

JAGODA MAĆKOWIAK¹

Specific Instagram Works

Abstract: Universal access to social media platforms, the vast number of users, and the resulting diversity of published content have created challenges regarding the recognition of materials as subject matter of copyright and the protection of users' creativity on these platforms. Within the legal publishing market, there is a noticeable lack of comprehensive consideration of the issues surrounding creative works on Instagram. Therefore, the aim of this article is to provide a legal analysis of the aforementioned issue and to examine the specific types of content shared by Instagram users based on existing concepts and institutions of copyright law. To achieve this, the article assesses the potential recognition of Instagram users as authors and explores whether materials posted on Instagram may constitute subject matter of copyright.

Keywords: Instagram works, copyrights, social media, Instagram, subject matter of copyrights

Introduction

Over the years, social media have become an integral part of life for most people worldwide. In many cases, it is through their prism that we explore the world around us, communicate with each other, sharing snippets of our

1 Jagoda Maćkowiak, SWPS University, Kutrzeby 10, 61-719 Poznań, Poland. e-mail: jagodamackowiakk@gmail.com, <https://orcid.org/0009-0002-9301-8092>.

daily lives, and occasionally create an idealized reality. Social media platforms serve as virtual spaces where, upon creating a profile, users can share a variety of content, often drawn from their private lives, communicate with friends, and establish new contacts, thereby forming a space for active interaction on a broad scale.²

According to the definition by Boyd Danaher and Nicole B. Ellison, social media platforms are online services directed at individuals and characterized by three specific attributes: the ability to create a public or partially public profile within a defined platform, the capability to compile a list of users who are connected in some manner, and the opportunity to track the activities of other users of the service.³ Among the most frequently utilized social media platforms are Facebook, YouTube, TikTok, and Instagram. Nonetheless, Instagram remains one of the social media platforms that, despite its establishment several years ago amidst the emergence of numerous new services offering increasingly novel functionalities, continues to enjoy significant popularity among users. It plays a crucial role in communication, marketing, and promotion, contributing to the continuously growing number of individuals opting to become part of the “Instagram community” by creating profiles on this platform.⁴

The functions available on Instagram and the nature of this platform have led users to share their creations through it, disseminating materials

2 Izabela Stańczuk, “Dane osobowe jako „waluta” związana z uczestnictwem w mediach społecznościowych,” in *Media w erze cyfrowej. Wyzwania i zagrożenia*, ed. Katarzyna Chałubińska-Jentkiewicz et al. (Wolters Kluwer, 2021).

3 Iga Małobęcka-Szwast, *Big Data and the Abuse of a Dominant Position by Data-Driven Online Platforms under EU Competition Law* (C.H. Beck, 2021), quoted by: Danah M. Boyd and Nicole B. Ellison, “Social Network Sites: Definition, History, and Scholarship,” *Journal of Computer-Mediated Communication* 13, no. 1(2008): 211, <https://doi.org/10.1111/j.1083-6101.2007.00393.x>. The nature and terminology of these connections may differ from site to site. See also: Aleksandra Gebicka and Andreas Heinemann, “Social Media & Competition Law,” *World Competition* 37, no. 2(2014): 152; Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Wolters Kluwer, 2016), 12–13.

4 Anna Lojza and Radosław Wolniak, “Media społecznościowe jako narzędzie komunikacji marketingowej na przykładzie serwisu Instagram,” *Management and Quality – Zarządzanie i Jakość* 3, no. 3(2021): 37–59.

they have generated, such as photographs, videos, or graphics, in the form of posts, reels, or InstaStories. However, the type of content posted, as well as the functionality of the platform, affect the specific nature of the content posted on Instagram. This gives rise to the need for an analysis of the challenges surrounding Instagram creativity. It should be noted that in the legal publishing market lacks comprehensive examination of these issues. Therefore, the aim of this article is to analyze Instagram creativity from the perspective of existing legal concepts and institutions, as well as the tools developed by Instagram.

It should be pointed out that in Poland, the creation, content, and determination of intellectual property rights, including copyright, “are subject to the law of the country in which the right is exercised, as stated in Article 46(1) of the Act of 4 February 2011—Private International Law.⁵ Additionally, paragraph 3 of the aforementioned regulation emphasizes that the law of the country providing protection shall apply to the protection of these rights. Therefore, issues concerning copyright on Instagram will be governed by individual national legal systems.

According to Polish law, pursuant to Article 5 of the Act of 4 February 1994 on Copyright and Related Rights,⁶ these provisions apply to Instagram authors who are citizens of or residents in a Member State of the European Union. They also apply to works of Instagram authors first published in the territory of the Republic of Poland, or simultaneously in this territory and abroad, or those first published in the Polish language. Nevertheless, since content is posted on a social media platform, users will also be subject to internal provisions specifically created for the particular service, such as Instagram.⁷

⁵ Consolidated text: Journal of Laws of 2023, item 503, hereinafter: PIL.

⁶ Consolidated text: Journal of Laws of 2022, item 2509, hereinafter: Copyright Act.

⁷ Anna Podolska, “Portale społecznościowe, blogi i vlogi a prawo autorskie,” in *Prawo autorskie w praktyce. O prawach twórców i odbiorców utworów*, ed. Ewelina Szatkowska (Wolters Kluwer, 2022), 296–300.

The History of Instagram

To conduct an analysis of Instagram creativity, it is first necessary to consider the nature of the platform itself, which may influence the perception of user activities on the service, as evidenced by the platform's history of creation.

Meta Platforms Inc.,⁸ which also owns Facebook, currently owns Instagram. The service was founded in 2010 in San Francisco by Kevin Systrom and Mike Krieger. Considering the available applications at the time, the creators inferred that a platform enabling users to share photos and communicate would perfectly meet societal needs and fill a previously unexploited area.⁹

The name “Instagram” accurately reflects its key function, i.e. allowing users to share photos, which is reminiscent of the instant communication made possible by telegrams.¹⁰ The invented term may also symbolize the speed and efficiency of the interactions facilitated by the platform.

The debut material on Instagram, then known as *Codename*, was published on July 16, 2010, on a profile named *kevin* and consisted of five photographs. However, in the literature, the first shared content is recognized as a photograph of a golden retriever dog, whose name was not disclosed, taken near a food stall called *Tacos Chilakos*. The photograph also featured a foot, most likely belonging to the partner of its author—Nicole Systrom. The first published post was captioned with the description “test.” The author of the photograph and the first post was Kevin Systrom, who, as was mentioned, is also one of the creators and innovators of the entire service.

Initially, Instagram had only basic, simple functions that evolved over time with technological advancements. Starting from the ability to solely observe other users' profiles and share photographs, capabilities expanded to include photo editing features such as filters and overlays, as well as the ability to geotag photos.

8 Since the latter part of 2021, the name Meta Platforms, Inc. has been in effect (formerly known as Facebook, Inc. from 2005 to 2021 and as TheFacebook, Inc. from 2004 to 2005).

9 Katarzyna Grzybczyk, “Instagram – jak zostać influencerem,” in *Rozrywki XXI wieku a prawną własności intelektualnej* (Wolters Kluwer, 2020), 155.

10 Grzybczyk, “Instagram – jak zostać influencerem,” 155.

Hashtags were also introduced, i.e. “phrases preceded by the # sign, which in Internet communication are used to mark content (posts, photos, videos) so that they can be searched more easily.”¹¹ They were intended precisely to facilitate the discovery of content of interest. Although the service offers numerous tools, it continues to undergo modifications and updates in response to emerging changes and societal needs, thereby influencing the distinctive nature of the content shared through its platform.

Instagram Author

Universal access to the internet and social media has enabled practically anyone to create a profile on various platforms, including Instagram. However, there are exceptions in this regard, as per Instagram’s Terms of Service: “Users must be at least 13 years old.”¹² Therefore, to access the service and create a profile, individuals must meet the age criterion.

In Poland, upon reaching the age of thirteen, according to Article 15 of the Civil Code dated April 23, 1964,¹³ hereinafter referred to as the Civil Code, individuals attain limited legal capacity. Limited legal capacity primarily means that such individuals participate in legal transactions personally or are represented by a legal representative; importantly, there are also cases where such individuals cannot act at all. According to Article 20 of the Civil Code, a person who has reached the age of thirteen has the ability to independently conclude contracts that are commonly made in minor, everyday matters of life. Additionally, under Article 21 of the Civil Code, such individuals may dispose of their earnings without the consent of a legal representative, unless the guardianship court decides otherwise for important reasons.

11 Keyword: “Hashtag,” *Wielki Słownik Języka Polskiego*, accessed April 25, 2023, <https://wsjp.pl/haslo/podglad/86506/hashtag>.

12 “Instagram Terms of Service,” Instagram, accessed April 25, 2023, <https://www.facebook.com/help/instagram/581066165581870>.

13 Consolidated text: *Journal of Laws of 2023*, item 1610, as amended.

A natural person, upon becoming a user of a service, gains access to its tools, primarily enabling them to share their created content, such as photos, videos, or graphics with individuals who follow their profile. Collectively, this activity can be defined as creativity, attributable to active users—natural persons—many of whom can be considered authors under the Act of 4 February 1994 on Copyright and Related Rights.

The Act does not provide a strict definition of the author; however, this term is indirectly described in Article 8 of the Copyright Act. According to paragraph 1 of this provision: “Unless otherwise provided for in this Act, the holder of copyright is the author.”¹⁴ The second paragraph of the article further states that: “It is assumed that the author is the person who is named as such on the copies of a work or whose authorship has otherwise been communicated to the public in association with distribution of a work.”¹⁵

From the cited provision, it follows that, as a general rule, copyright belongs to the creator who is the author of a given work. Therefore, only a human being—a natural person—can be considered an author.¹⁶ In this respect, factors such as age, competence, education, awareness, or the degree of legal capacity are irrelevant.¹⁷

An attempt to define the term author was made by the Regional Administrative Court in Warsaw in a judgment dated December 4, 2015, IV SA/Wa 2455/15 according to which: “A creator is considered to be the author of a work of art or a scientific study, the subject of a creative act, completed by bringing to life a work of a singular nature, which has not existed before and which, at the time it is made available, has the value of novelty. (...) The author gives the work artistic, aesthetic or cognitive value and individual

14 Act of February 4, 1994 on Copyright and Related Rights (consolidated text: Journal of Laws of 2022, item 2509).

15 Act of February 4, 1994 on Copyright and Related Rights (consolidated text: Journal of Laws of 2022, item 2509).

16 Ewa Ferenc-Szydełko, ed., “Art. 8,” in *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz* (C.H. Beck, 2021).

17 Ferenc-Szydełko, ed., “Art. 8.”

character. An author is only a person, contributing original artistic or cognitive invention.”¹⁸ In addition, the legislator, in the provision of Article 8(2) of Copyright Act, introduced a presumption that the person whose name is indicated on a copy of the work or made available to the public in a manner related to the dissemination of the work is considered the creator of the work, nevertheless, according to the position presented in the doctrine and case law, this presumption may be rebutted, using all means of evidence, because: “the wording of the provision and logical interpretation lead to the conclusion that the inclusion of the name of a certain person on a work as the author cannot prejudge the issue of authorship conclusively”¹⁹ (*vide*: the Supreme Court in its judgment of December 21, 1979, I CR 434/79).

Therefore, in order to recognize the author of a work as an author, it is not necessary for them to possess any exceptional qualities, skills, or competencies; the sufficient criterion is solely the possession of legal capacity, which is inherent to every human being from birth.²⁰ Nevertheless, factors such as age, mental state, or legal incapacity may affect the ability of the author to exercise or dispose of their copyright. Therefore, while the author may hold the status of an author, the execution of their copyright may necessitate the involvement of third parties, particularly legal representatives,²¹ however, this issue is not the subject of this article’s focus.

In summary, according to the Instagram Terms of Service, the purpose of creating an account on the platform, and consequently becoming a participant in this medium, requires reaching the age of thirteen. In Poland, individuals achieving this milestone are granted limited legal capacity. Therefore, natural persons who are users of Instagram possess the prerequisites to be considered authors under Article 8 of the Copyright Act, as this status is granted irrespective of age or mental state. The potential challenge in this context could pertain

18 Judgment of the Regional Administrative Court in Warsaw of December 4, 2015, IV SA/Wa 2455/15, LEX no. 2327035.

19 Judgment of the Supreme Court of December 12, 1979, I CR 434/79, OSNC 1980, no. 9, item 171; and Ferenc-Szydełko, ed., “Art. 8.”

20 Adrian Niewęglowski, “Art. 8,” in *Prawo autorskie. Komentarz* (Wolters Kluwer, 2021).

21 Niewęglowski, “Art. 8.”

solely to the independent execution of significant legal acts, which, however, falls outside the scope of this analysis.

The Subject Matter of Copyright Protection on Instagram

As has been emphasized, social media platforms are filled with a vast array of content posted by users, and their quantity increases every day. Depending on the user's intentions and the nature of the platform, these include photographs capturing everyday moments, portraits, landscapes, artistic photos, as well as illustrations, graphics, and textual content. Currently, short video clips are also gaining significant popularity.

On Instagram, one can find content in practically every form mentioned above, which is posted using all the available functions offered by the platform. As indicated earlier in this work, users can share their creations by posting photos, videos, or instastories. However, a question arises as to whether such materials are subject to copyright and will enjoy the copyright protection guaranteed by the Act on Copyright and Related Rights.

In light of the provision contained in Article 1(1) of the Copyright Act, the subject matter of copyright is a work, understood as any manifestation of creative activity, characterized by individuality and expressed in any form, regardless of its value, purpose, or manner of expression.²² Accordingly, copyright protects intellectual property, meaning that under the regulation of the Copyright Act, for example, a literary work is not the physical book as a collection of bound sheets of paper, but rather the specific intellectual creation it embodies, created by the author.²³ Therefore, the physical carriers of works are not covered by copyright protection.²⁴

²² Act of February 4, 1994 on Copyright and Related Rights (consolidated text: Journal of Laws of 2022, item 2509).

²³ Ewelina Szatkowska, "Utwór jako przedmiot prawa autorskiego. Zagadnienia podstawowe," in *Prawo autorskie w praktyce. O prawach twórców i odbiorców utworów*, ed. Ewelina Szatkowska (Wolters Kluwer, 2022), 19.

²⁴ Ewa Ferenc-Szydełko, ed., "Art. 1," in *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz* (C.H. Beck, 2021).

In legal doctrine, it is consistently accepted that the determination of which intangible goods can be defined as works under Polish law is achieved through two methods of definition. One method is based on enumerating specific goods that are under copyright protection, while the other method involves indicating general criteria that condition the granting of copyright Protection.²⁵

As previously indicated, the second method stipulates that to consider a specific intangible good as the subject of copyright, it must be the result of human activity, constitute a manifestation of creative activity, possess individual character, and be fixed. By fulfilling these criteria, a work, regardless of its value, purpose, and manner of expression, will be subject to protection. In this aspect, the intention behind its creation, its purpose, or its utility are irrelevant.²⁶

Instagram Works

Users of the Instagram platform post various types of content daily, utilizing the different functionalities provided by the portal, such as posts, reels, or instastories. By doing so, they enhance their profiles with new components that affect the overall perception of their profile, often with the aim of brand building. Moreover, these materials can belong to different categories, classified according to various criteria. Many of these materials can be granted the status of a work within the meaning of copyright law. Some of them are works that can be classified under the examples in the catalog contained in Article 1, Section 2 of the Copyright Act, including works expressed in words, graphic symbols, photographs, or audiovisual works.²⁷ However, there are also types of creative works that do not fit within the existing established frameworks. These include

²⁵ Jacek Sobczak, *Prawo autorskie i prawa pokrewne* (Iuris, 2000), 34.

²⁶ Judgment of the Supreme Court—Civil Chamber of February 21, 2020, I CSK 513/18, OSNC 2020, no. 12, item 104.

²⁷ Act of February 4, 1994 on Copyright and Related Rights (consolidated text: Journal of Laws of 2022, item 2509).

specific Instagram creations that are not explicitly listed in the aforementioned catalog but satisfy the criteria of Article 1, Section 1 of the Copyright Act.

Works Expressed in Words or Graphic

On Instagram, practically every post is accompanied by a description. As practice shows, these descriptions supplement the visual content by communicating information about the posted material or providing a narrative related to it. Descriptions help build relationships with followers and convey specific content, stories, or general messages. It turns out that these descriptions can often play a crucial role or, at the very least, be a significant element of a post or reel.

On Instagram, one can also find content where the message is expressed in words or through graphic symbols, taking the form of an image with such elements. These creations can constitute works expressed in words or graphic symbols in accordance with Article 1, paragraph 2, point 1 of the Copyright Act.

The works listed in Article 1, Paragraph 2, Point 1 of the Copyright and Related Rights Act (PrAut) are diverse, belonging to various fields. However, according to the position of E. Ferenc-Szydełko, “they are all characterized by a common feature - their primary form of expression is recorded on a paper or electronic medium.”²⁸ The expression of a work in words relates to the method of perceiving such a creation through the sense of sight, thereby including materials in written form, such as widely disseminated printed books or manuscripts, as well as in electronic form—presented through computer program code, messages,²⁹ Instagram post descriptions, or images containing textual elements. Works expressed through graphic symbols are created using letters, graphics, symbols, or emblems. It is also accepted that, provided the

28 Ewa Ferenc-Szydełko, ed., *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz* (C.H. Beck, 2021).

29 Ewa Laskowska-Litak, “Art. 1,” in *Komentarz do ustawy o prawie autorskim i prawach pokrewnych*, in *Ustawy autorskie. Komentarze. Tom 1*, ed. Ryszard Markiewicz (Wolters Kluwer, 2021).

criteria outlined in Article 1, Paragraph 1 of PrAut are met, this category would also include messages utilizing so-called emojis.³⁰

The provision contained in Article 1, Paragraph 2, Point 1 of the Copyright Act, besides stipulating the appropriate method of expressing a work and meeting the general criteria of a work indicated in Paragraph 1, does not foresee additional requirements necessary for categorizing a creation within the discussed category. Therefore, it follows that works not explicitly listed in the regulation are also subject to copyright protection in this respect.³¹ Certainly, due to the nature of the Instagram platform, one will not find content that qualifies as literary works; instead, one encounters materials more akin to journalistic works addressing current topics, especially social, cultural, or political issues. According to doctrinal interpretations, particularly that of R.M. Sarbiński, these are so-called „non-fictional” works, where the author draws from existing components in the world but expresses them in an individual, creative, and original manner.³²

On Instagram, we encounter materials on a daily basis that are expressed through words and graphic symbols. However, due to the nature of the medium, such content typically consists of short statements, which makes it difficult to fulfill the criteria of Article 1, Paragraph 1 of the Copyright Act and demonstrate their creative and individual character. Nonetheless, achieving this is not impossible.³³

Photographic Works

The primary and fundamental type of content shared on Instagram was photographs, which aligned with the initial premise of its creators—that participants would communicate with each other through photos. This premise proved suc-

30 Laskowska-Litak, “Art. 1.”

31 Laskowska-Litak, “Art. 1.”

32 Rafał M. Sarbiński, “Art. 1,” in *Prawo autorskie i prawa pokrewne. Komentarz*, ed. Wojciech Machała and Rafał M. Sarbiński (Wolters Kluwer, 2019).

33 Sarbiński, “Art. 1.”

cessful for many years, and over time, additional platform functionalities were introduced to improve its operation and appeal to users. Despite the development of the platform and new introduction of new possibilities, the original idea of communicating through photos remains relevant and widely used by participants of the Instagram community.

The term “photography” should be understood as “the capturing of images using a photographic camera.”³⁴ However, not every photograph will constitute a photographic work as defined in Article 1(2)(3) of the Copyright Act. For this purpose, it is necessary for the photograph to meet the general criteria set forth in Article 1(1) of the Copyright Act, meaning it must be a manifestation of creative activity by a human being, and it must exhibit a creative idea, innovation, and uniqueness.³⁵ As adopted by the Court of Appeals in Białystok in its judgment of April 11, 2018 in the case I ACa 1009/17: “The photographic work is a subjective vision of reality, as it reflects the author’s way of seeing the world. (...) ‘Creativity’ within the meaning of Article 1(1) of the Copyright Act can be recognized in the field of photography as the conscious choice of the moment of shooting, the point of view, the composition of the image (framing), lighting, determining depth, sharpness, and perspective, applying special effects, and techniques aimed at giving the photograph a specific character.”³⁶ Additionally, the Court pointed out that the uniqueness of a photograph can also be manifested in the composition and arrangement of photographed objects, subjects, or people, as well as the obtained colors or background. The creative nature of the actions taken can occur at the time of taking the photograph, but also before and after it, particularly in terms of introducing modifications.³⁷

34 Keyword: “Photograph,” Słownik języka polskiego PWN, accessed April 30, 2024, <https://sjp.pwn.pl/slowniki/fotografia.html>.

35 Judgment of the Court of Appeals in Lublin of September 12, 2016, I ACa 942/15, LEX no. 2209926.

36 Judgment of the Court of Appeals in Białystok of April 11, 2018, I ACa 1009/17, LEX no. 2658034.

37 Judgment of the Court of Appeals in Białystok of April 11, 2018, I ACa 1009/17, LEX no. 2658034.

According to R. Markiewicz, when analyzing a photograph to determine its creative character, verification should be made regarding three aspects:

- the photographed subject, in terms of arrangement, composition, or lighting,
- the execution of the photograph, involving the choice of moment, place, photographer's setup, or applied technique,
- editing of the photograph after it was taken, including modifications, frame adjustments, application of effects, or even development techniques.³⁸

Due to the ubiquity and multitude of photographs taken, creating a completely unique and unparalleled photograph may seem potentially impossible. However, in reality, many photographs do exhibit elements that mean they satisfy the required criteria. Therefore, in order to classify a photograph as a photographic work within the meaning of Article 1(2)(3) of the Copyright Act, it is necessary to verify the aforementioned criteria. For certain types of photographs, this examination will be relatively straightforward and lead to unequivocal findings. For others, however, it may prove challenging and, at times, even subjective.

Photographs of Human Profile

In the Instagram space, one of the most frequently shared types of photographs are those depicting people in various situations. These range from posed shots taken by professionals to spontaneous images from everyday life or vacations, including selfies and portraits. Despite their diversity, not all of these photographs will qualify as photographic works within the meaning of Article 1(2)(3) of the Copyright and Related Rights Act.

First and foremost, it should be noted that photographs taken for documents such as passports or identity cards do not constitute subject matter pro-

³⁸ Ryszard Markiewicz, *Ilustrowane prawo autorskie* (Wolters Kluwer, 2019), 109.

tected by copyright. As indicated by the Court of Appeals in Białystok, photographs taken according to a pre-defined schema imposed primarily by law, as in the case of document photos, lack sufficient manifestations of creative individuality or creativity, and therefore do not qualify as works.³⁹ A similar situation arises with template photographs, often portraits, where identifying creative expressions can be very challenging, although it is not impossible under the right conditions.

On Instagram, one can find many photographs that appear to meet the criteria allowing them to be recognized as photographic works within the meaning of Article 1(2)(3) of the Copyright Act, as they stand out for their originality and uniqueness, which is evident in the very concept of the photograph. Additionally, they often feature distinctive compositional arrangements, background, lighting, positioning of subjects, and even the location from which the frame was captured is not incidental. All these components of the photographs may determine their qualification as subject matter protected by copyright.

Audiovisual Works

Currently on Instagram, there has been a significant rise in sharing not only photographs but also video materials posted as so-called *reels*. It should be noted that, in addition to classic short videos that do not stand out among others with specific features, unique and distinctive content also appears on Instagram, which may constitute audiovisual works within the meaning of Article 1(2)(p) of the Copyright Act.

An audiovisual work, as indicated by M. Poźniak-Niedzielska, is “a collection of sequences of images usually combined with sound, evoking in the viewer’s consciousness the impression of motion.”⁴⁰ Both legal doctrine and

39 Judgment of the Court of Appeals in Białystok of February 19, 2016, I ACa 955/15, LEX no. 1998958.

40 Maria Poźniak-Niedzielska, *Autorstwo dzieła filmowego. Studium cywilnoprawne* (Wydawnictwo Prawnicze, 1968), 52–53.

case law that the key element of such materials is their ability to evoke in the audience a sense of image movement.⁴¹ It should be emphasized that for an audiovisual work to be recognized as a work, it must also fulfill the general requirements provided in Article 1(1) of the Copyright Act, namely uniqueness and creativity. This position was confirmed by the Court of Appeal in Łódź, which indicated that “not every recording of an event with a camera constitutes an audiovisual work and may be treated as an object of copyright protection only when it meets the general criteria of a work.”⁴²

Instagram *reels*, despite often having a short form and being recorded with a phone camera, can result from significant creative effort. Authors often dedicate time not only to conceptualizing the entire material but also to the recording process itself—especially capturing appropriate shots, often from a special and unconventional position of the recording person, framing, and then editing individual shots, and adding special effects, including sounds and texts. All of this ultimately contributes to the unique and original character of the film, as well as its complexity due to the multitude of components involved.

The individual character of a work is one of the key criteria for copyright protection. *Reels*, through their form, content, and presentation style, can exhibit individual features that reflect the personality and style of the author. For example, the narrative style, choice of music, arrangement of scenes, framing, and the use of various editing techniques can make a particular video recognizable and attributed to a specific creator.

It is important to note that the legal provisions do not specify requirements regarding the minimum length of a work. This means that even a short video, such as a reel lasting only a few seconds may be subject to copyright protection if it meets the conditions specified in Article 1(1) of the Copyright Law. The short form of *reels* does not exclude them from legal protection, as what

41 Anna Wojciechowska, *Autorskie prawa osobiste twórców dzieła audiowizualnego* (Zakamycze, 1999), 56–57.

42 Judgment of the Court of Appeals in Lodz of December 17, 2002, I ACa 254/02, LEX no. 535064.

matters is their creative, individual, and original character, rather than the duration of the work.

It is significant that *reels* may contain various elements that can independently be protected by copyright, such as music, texts, photographs, or graphics. The combination of these elements in one audiovisual form creates a new work, which also appears to be eligible for copyright protection. *Reels* on Instagram may be considered works under copyright law because they can meet all the necessary criteria: originality, individual character, and result from the creative activity of the author.

Taking the above into account, and analyzing video materials posted on the Instagram platform, including *reels*, some of them will certainly qualify as audiovisual works and therefore be subject to copyright protection.

Multiformat or Multicreation Works

Analyzing individual categories of works listed in Article 1(2) of the Copyright Law, as well as considering the general criteria outlined in paragraph 1 of this provision, one can conclude that an Instagram post treated as a cohesive hybrid creation consisting of several elements could also, in certain situations, be recognized as a subject of copyright.

It seems that the possibility of classifying the entirety of a post as a work is influenced by the fact that it is ultimately created using the Instagram platform, involving several stages:

- incorporating the “base” of the post in the form of material expressed through graphic symbols, photographs, or audiovisual works,
- making creative modifications and editing of the work using the platform’s functionalities, particularly by applying selected filters, overlays, special effects, and optionally adding a musical background, thereby giving the materials their final form,

- accompanying the materials with a description, which enriches the content with a kind of narrative or conveys a specific message, thus potentially constituting a work expressed in words.

Such a post, when considered as a whole, may constitute a distinct, unnamed work, and due to the multitude of components contributing to its creative, individual, and original character, could be classified as a “multiformat work” or “multicreative work.”⁴³ Both suggested terms include the phrase “multi”, and its use is deliberate. This term signifies “the prefix in compound words indicating multiplicity, multitude, or a large quantity of something.”⁴⁴ Therefore, its use in the name aims to denote the diversity and variety of elements that make up the entire work.

The term “multiformat” includes a phrase known in copyright law, referring to a television format, which, while not subject to copyright itself, is recognized in the doctrine as a set of characteristic features and elements of a particular television program.⁴⁵ Based on this format, individual episodes of a series or programs are created.⁴⁶ Similarly, the proposed term for the work also arises from a specific framework, somewhat conditioned by the functionality of Instagram. However, by using it, the author imparts creative and individual characteristics to the resulting work, justifying the use of the discussed phrase. In the second proposal, the term “multicreative” “incorporates the notion of creation, meaning the act of producing something, usually a work of art.”⁴⁷ It is a more general term relating to the nature of this potential type of

43 These are suggestions from the author regarding the naming of specific Instagram creativity.

44 Keyword: “Multi,” Słownik Języka Polskiego PWN, accessed May 4, 2024, <https://sjp.pwn.pl/sjp/multi;2568576.html>.

45 Marta Cyran, “Czy możliwa jest ochrona tzw. formatów telewizyjnych w polskim prawie autorskim: zarys zagadnienia w ujęciu komparatystycznym,” *Palestra* 51, no. 3–4(579–580) (2006): 38–55.

46 Cyran, “Czy możliwa jest ochrona tzw. formatów telewizyjnych w polskim prawie autorskim: zarys zagadnienia w ujęciu komparatystycznym.”

47 Keyword: “Creation,” Słownik Języka Polskiego PWN, accessed May 4, 2024, <https://sjp.pwn.pl/sjp/kreacja;2564875.html>.

creativity, encompassing several aspects of the creative process. It should be emphasized that the proposed names are merely suggestions resulting from an analysis of the content posted on Instagram.

In summary, it seems possible to recognize that a post treated as a “multi-format/multicreative work,” meeting the required criteria such as creative and individual character, may be considered a hybrid work under copyright law. However, this is only a potential legal interpretation and only applies to a minority of Instagram posts.

Posts with Multiple Visual or Audiovisual Works and the User Profile Feed as a Collection of Works

In the case of Instagram creativity, one can encounter content that can be classified as a compilation under the provisions of Article 3 of the Copyright Act. Such a compilation, according to A. Niewęłowski, should meet two criteria: “it should be organized for a specific purpose and conducted according to non-random criteria.”⁴⁸ Additionally, the creation of such a compilation should result from the creative activity of the author. On Instagram, examples of works meeting these criteria include posts containing multiple visual or audiovisual works, as well as the user profile feed—understood as a collection of posted photos, known as the feed.

Instagram allows users to post content that may include multiple elements—visual works such as photographs or graphics, or audiovisual materials. This function is widely utilized by participants, fulfilling various roles, particularly the opportunity to present materials that are somehow related—addressing specific topics or originating from similar periods. Additionally, such materials, understood as a whole, are created as a result of the author’s creative activity, characterized by uniqueness, originality, and reflecting the intention conceived in their imagination. Thus, in this case, compilations of such works

48 Adrian Niewęłowski, “Art. 3,” in *Prawo autorskie. Komentarz* (Wolters Kluwer, 2021).

may constitute subject matter of copyright under Article 3 of the Copyright Act, as collections.

Analyzing the issue of collections of works, it is possible to identify characteristic features for this type of category of copyright objects also in the feed of posts on a user's profile. The profile feed on Instagram is a graphical presentation that displays all the materials published on a given profile—posts and reels. Currently, a cohesive, aesthetic feed created according to a specific concept plays a significant role in building one's image and gaining new followers, particularly emphasized by professional account holders such as influencers or brands.

An example can be seen in the Instagram account of the fashion house Balenciaga under the username *balenciaga*, where during a specific period, photographs illustrating a particular clothing collection are posted.⁴⁹ Such a feed created according to a non-obvious concept, selecting specific photographs to showcase elements of the clothing assortment in an innovative, original manner, suggests that it could potentially be recognized as a collection of works under Article 3 of the Copyright Act.

Conclusion

The photographs, videos, graphics, and texts appearing on Instagram, in the form of posts, reels, or stories, are examples of content that increases daily in quantity. Some of these are repetitive, templated, or even derivative. However, while browsing Instagram content, we may also come across distinctive, unique works that capture our attention. Upon analysis, it can be determined that these may constitute works under Article 1(1) of the Copyright Act. Additionally, some of them can be classified into categories explicitly listed in Article 1(2) of the Copyright Act, such as photographic works, works expressed in words or graphic symbols, or audiovisual works.

⁴⁹ Profile feed of the user named *balenciaga* on Instagram, accessed April 18, 2024, <https://www.instagram.com/balenciaga/?hl=pl>.

Furthermore, the study allows for the identification of collections of works, in the form of posts with multiple visual or audiovisual elements, and even the concept of a “profile feed.”

Exploring the functionalities of the platform and the actions taken by its participants, while conducting a detailed verification of the prerequisites necessary to recognize certain content as a work, leads to the conclusion that an Instagram post, treated as a whole, composed of visual or audiovisual elements, descriptions, as well as introduced improvements and modifications, may constitute a specific, hybrid type of work. It combines various categories of works specified in Article 1(2) of the Copyright Act, as well as other unclassified works. The diversity of potential components of such a creation warrants describing it with the proposed term “multiformat/multicreation work.”

References

- Cyran, Marta. “Czy możliwa jest ochrona tzw. formatów telewizyjnych w polskim prawie autorskim: zarys zagadnienia w ujęciu komparatystycznym.” *Palestra* 51, no. 3–4(579–580) (2006): 38–55.
- Ferenc-Szydełko, Ewa, ed. “Art. 1.” In *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*. C.H. Beck, 2021.
- Ferenc-Szydełko, Ewa, ed. “Art. 8.” In *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*. C.H. Beck, 2021.
- Gebicka Aleksandra, and Andreas Heinemann. “Social Media & Competition Law.” *World Competition* 37, no. 2(2014): 149–72.
- Graef, Inge. *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility*. Wolters Kluwer, 2016.
- Grzybczyk, Katarzyna. “Instagram – jak zostać influencerem.” In *Rozrywki XXI wieku a prawo własności intelektualnej*. Wolters Kluwer, 2020.
- Instagram. “Instagram Terms of Service.” Accessed April 25, 2023. <https://www.facebook.com/help/instagram/581066165581870>.

- Instagram. Profile feed of the user named *Balenciaga*. Accessed April 18, 2024. <https://www.instagram.com/balenciaga/?hl=pl>.
- Laskowska-Litak, Ewa. "Art. 1." In *Komentarz do ustawy o prawie autorskim i prawach pokrewnych*, in *Ustawy autorskie. Komentarze. Tom 1*, edited by Ryszard Markiewicz. Wolters Kluwer, 2021.
- Lojza, Anna, and Radosław Wolniak. "Media społecznościowe jako narzędzie komunikacji marketingowej na przykładzie serwisu Instagram." *Management and Quality – Zarządzanie i Jakość* 3, no. 3(2021): 37–59.
- Małobęcka-Szwast, Iga. *Big Data and the Abuse of a Dominant Position by Data-Driven Online Platforms under EU Competition Law*. C.H. Beck, 2021.
- Markiewicz, Ryszard. *Ilustrowane prawo autorskie*. Wolters Kluwer, 2019.
- Niewęglowski, Adrian. "Art. 3." In *Prawo autorskie. Komentarz*. Wolters Kluwer, 2021.
- Niewęglowski, Adrian. "Art. 8." In *Prawo autorskie. Komentarz*. Wolters Kluwer, 2021.
- Podolska, Anna. "Portale społecznościowe, blogi i vlogi a prawo autorskie." In *Prawo autorskie w praktyce. O prawach twórców i odbiorców utworów*, edited by Ewelina Szatkowska. Wolters Kluwer, 2022.
- Poźniak-Niedzielska, Maria. *Autorstwo dzieła filmowego. Studium cywilnoprawne*. Wydawnictwo Prawnicze, 1968).
- Sarbiński, Rafał M. "Art. 1." In *Prawo autorskie i prawa pokrewne. Komentarz*, edited by Wojciech Machała, and Rafał M. Sarbiński, Wolters Kluwer, 2019.
- Słownik Języka Polskiego PWN. Keyword: "Creation." Accessed May 4, 2024. <https://sjp.pwn.pl/sjp/kreacja;2564875.html>.
- Słownik Języka Polskiego PWN. Keyword: "Multi." Accessed May 4, 2024. <https://sjp.pwn.pl/sjp/multi;2568576.html>.
- Słownik języka polskiego PWN. Keyword: "Photograph." Accessed April 30, 2024. <https://sjp.pwn.pl/slowniki/fotografia.html>.

Sobczak, Jacek. *Prawo autorskie i prawa pokrewne*. Iuris, 2000.

Stańczuk, Izabela. “Dane osobowe jako „waluta” związana z uczestnictwem w mediach społecznościowych.” In *Media w erze cyfrowej. Wyzwania i zagrożenia*, edited by Katarzyna Chałubińska-Jentkiewicz, Monika Nowikowska, and Krzysztof Wąsowski. Wolters Kluwer, 2021.

Szatkowska, Ewelina. “Utwór jako przedmiot prawa autorskiego. Zagadnienia podstawowe.” In *Prawo autorskie w praktyce. O prawach twórców i odbiorców utworów*, edited by Ewelina Szatkowska. Wolters Kluwer, 2022.

Wielki Słownik Języka Polskiego. Keyword: “Hashtag.” Accessed April 25, 2023. <https://wsjp.pl/haslo/podglad/86506/hashtag>.

Wojciechowska, Anna. *Autorskie prawa osobiste twórców dzieła audiowizualnego*. Zakamycze, 1999.

Judgment of the Supreme Court of December 12, 1979, I CR 434/79, OSNC 1980, no. 9, item 171.

Judgment of the Court of Appeals in Lodz of December 17, 2002, I ACa 254/02, LEX no. 535064.

Judgment of the Regional Administrative Court in Warsaw of December 4, 2015, IV SA/Wa 2455/15, LEX no. 2327035.

Judgment of the Court of Appeals in Białystok of February 2, 2016, I ACa 955/15, LEX no. 1998958.

Judgment of the Court of Appeals in Lublin of September 12, 2016, I ACa 942/15, LEX no. 2209926.

Judgment of the Court of Appeals in Białystok of April 11, 2018, I ACa 1009/17, LEX no. 2658034.

Judgment of the Supreme Court— Civil Chamber of February 21, 2020, I CSK 513/18, OSNC 2020, no. 12, item 104.