

Age of technology – metadata is sufficient to retain author's right of attribution

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Facts

Decision

Comment

The Supreme Court recently ruled⁽¹⁾ that the producer of a photograph who marks his or her name in the photograph's metadata must be credited as the producer on copies of the photograph made by other persons and intended for distribution.

Facts

The plaintiff took a photographic portrait of a columnist who regularly wrote for a newspaper published by the defendant. She transmitted the photograph to the columnist electronically in a JPEG format. The file's International Press Telecommunications Council (IPTC) metadata contained the following information: "Producer: E*** K***", "Copyright Status: Public Domain" and "Copyright Note: E*** K***".

The defendant published the photograph in its publication to accompany the pieces written by the columnist. The photograph did not credit E*** K*** as its producer.

On behalf of the producer, the copyright collecting society managing photographers' rights filed an action on the merits, demanding that the defendant not publish the photograph without crediting the producer. The action was based on Section 74(3) of the Copyright Act, which stipulates that where a producer has marked his or her name on a photograph, copies thereof made by other persons and intended for distribution must credit the producer.

The first-instance court rejected the claim. The appellate court overturned the decision and found in favour of the collecting society. The appellate court allowed an appeal to the Supreme Court in order to determine whether the right to be credited as the producer of a photograph pursuant to Section 74(3) of the Copyright Act can be based on markings in the metadata of a photograph.

The Supreme Court accepted the defendant's appeal but ultimately rejected it, confirming the legal view of the appellate court.

Decision

The Supreme Court stressed that Section 74(3) of the Copyright Act entitles the producer of a photograph to prohibit the reproduction and distribution of a photograph which does not credit him or her, provided that the producer objectively expresses his or her wish to be credited as the producer in close connection with the photograph itself.

In relation to the 'close connection' requirement, the Supreme Court alluded to earlier decisions⁽²⁾ where, in the context of an analog photograph, it took the view that a sufficient close connection is deemed to exist if the producer writes his or her name on the wrapping of the negatives, the plastic bags of diapositives or the backs of paper prints. According to previous case law, a close connection is lacking if the producer merely states in an accompanying letter sent to his or her direct customer

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that he or she is the photograph's producer, because a later buyer may be unaware of the producer's request. The same goes for a reference to the producer on the packaging of a parcel, since packaging material is normally thrown away without much attention being paid to it.(3)

In summarising these precedents, the Supreme Court pointed out that there is no need for a producer to put his or her name directly on the photograph itself in order to retain the right to be credited as its producer. The only relevant fact is that the producer's name would under normal circumstances come to a third party's attention when reproducing and distributing a copy of the photograph.

After a brief analysis of the nature of metadata and the IPTC-Information Interchange Model standard, the Supreme Court concluded that – considering that a reference on the wrapping of the negatives or the back of paper prints meets the close connection requirement – a reference in a photograph's metadata must also be regarded as sufficient, given that metadata is a part of the electronic file and can easily be accessed by a user.(4)

Therefore, the Supreme Court held that putting the producers' name in the metadata creates a sufficient 'close connection' to the digital photograph within the meaning of Section 74(3) of the Copyright Act and thus obliges any third party that copies and distributes the marked photograph credit the producer on reproduction.(5)

Comment

This judgment is good news for producers of digital photographs who wish to safeguard their copyright. All they have to do is mark the photograph by stating their name in the metadata. In future, persons reproducing and distributing digital photographs should routinely check the metadata to ensure that the producer's name is listed on any reproduction. Failing to do so could be a costly mistake, as neither reproduction nor distribution would have the copyright holder's consent. The copyright holder would not only have a cease and desist claim, but also a claim for damages. Under Austrian copyright law, in the case of negligence, instead of claiming damages, a copyright holder may claim twice the amount of a reasonable licence fee. Considering the Supreme Court's judgment, anyone that reproduces and distributes photographs on a commercial level and does not check the metadata for the producer's copyright marking will be deemed to have acted negligently.

The judgment is a welcome interpretation of the applicability of Section 74(3) of the Copyright Act in the context of digital photography. While the case law regarding marking photo negatives and paper prints with the producer's name served its purpose in the 1980s and 1990s, advances in technology require that existing rules occasionally be re-interpreted in light of the available technology.

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Endnotes

- (1) OGH March 28 2017, 4 Ob 43/17b.
- (2) OGH September 16 1986, 4 Ob 341/86.
- (3) OGH October 12 1993, 4 Ob 117/93 and 4 Ob 121/93.
- (4) OGH March 28 2017, 4 Ob 43/17b para 4.2.
- (5) OGH March 28 2017, 4 Ob 43/17b para 4.2.

