal completely, the claim requesting to determine a copyright infringement and to oblige the defendant to remove it, in conditions when it has already been removed, is unfounded" (Zivan Panic v. Color Media Plus, 2019).

With this position, the tendency of the courts to provide and guarantee legal protection of the photos published on the internet is more than clear, without allowing at the same time the users to be "punished" for unintentional omissions committed in the internet space, if there is no particular damage.

Another interesting position of the Macedonian courts regarding the authorship is expressed in the case *Zivan Panic v. Inovativa Group.* According to the Court, the fact that the plaintiff is the author of the photograph, which was previously confirmed by a final judgment of the same court, is not sufficient in terms of determining the active legitimation of the plaintiff (Zivan Panic v. Inovativa Group, 2019). The authorship and in this case, the active legitimation of the plaintiff, should be proven during the procedure with additional evidence, such as original copy of the photograph and expert opinion in the field of photography. In *Zivan Panic v. Inovativa Group*, the Court stipulated that .... *"the plaintiff neither submitted the original copy of the photograph, nor submitted an expert opinion the field of photography made by an expert who would determine that the photograph, in a comparison with the negative, was made by the plaintiff* "(Zivan Panic v. Inovativa Group, 2019).

According to the Court, even an original negative of the photograph alone could not constitute sufficient evidence that the plaintiff was the author of the photograph. A photograph published on the internet, in free use, can be downloaded by anyone, and also anyone can edit it so to show their name on the photo or will process it as a negative, so the Court considers that the plaintiff should support its claim with appropriate evidence, which is not the negative of the photograph, but above all expertise opinion in the relevant field (Zivan Panic v. Inovativa Group, 2019). The same position is confirmed in the judgment *Zivan Panic v. Makedonski Telekom AD* by the Basic Civil Court Skopje, and by the Supreme Court in the judgment *Zivan Panic v. EF-TRI DOO Skopje*.

Additionally, according to the Supreme Court, *a copy of the photograph, a copy of the negative and an expert opinion in the field of copyright are not sufficient proof that the plaintiff is indeed the author of the photograph. The plaintiff did not prove that the photograph that was published on the web portal is the same photo from the concert, and did not point out his moral and material rights that were violated, in what way they were violated, with which actions and what damage he suffered from the same, so that he can propose that the damage be removed. The court did not receive the original photo, nor an expert opinion from a competent expert in the field of*

photography which would confirm that the photo compared to the negative was made by the plaintiff (Zivan Panic v. EF-TRI DOO Skopje, 2021).

It is interesting to note, that the plaintiff Zivan Panic initiated similar procedures in this area. In this sense, the subject of analysis is also the judgment *Zivan Panikj v. Avaz Roto Press*, rendered by the Municipal Court of Sarajevo, Federation of Bosnia and Herzegovina, with which, unlike the Macedonian judgments, the claim of the plaintiff was upheld and the copyright infringement was confirmed.

The Municipal Court of Sarajevo interpreted the legal provisions in a much more rigid and inflexible way when it decided that with the publishing of the photo in question on its portals, the defendant had committed a copyright infringement. According to the Municipal Court of Sarajevo, the fact that the photograph was publicly available and used more than 50 times in various media is not sufficient to conclude conclusively that the plaintiff consented to its use. As the Court stipulates, "*the photograph is the only medium that by its very creation becomes a copyright work, which means that automatically every photograph is protected by copyright, hence the allegations of the defendant that he did not know who the author of the photograph is, does not give him the right to use it."*

The Court based its decision on Article 16 of the Law on Copyright and Related Rights of Bosnia and Herzegovina, according to which copyright protects the author in terms of his spiritual and personal ties to the work and Article 17 of the same Law, "which gives the author the right to decide whether he wants, when he wants, where he wants, in what way he wants and in what form he wants to publish his work" (Law on copyright and related rights of the Federation of Bosnia and Herzegovina, art.16-17). Therefore, having in mind that the defendant did not obtain consent or approval for publishing the photo, nor did he/she pay a fee for its use, he/she thus acted contrary to the Law and infringed the plaintiff's copyright.

However, with this decision, the Court sets an interesting precedent in regards to determining the amount of compensation for non-pecuniary damage, which should serve as example in future cases. Although the Court found a violation of the plaintiff's copyright, it took into account the previous case law when deciding on the amount of compensation. As explained by the Court *"given that the evidence presented has unequivocally proved that the photograph for many years was available online to an unlimited number of persons, and that the plaintiff has already conducted proceedings before the courts in the region with persons who have published it without authorization and have concluded settlements, i.e. that he has already been awarded compensation for mental pain, the court considers that the suffered emotional pain cannot be of the same intensity and duration as the first time the photo was published, so and the amount of compensation for the mental pain suffered should be properly assessed.*" (Zivan Panikj v. Avaz Roto Press, 2019).

4.3. Comparison between the liability of the social media providers and the traditional liability of publishers

The "threshold of tolerance" given by the Macedonian courts in cases of "online" copyright infringement, is to some extent applicable to the traditional publishers as well. The practice shows that the courts determine copyright infringement when it indisputably arises from all circumstances, but also when the author himself has previously taken all the necessary actions for protection of his right.

In the case *Vasilije Smilevski v. Ultranet Ultra*, the subject of dispute is copyright for publishing photos and graphics of the plaintiff which show the old Skopje neighborhoods. The photos were handed over to the defendant personally by the plaintiff and the plaintiff knew that they would be published at some point in the future, but he did not take any action to recover the photos. The photos were posted on a non-commercial site, owned by the defendant, which was for informational purposes only and was used to share information and promote the city of Skopje.

In this case, the Court did not find a copyright infringement precisely because the plaintiff's photos were published on a non-commercial site dedicated to the city of Skopje, where there was no indication of the owner of the website, nor could advertisements be displayed on it. The website was used for promotion of the city of Skopje and the old Skopje neighborhoods without commercial use and its only purpose was to give information about the city of Skopje of general importance. According to Court, the posting of the photos on this site affirms the work of the author and at the same time uses works of folklore and information about the life in old Skopje (Vasilije Smilevski v. Ultranet Ultra, 2012).

The Court relied on Article 57 of the Law, according to whichis free to temporarily reproduce copyrighted works of an incidental or accidental nature, which is an integral or essential part of the technological process, which as such has no independent economic value and has the sole purpose to enable transmission in the network through third parties, through an intermediary or authorized use in accordance with law. According to the Court, the photos are not the reason for someone to visit the site, but the visitors initially visited the site to get information about the city of Skopje, and only a small part of them went to the page where the photographs were posted. For these reasons, in accordance with the legal provisions, the defendant was free to use these copyright works (Vasilije Smilevski v. Ultranet Ultra, 2012).

Moreover, the fact that the plaintiff submitted the photographs without concluding an appropriate written agreement for the transfer of rights, according to the Court, indicates that he acted contrary to the legal provisions and therefore did not acquire the opportunity to obtain possible copyright compensation from such an agreement. According to the Court, if the plaintiff considered that the submitted works were in the function of making a profit, he was obliged to transfer them to the defendant in accordance with the law, i.e., to conclude a written agreement for such transfer and to decisively regulate the mutual rights and obligations (Vasilije Smilevski v. Ultranet Ultra, 2012).

This decision was upheld by the Court of Appeals because, in accordance with Article 19 of the Law, the substantive rights protect the property interests of the author. The use of the copyright work is allowed when the author has transferred the material copyrighted in accordance with the law. In the specific case, according to the Appellate Court, the plaintiff did not transfer the material rights in accordance with the law, and the defendant, after obtaining the consent of the plaintiff, and in the interest of reviving the interest in Old Skopje, published the photos on the website. In this way the defendant used the materials in a legal manner, with the permission of the author who himself, voluntarily submitted the materials (Vasilije Smilevski v. Ultranet Ultra, 2015).

The position of the Court is identical in the case *Rumen Kjamilov v. Matica Makedonska.* This specific case is about photographs of the plaintiff which were used in two monographs issued by the defendant.

According to the Court, "*although it is not disputed that the plaintiff is the author of the said photographs, there was no copyright infringement because he knew at the time of photographing the purpose of the photographs, it was clear to him that they would be used for the scientific work of the author of the monograph, who is in fact his longtime friend and collaborator. The plaintiff himself agreed to make and hand over the mentioned photographs, thus transferred the right for their usage. Moreover, the plaintiff did not ask for a copyright agreement to be concluded, nor for any fee to be paid to him. On the other hand, the defendant, before publishing the monographs, duly concluded copyright agreements with the authors of the monographs who had the right to use the photographs published in them. Hence, the publication of the photographs in both monographs does not constitute an infringement of the author's copyright, although he was not asked for explicit consent for the publication"* (Rumen Kamilov v. Matica Makedonska, 2015).

It can be concluded that in order for the author to enjoy judicial protection of copyright, the Court requires the author to previously undertake all legal measures to ensure its protection. The pillar between the preventive measures is the conclusion of a written agreement for transfer of the rights which will regulate the content of the rights and the manner of use.

4. Conclusion

Despite the popular opinion that all content published on the internet is free and that the online sphere is a zone of impunity, where positive legal regulations do not apply and nothing is forbidden, still the photographs published on the internet are subject of protection of the intellectual property like any other copyrighted work.

However, the photographs published on the internet enjoy their own protection regime and it is the Court's job to revive the law and, through extensive interpretation of the legal provisions, to enable it to stand the test of the time and the internet.

As can be seen from the analyzed case law, the Macedonian courts have the tendency to interpret the legal provisions in the broadest sense when

determining the copyright infringement and ensuring the protection of the copyright. Generally, the decisions are not adopted by simply and rigidly following the literal meaning of the law, but by respecting the principles of justice and fairness.

Internet copyright infringements happen every day and it is an illusion to think that any legal framework will prevent it completely. But it is also a misconception that the nature of the internet is contrary to the copyright protection. In the analyzed decisions, the Court presents a good balance between the rights of the copyright authors and the rights of the users of the internet. As it is evident from the case law, the Court does not impose an excessive burden on the users by expecting them that they should constantly fear whether a photograph is subject of copyright or not.

On the other hand, the Court does not deprive the authors of their copyright, nor of the possibility of exercisiing their right to compensation due to unauthorized use of their work. On the contrary, through its judgments, the Court gives some guidelines for the authors in regards to the request for determination of a copyright violation, as well as the evidence that needs to be submitted in order to prove copyright infringement.

Having in mind all of the above, the protection of the copyright in the digital era is bigger challenge for the Courts than ever. The case law is fluid and will probably change and adapt as the time passes and as the internet offers better content protection. Until then, it is on the Courts to protect and guarantee "the balance between the protection for the artist and the rights of the consumer."

Bibliography

Anastasovska Jadranka, Pepeljugoski Valentin, *Avtorsko Pravo,* Praven Fakultet Justinijan Prvi Skopje, 2016.

Bettinger T. Bleine, "Social Media: Implications for Intellectual property law", May 2010 (Retrieved from: http://www.slideshare.net/blaine_5/social-media-implications-for-intellectual-property-law).

Carpenter Craig, "Copyright Infringement And The Second Generation Of Social Media Websites: Why Pinterest Users Should Be Protected From Copyright Infringement By The Fair Use Defense", 2012 (Retrieved from https://ssrn.com/abstract=2131483).

Correa M. Carlos, *Intellectual property rights and the WTO developing countries*, TWN 2000.

European Union Intellectual Property Office, *Monitoring and analyzing social media in relation to IP infringement*, 2021.

Henneberg Ivan, *Autorsko Pravo*, Informator, Zagreb 1996.

Hochberg D. Elizabeth, Koenigbauer M. Fabian, Hoch B. Allison, E-*Z Review for Intellectual property*, Law Review Publishing, 2004.

Law on copyright and related rights of the Federation of Bosnia and Herzegovina *(Official Gazette of Bosnia and Herzegovina no. 63/10)*

Law on copyright and related rights of the Republic of North Macedonia (*Official Gazette of RNM no. 115/2010, 51/2011, 154/2015, 27/2016*).

Law on electornic trade of the Republic of North Macedonia (*Official Gazette of RNM no. 133/2007, 17/2011, 104/2015, 192/2015, 4/2020*).

Leong H. Susanna, Saw Lim Cheng, "Copyright infringement in a borderless world-does territoriality matter?", *Oxford Journals vol. 15*, 2007.

McGrady Jr. Paul D., *Social Media*, Lexis Nexis, 2011.

Obar Jonathan, Wildman Steve, *Social Media Definition and the Governance Challenge: An Introduction to the Special Issue*, 2015.

Pepeljugoska Ana, *Protection of intellectual property rights on social media*, CEPPE, 2013.

Reed Chris, Angel John, *Computer Law 6th Edition*, Oxford University Press, 2007.

Rumen Kjamilov v. Publising House Matica Makedonska DOOEL Skopje, XXXVIII.P1-539/14 (Basic Court Skopje II Skopje, 2015)

Rumen Kjamilov v. Publising House Matica Makedonska DOOEL Skopje, GZH-6476/15 (Appellate Court Skopje, 2016)

Rumen Kjamilov v. Publising House Matica Makedonska DOOEL Skopje, XXXIV.P1-731/12 (Basic Court Skopje II Skopje, 2013)

Rumen Kjamilov v. Publising House Matica Makedonska DOOEL Skopje, GZH-2300/14 (Appellate Court Skopje, 2014)

Scheirer L. Bianca, "Intellectual property issues in social media", *Social Media Law Paper 3.1*, 2011.

The Agreement on Trade Related Aspects of Intellectual Property Rights (1994).

The Bern Convention for Protection of Literary and Artistic Works of 1886.

The Interoperability of Social Media, 10.11.2010 http://cdixon.org/2010/11/10/the-interoperability-of-social-networks/

Vasilije Smilevski v. Company for processing of data Ultranet Ultra DOOEL Skopje, 20 P1-3169/10 (Basic Court Skopje II Skopje, 2012)

Vasilije Smilevski v. Company for processing of data Ultranet Ultra DOOEL Skopje, GZH-3958/15 (Appellate Court Skopje, 2015)

WIPO Copyright Treaty (1996).

WIPO Performances and Phonograms Treaty (1996).

WIPO, *Guide to copyright and related rights administered by WIPO and glossary of copyright and related rights term*s, Geneva, 2003.

Zivan Panic v. AVAZ ROTO PRESS d.o.o. Sarajevo, 65 0 Ps 742199 18 Ps (Municipality Court Sarajevo, 2019)

Zivan Panic v. Company for internet and information technologies, marketing and trade EF-TRI DOO export-import Skopje, Rev2.no.106/2021 (Supreme Court of Republic of North Macedonia, 2021)

Zivan Panic v. Company for marketing services Inovativa Group DOO Skopje, 15 P1-314/17 (Basic Court Skopje II Skopje, 2019)

Zivan Panic v. Company for marketing services Inovativa Group DOO Skopje, GZH-3492/19 (Appellate Court Skopje, 2019)

Zivan Panic v. Company for production, trade and services Kolor Media Plus DOO Skopje, XXXVII P1. NO.246/19 (Basic Civil Court Skopje, 2019)

Zivan Panic v. Makedonski Telekov AD for electronic communications Skopje, XXXI P1.no.313/17 (Basic Court Skopje II Skopje, 2018)

Zivan Panic v. Makedonski Telekov AD for electronic communications Skopje, XXXI P1.no.777/19 (Basic Civil Court Skopje, 2019)

Zivan Panic v. Makedonski Telekov AD for electronic communications Skopje, Rev2.no.147/2021 (Supreme Court of Republic of North Macedonia, 2021)

Zivan Panic v. Trade broadcasting company Television SITEL DOOEL Skopje, Rev2.no.194/2020 (Supreme Court of Republic of North Macedonia, 2020)