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Almost a photo finish

Bogdan Ivanišević and Marko Popović of BDK Advokati review the recent squabble about copyright protection in Serbia for 'routinely created photos'

Serbia's parliament, during its session on 26 January, declined to adopt the so-called 'authentic interpretation' of Serbia's 2009 Copyright Act, would have effectively restricted rights in photos.

For the time being, photos are likely to continue enjoying the generous protection traditionally conferred by the courts.

In the days preceding the parliament's session, it seemed that the ruling Serbian Progressive Party and its coalition partners would narrow the scope of copyright protection—not by changing the Copyright Act, but by providing the 'authentic interpretation' of a provision referring to photos as works protected by the author's rights.

The legal committee of the parliament drafted a restrictive interpretation and the committee's president, a prominent member of the Progressive Party, staunchly defended the draft in the media.

Photographers' rights became a hotly debated issue both in the media and on the streets, where photographers raised their voices in protest. Some opponents claimed that, should the parliamentary majority adopt the proposed text of the authentic interpretation, copyright in photographs would be abolished altogether.

In actuality, the ruling majority was up to abolishing copyright in one type of photo: "A routinely created photograph, which first appears and is reproduced in the electronic format, [i]rrespective of whether it is an original intellectual creation of the author."

The draft lacked in consistency and betrayed poor understanding of the copyright law's basic principles. Fortunately for Serbia, it was ultimately rejected by the parliament.

Under the proposal, copyright protection would be removed from photos that first appear on the internet—"in the electronic format". A "routinely created" photo would enjoy full copyright protection if it was first published offline. It would be unlawful for a third person to copy such a photo from the hard copy of a magazine or a newspaper and subsequently use it online. At the same time, it would be lawful to appropriate that same photo if it was first published online.

It is difficult to find any justification for the unfavourable treatment of the photos appearing online, and the proposed text did not offer any. In jurisdictions such as Italy, Germany, or Spain, where the laws treat some categories of photo as less worthy of protection than other categories, the dividing line has nothing to do with the format

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Bogdan Ivanišević, Partner, BDK Advokati/Attorneys at Law

in which the photo first appeared. Instead, the laws grant stronger or weaker protection to photos depending on whether they have, or lack in, originality.

Hardly anybody in Serbia doubts that the reason why the draft authentic interpretation focused on photos appearing online was to meet the needs of those influential media outlets in Serbia that frequently misappropriate someone else's photos published on the internet.

What made the legal committee's proposal especially vulnerable was its legal and logical fallacy in the part that maintained that certain photos could not be considered works of authorship and enjoy protection under the author's rights—even if they were original intellectual creations.

In fact, if a photo is "an original intellectual creation of the author", it is by definition a work of authorship. The Serbian Copyright Act itself defines a work of authorship as "an original intellectual creation of the author, expressed in certain form, irrespective of the work's art, scientific, or other merits, intention, size, content, or manner of expression".

In a similar vein, the legal committee displayed a strange lack of familiarity with the copyright law when, in the explanation accompanying the motion, it wrote that the following categories of photos were unlikely to deserve protection as works of authorship: "Selfie; a photo of sausages; photos of empty shelves in a store, holes in a street, chicken wings, crane, automobile, or similar."

A fundamental rule of copyright law is that originality and thus protection of a work of authorship does not depend on the "object" or the "idea" underpinning the work, but on the way in which the object/idea is expressed. Thus, a photo of empty shelves in a store—to take that example—may also be original, in the dual sense of being the photographer's own creation and expressing his or her choices (the choice of camera angle, the light, shadow, cadre, time of exposure, the arrangement of objects or persons, evoking the desired expression, etc).

When the parliament voted on the draft authentic interpretation, not one member of the parliament was in favour. The parliamentary majority made a coordinated move and eventually left intact the very broad protection currently enjoyed in Serbia by virtually all categories of photos. That does not mean that the issue has been dropped from the table for good. The parliament has made a number of blunders in its attempt to address the issue of copyright in photos, but that issue is a genuine one.

This is evidenced by the fact that some major European jurisdictions, such as Germany, Italy, Spain and the Netherlands, legislate the protection of photos lacking originality in one way, and the protection of original photos in another way. The duration of protection for photos lacking originality is shorter, and the scope of economic rights enjoyed by the rights holder is narrower, than for the photos meeting the originality threshold.

Still, even non-original photos as a rule enjoy protection in these countries, under the legal regime applicable to the related rights. This seems to be only wise. It is often difficult for a judge to tell a photo having originality from the one lacking it, so the laws ensure that even a photo wrongly assessed to be non-original continues to enjoy some protection under the framework of related rights.

An additional argument for providing some measure of protection is that non-original photos may well have significant economic value, and the copyright law, taken as a whole, can scarcely ignore that.

Some supporters of the effort to change the copyright rules for photos in Serbia claim that, without copyright protection, photos would still be adequately safeguarded. The general rules of compensation for damages and on unfair competition purportedly provide sufficient protection.

However, if the Serbian government decides to revisit the issue of the distinction between original and non-original photos, the protection of the latter under the related rights framework is a better model to follow. One should also hope that any future debate on the issue would be free of exaggerations, inaccuracies and logical fallacies that marked the latest controversy. **IPPro**

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Marko Popović, Associate, BDK Advokati/Attorneys at Law