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**PHOTO AS SUBJECT OF COPYRIGHT****EKATERINA NESTERENKO**  
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*Article is devoted to consideration of the photo as subject of copyright. The concept of creative activity is investigated. Criteria of novelty and originality of the work are analysed. The question of protectability of the photo is studied. Features of a legal regime of the "news" and "reporting" photo are considered.*

The photo was always and is one of the most demanded types of arts today. Recently use and distribution of photos has gained mass character, there was a set of ways of distribution and use of the photos allowing to get access to the specified objects to more wide range of persons.

Rapid development of technology has significantly aggravated the conflict between the developing institutes of copyright and allied rights on the one hand and objective requirements of society for access to cultural values, to information on the other hand, in particular a possibility of their "digital" copying in unlimited number, have led to large-scale increase in cases of a violation of the law about copyright and allied rights [1, page 3].

According to articles 992, 993 of the Civil Code of Republic of Belarus photographic works, including the works received by the ways similar to the photo are subjects of copyright [2].

But neither the Civil code of Republic of Belarus, nor the Law of Republic of Belarus "About copyright and allied rights" contains legal definition of the work which is the main category of copyright. The lack in the legislation is met in works of scientists in the field of copyright. The greatest distribution was gained by definition of V. I. Serebrovsky who understood as the work set of the ideas, thoughts, the images which have received as a result of creative activity of the author the expression in available to perception by human feelings to the concrete form allowing a possibility of reproduction [3]. There is also a number of other definitions concerning a concept the work. For example, E. P. Gavrilov defines the work as "the result of creative activity of the author expressed in an objective form" [4, page 44].

According to article 992 of the Civil code of Republic of Belarus and article 6 of the law "About Copyright and Allied Rights" of the work which are subject of copyright have to:

- 1) to represent result of creative activity;
- 2) to be expressed in an objective form.

As the photo is subject of copyright, it has to be result of creative activity. The legislation of Republic of Belarus contains the legal definition of creative activity enshrined in article 1 of the Law "About Culture in Republic of Belarus" which is defined as follows: "Creative activity - the type of cultural activity including art creativity and other intellectual activity that comes to the end with emergence of the new, not existing earlier independent result of intellectual activity in the field of culture" [5]. Scientists, in turn, developed various options of determination of category "creative activity". So, V. I. Serebrovsky wrote that "creativity is conscious and in most cases very labor-intensive process aiming at achievement of a certain result" [3].

On the basis of the analysis of the definition offered by V. I. Serebrovsky it is possible to note that, first, creativity is an intellectual activity of the person, but not physical and, secondly, such activity of the person has to result in result which was not known earlier.

Based on the modern level of knowledge in the field, creativity in an author's right can be defined as the intellectual activity of the person in the field of literature and art directed to creation of original result [1, page 8].

As creative activity assumes creation of the new work, one more integral sign – a novelty sign appears. This sign is not allocated as independent as novelty cannot always testify to creative character of the work. As A. P. Sergeyev notes, in an author's right which protects a work form, allocation of a sign of novelty as independent is represented excessive as "it is completely absorbed by a creativity sign" [1, page 11].

In the doctrine of the Soviet period as conditions of protectability of the work such signs as novelty and originality [6] were allocated, recognition was gained by theses that object of protection is not activity of the author, and the work [7, page 22], that novelty in itself does not testify to independence and creative character of the work as new can be result of technical character [3, page 33].

Whether but in the analysis of a question that or other result an object author's is, proceeding from interpretation of standards of the civil legislation it is possible to claim that other is not proved yet, results of intellectual activity are assumed created by creative activity.

Similar approach found reflection in court practice of Republic of Belarus. So in the case of Anton Motolko, two photos of the claimant which the defendant used without the permission as he considered that they

do not belong to objects of an author's right became a subject of judicial proceedings. In the conclusion the expert of art criticism examination came to a conclusion that pictures are not unique, in them there is no "an art novelty" and they "are not exclusive in the photoworld". The expert supported the beliefs with the list of references. Protecting the interests, the defendant claimed that in photos there is no creative activity, referring to the fact that pictures were taken within two minutes, and for such short period, in his opinion, it is possible to state the natural phenomenon only.

It is also necessary to consider that lack of novelty in itself, uniqueness and (or) originality of result of intellectual activity cannot demonstrate that such result is not creative activity and, therefore, is not an object of an author's right [8, page 24].

Today in practice as a separate look select "news" and "reporting" photos. In the doctrine the uniform position concerning a legal regime of the specified works was not created.

The "news" photo is understood as daily shooting of the current events, it is not important — local or international scale.

Concerning this type of photos there is the Russian court practice where the court specifies that a subject of a dispute are the photos which are not comprising a creativity element. There are beliefs that if the photographer costs on one place or there is no production plot, etc., then photos lose signs of novelty and originality. Though with development of digital technologies, even being in one place the photographer can estimate all process of photographing, choose the most interesting moments. In this process creative activity of the photographer is also shown.

There are opinions that process of pressing of the button of a lock of the camera of photographers and further conversion of a picture to paper, are exclusively mechanical actions and do not demand the application of mental abilities, creative activity of the person at all.

It is difficult to agree with this position. Before making a photo the photographer thinks over future ready result of photographing. He needs to point the camera at the interesting object, then to choose necessary technical settings of the camera for a successful shot and only after that he presses the lock button.

It is obvious that today there are many technical means by means of which the photographer can influence stay in space of an object of photography, its illumination, lenses with various viewing angle, the matrixes of the camera of various photosensitivity allowing to remove objects indoors with various degree of opacity and many other things concern to them [8, page 27].

As a result of the above, one may say, that even being in one place, the photographer can assess the situation occurring around and all process of photographing to choose the most high and impressive points disclosing the idea of the photographer which then it reproduces in the pictures.

It is impossible to disregard and the photo report which is understood as the shooting method allowing the photographer to fix original life without interfering with its current, seeking to transfer its original essence in a picture, also understand a series of photos as the concept "photo report" [8, page 28].

This type of photos is excluded from objects of an author's right as the main line of the photo report is documentation. Though the exception of the organization of the subject does not mean impossibility of exact composite solutions of reporting pictures, on the contrary, at all impossibility to work with an object, to give it a certain look or a pose, demands bigger creative activity as the photographer should choose the correct composition methods for a successful shot. Talent, creative activity, originality give the chance to show all truthfulness of events, an essence of the phenomena, help to characterize the hero objectively.

Therefore the photo report as a shooting method, is not the proof of existence or lack of "a creative element" of photos received by the specified method [8, page 29].

Thus in court practice the concepts "news" and "reporting" of the photo meet, however at the legislative level these concepts are absent.

Not all photos should be considered objects of an author's right as it is necessary to consider the purpose which initially was the cornerstone of creation of the photo. So, if the purpose of the photographer was to receive the work, then it is impossible to deny existence of its creative activity, but in case initially the purpose was fixing and information transfer, for example, the video recorder in the car, then this picture will not be considered as the work.

On the basis of the conducted research, it is possible to conclude that in practice there are questions of existence or lack of creative activity in photographic works. Also questions of differentiation of "news" and "reporting" photos take place that causes need of improvement of the Belarusian legislation.

#### REFERENCES

1. Иванов, Н.В. Авторские и смежные права в музыке : моногр. / Н.В. Иванов, А.П. Сергеева ; под ред. А.П. Сергеева. – 2-е изд., перераб. и доп. – М. : Проспект, 2016. – 328 с.

2. Гражданский кодекс Республики Беларусь [Электронный ресурс] : Закон Респ. Беларусь, 7 дек. 1998 г., № 218-3 : в ред. Закона Респ. Беларусь от 30 дек. 2015 г., № 343-3 // Эталон 6.6 – Беларусь / Нац. центр правовой информ. Респ. Беларусь. – Минск, 2016.
3. Серебровский, В.И. Вопросы советского авторского права / В.И. Серебровский. – М., 1956. – 281 с.
4. Гаврилов, Э.П. Комментарий к закону об авторском праве и смежных правах: Судеб. практика / Э.П. Гаврилов. – М. : Экзамен, 2002. – 352 с.
5. Аб культуры ў Рэспубліцы Беларусь [Электронны ресурс] : Закон Рэсп. Беларусь ад 4 чэрв. 1991 г., № 832-XII // Эталон 6.6 – Беларусь / Нац. центр правовой информ. Респ. Беларусь. – Минск, 2015.
6. Кашанин, А.В. Уровень требований к творческому характеру произведения в отечественном юридическом дискурсе / А.В. Кашанин // Законы России: опыт, анализ, практика. – 2012. – №9. – С. 92–102.
7. Савельев, И.В. Правовое регулирование отношений в области художественного творчества / И.В. Савельев. – М., 1986. – 310 с.
8. Вешкурцева, З. Цифровая фотография: проблема теории и практики / З. Вешкурцева // Интеллектуальная собственность. Авторское и смежные права. – 2014. – № 8. – С. 21–30.