

PHOTOGRAPH SHARING AND VIOLATIONS ON SOCIAL MEDIA (CASE OF TURKISH SOCIAL MEDIA)

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INTRODUCTION

All rights and responsibilities of photographs belong to the photograph owners. Copying, reproducing and distributing the photographs unofficially are not allowed without the permission of the photographer. Copying and using photographs without any permission is considered as a crime according to the laws.

Mankind has been creating, sharing images since their existence... New media serves as a significant platform for this sharing. The most remarkable image sharing is photograph sharing.

“Why do people take photographs and share them?”

The answers of people sharing photographs are as follows:

“Actually, photography is a ‘language’. Photography is a way we use to express our feelings and thoughts. If we want to communicate content, we take photographs. We have the desire or rather the need to share. I believe that people take photographs to express themselves and share these photographs for the same reason.” (Gokhan Korkmazgil, <http://www.fethiyefotograf.com>)

“Photography is a visual way of expression. When we open our family photo album, we read the stories of our babyhood, childhood, youth years, the ones we were together with and those who left us in time and different places. We see where we came from and where we are going to in photographs.

We share the behaviors, emotions and postures of all living creatures in the universe. We notice the differences. Every photograph is full of emotions. We share

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doi: 10.17349/jmc114103

these emotions by looking at the same photograph. (Kamil ACAR, <http://www.fotono1.com>)

*“What lies beyond photograph taking is to satisfy our souls, prove our superiority and the desire to have this superiority be appreciated by others. That’s why we take photographs and share them...” I think taking photographs is similar to picking flowers in nature, collecting colorful pebble stones on the beach and choosing apples in the market. Or to wear the most beautiful clothes, drive the best car, have the most delicious drinks and food or to have the “best” spouse. Briefly to have the “best” of anything and to show that you have the best of anything. “Self, selfish, selfishness “sneakily lie beyond having the “best” of everything; the bad “nature” of the inner self. This is the feeling of having something unique that nobody else has; something more beautiful, bigger, more colorful, more delicious or different from others. This is the feeling that lies beneath having the best of everything. And with a power that dominates all desires; “Look! I have the most beautiful one, I own it... What I have is the most beautiful one”. Taking photographs gives the feeling of having the most beautiful and possessing what is interesting and beautiful even if it is virtual beauty. Taking the photograph of a beautiful view, flower or fruit to possess it; a beautiful person to document an interesting happening; to have our photographs taken or take photographs in a beautiful place we visit mean “Look!... I have seen this, I had the opportunity to see this, an opportunity that some others could not have”. It also gives the chance to remember those moments, those things we once had without sharing with anyone just like Moliere’s *The Miser*. That’s why we take the photographs of the things we like, the things we find interesting, the things nobody else sees and the things we do not have but we want to have. With the help of these photographs, we document the values that we have and that other people do not have and accordingly we document our privilege. Briefly, the desire to have these privileges all the time and to show these privileges to everyone leads us to take photographs and share these photographs in order to document our superiority we gain thanks to these values. We also demonstrate how wise and how talented we are while experiencing this satisfaction. Finally: “We take and share photographs to feed the feeling of satisfaction and proof... We expect and wish to be noticed and admired by others to feel the pleasure of this experience”. (Korkmaz Gocmen, <http://www.foto-no1.com>)*

Today photograph sharing reaches millions of people thanks to the social media applications that facilitate photograph sharing. Way of photograph taking, showing and sharing has become an integral part of social media and changed in parallel with the development and usage of digital technology. People share their photographs mostly through Facebook, which is one of the social networking sites.

COMMERCIALIZATION OF VISUAL SHARING AND VIOLATIONS

Today’s technological developments provide people with the opportunity to send songs, films or books to their friends by using their computers. People are not aware of the fact that this is ‘illegal reproduction’. Moreover, they do not know that the photographs of their most precious moments can be used by third parties for

commercial or bad intentioned purposes. As a matter of fact, it is possible to see lots of news that include warnings about sharing on Internet on television, newspapers and news sites:

“Do not share your child’s photograph on Internet”

Parents sharing their children’s photographs on Internet actually invite virtual stalkers... Ankara Bar warns experts: Do not send your children’s photographs to social networking sites. Perverts convert these photographs into pornographic images with the help of Photoshop. The risks related to social networking sites have been explained with a report. It was stated in the report prepared by lawyer Sahin Antakyahoglu that Facebook and similar sites create risks for children. It was told that parents sharing their children’s photographs on such sites invite perverts. According to the report, “Child abusers convert children’s photographs into pornographic images. Thus, children’s photographs shared on site for innocent purposes provide perverts with golden opportunities”. (<http://arama.hurriyet.com.tr>)

People whose sharings were violated on Internet express their situation in their own words.

“I make rag dolls as a hobby. I share these on my personal blog page and shopping sites (mostly foreign sites) with photographs and stories. Most of my rag dolls reflect the humorous side of certain characters. I also created a brand for my dolls and expose my blog and my name on shopping sites by using this brand name. I have not obtained any patent yet but I’m planning to get one as soon as possible.

2 days ago (on 22-09-2012), when my husband and I were in a famous bookstore in Kadikoy, I saw the picture of one of the toys I made on the “cover of a book” and I was really shocked. The picture of my doll was used on the cover of a book written by a foreign author; same picture was used on the bookmark in the book. I took a look at the section related to the book cover but there was nothing written about me or the brand I mentioned. Frankly, I don’t mind my doll’s picture being used in such a book but I do mind that my name has not been mentioned.”(<http://www.hukuki.net>)

I have been an amateur photographer for 7-8 years, I generally took pictures on “The History of Konya” as I live in Konya and I’m interested in history...

I coincidentally saw my photographs used without my permission in 2 magazines last month. There were 6 photographs of mine... (<http://www.hukuki.net/showthread.php?70002-Fotograf-Telifi-Hakkinda-Soru-ve-Bilgi>)

Photographs are one of the most popular means of sharing for Facebook. Considering the number of photographs uploaded to Facebook every month in 2010, which was 3 billion, the total number by the end of 2010 reached 36 billion.

LEGAL DIMENSIONS OF PHOTOGRAGH SHARING VIOLATIONS

Fast sharing and content creation on Internet, which has become a new and very effective mass communication channel, have changed the dimensions of communication on social networking sites. People really loved sharing and consuming what other people share. Moreover, they gained the chance to share simultaneously. It became possible to share any idea or content on everywhere with an Internet access regardless of the time and location. It has never been so easy to access information. Fast and easy access to contents and reaching limitless targets have also eased violations of personal rights and intellectual properties and thus made people defenseless.

A photograph violation that was used on Hurriyet Newspaper on 23 September 2012 is as follows:

“Sharing a childhood black-and-white photograph taken by his/her photographer grandfather on a web site that promotes the city in Mersin, A.O. sued when he/she the same photograph on the display window of a shop. The court overruled the claim for 10 thousand liras because of ‘using a private photograph for commercial purposes and without permission’. However, Supreme Court granted the compensation considering this unauthorized usage as an ‘attack on personal rights’.

Supreme Court Assembly of Civil Chambers (YHGK) decided that a private photograph shall not be used for “commercial purposes without any permission” even if it is shared on Internet. The Court considered the unauthorized use of a childhood photograph shared on a site as an “attack on personal rights”. A.O. gave permission for using a black-and-white childhood photograph taken by his/her photographer grandfather with his/her elder sister in the old Gumruk Square in Mersin in 1964 on a web site that promotes Mersin. A company used this black-and-white photograph on its display window and business card. Seeing this photograph in the display window coincidentally, A.O. brought a 10 thousand-lira libel suit in 3rd Civil Court of First Instance in Mersin by claiming an attack on personal rights.

District court

The court overruled the claim stating that “There is no attack on personal rights” with its decision dated 25 September 2008. The decision was as follows: “In this case, the suer gave the photograph to a web site, which was created by people researching the history and culture of Mersin and which gives information about Mersin. Thus, this means that the suer indirectly gives permission to use the photograph knowing that everyone can access this photograph when visiting the web site. The texts under the photograph are texts describing the old view of Mersin. The main purpose in this photograph is not the people in the photograph. Therefore, it cannot be regarded as an attack on personal rights.

Supreme Court: It Shall Not Be Used

As a result of the appeal, 11th Supreme Court Civil Chamber reversed the judgment. The decision dated 21 June 2010 was as follows: “It is obvious that the purpose of displaying the photograph, which is the matter in dispute, was related to the

childhood and private life of the suer. Despite the court decision, giving permission to use the mentioned photograph on the web site for cultural and promotional purposes does not mean giving permission to other people to use and reproduce this photograph for commercial purposes. It is certain that the photograph has been used for commercial purposes without any permission.

The court insisted but...

Mersin 3rd Civil Court of First Instance insisted on its decision on reversing the judgment on 4 April 2011. The court insisted on overruling the claim by presenting an additional ground that “It is not possible to decide that the photograph was used for commercial purposes when the photograph and texts are evaluated as a whole”. The decision was made after discussing the matter in Supreme Court Assembly of Civil Chambers last Wednesday. The assembly approved the decision that “The permission for using a childhood photograph representing a moment from private life on a web site for cultural and promotional purposes shall not be regarded as permission for using and reproducing that photograph for commercial purposes.” Court’s decision on insisting on overruling the claim was overruled unanimously.

As seen, there are ethical and legal methods of protection for the injured party in case of violations. The lawmaker regards these violations as an attack on personal rights. Here, law of persons is taken into account. Suits for damages, which aim to compensate the damages caused by attacks on personal rights, are among the protective precautions offered by the lawmaker for the injured party. After illegality is proved, violation is prevented and the injured party gains the right to claim for pecuniary and non-pecuniary damages. This is the subject of the law of obligations. ‘Solatium is a way of monetary compensation that must be paid by the damaging party for the compensation of pain and suffering of the injured party due to an attack on personal rights.

Copying, reproducing and distributing photographs are subject to the permission of the photographer. (In case of an agreement between the author and the user, a copyright agreement must be made.)

However, it should be known that all kinds of photographs are under the protection of FSEK. Unauthorized reproduction and use of photographs is considered as a crime according to the Law no. 5846 on Intellectual and Artistic Works. For example, using a photograph that belongs to a certain person on a company’s web site is regarded as an act that violates the Law no. 5846 on Intellectual and Artistic Works and Decree Law no. 556 on Protection of Trademarks.

In case that the photographs are reproduced or published by using the same media by a third party, provisions of law on unfair competition are executed (FSEK m.84/11).

Unfair competition is governed by the provision no. 48 of the Law of Obligations and provisions no. 56-65 of Turkish Commercial Code. The enforcement of provisions of Turkish Commercial Code related to unfair competition does not require that the person involved in unfair competition must be a merchant (FSEKm.84/II). The

duration for the protection of the photographs is determined as 25 years. (<http://www.tfsf.org/haklarimiz1.pdf>)

If the taken photograph is regarded as an artwork according to the article 4 of the law no. 5846, the right to use this artwork belongs only to the owner for any purpose according to the article 20 of the same law. This is protected by article 14 of the law no. 5846. According to this law, “The time and style of publishing a photograph is determined only by its owner.”

The lawsuits that can be brought in case of violations of the rights protected by the law on Intellectual and Artistic Works are stated in Articles 66-73 of this law... “Action of Trespass” (FSEK 66, 67, 68) in case of an attack on moral or financial rights, “Actio Negatoria” that can be brought as a preclusion in case of neglecting attacks on moral or financial rights and “Claim for Damages” (FSEK 70) for the compensation of financial and moral damages can be brought (Oztan, Firat s. 616).

THE CRITERIA USED FOR CONSIDERING THE SUBJECT PHOTOGRAPH AS AN ARTWORK

According to the law no. 5846 on Intellectual and Artistic Works, “an artwork is an intellectual and artistic product regarded as scientific, literal, musical, fine art or cinema work that reflects the characteristic of its owner.” According to article 4/5; “Photographic works” are considered as articles of vertu. A photograph must reflect its owner’s characteristic to be regarded as an artwork. Complying with certain fundamental rules of the art of photography is the criterion used to determine whether it reflects this characteristic or not. These rules are categorized as composition components and the components that provide clarity in a photograph.

In order to consider the photograph, which is the subject matter of the suit, as an artwork, fundamental components that provide clarity and composition principles should be taken into consideration (three-dimension, focus point, rhythm, impression of speed and motion, continuation, direction, integrity, harmony, balance, light, contrast, perspective, color, texture, etc.) in the photograph and most importantly, the viewer of the photograph should have the feelings of reality and the photograph should fulfill the technical requirements related to diaphragm, instantaneity, three-dimension, framing, required daylight and a good environment. Courts assign experts for the evaluation. The expert submits his/her report and the final decision is made by the judicial authority.

THE PRECAUTIONS TO BE TAKEN BY THE ARTWORK OWNER

Artwork owner has to prove that the artwork belongs to him/her in case of a lawsuit. The simplest and easiest way to do so is nota-rization. (It can be stated on the web site that all the rights and responsibilities are reserved by the artwork owner as a deterrent method. [“Tüm hakları saklıdır © All Rights Reserved”]) However, it is not as deterrent as it should be because people believe that they will not be caught. Violations can happen at any place of the world.)

In lawsuits submitted to the court, the artwork owner will be requested to prove that the artwork belongs to him/her in case of a violation. In such cases, advanced digital technologies may help the artwork owner to prove ownership by means of various recording formats.

Artwork owner should keep recording formats such as raw, jpeg and tiff. These formats are required to transfer the photographs taken by a camera to a computer. Some results can be obtained by opening this type of format on Photoshop at later stages. These are called exif data. With the help of exif data, lots of information such as the model and brand of the photo camera, the time of the photo shoot, focusing settings of the camera and Kelvin value can be learned.

CONCLUSION

Internet has become an integral part of our lives and the fastest means of interactive communication. It not only eased the way to access information but also created a brand new platform to share information. People can communicate with their friends; attend conferences & meetings; send music, video files and e-books; share their photographs on social media by using their computers and mobile devices. They are unmindful of the ethical and legal aspects of this sharing thinking that this is just personal sharing. Actually, sharing artworks is 'illegal reproduction' and is regarded as ethical and legal violation. Every country has some legal arrangements to protect the personal rights of artwork owners and people sharing. According to the law no. 5846 on Intellectual and Artistic Works in our country, such an action is considered as a crime. In case that the artworks are reproduced or published by a third party, unfair competition provisions are enforced (FSEK m.84/11). Unfair competition is governed by the Article 48 of the Law of Obligations and Articles 56-65 of Turkish Commercial Code. Today, there are developments in creating robot software that can immediately detect sharing a copyrighted artwork on a computer with the purpose of finding pirated copies. Such software will start to be used shortly.

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