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Observance of copyright and related rights in advertising

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Presently development of the advertising industry is in step with the times and evolves along with global digitalization and plays a significant role in promoting not only achievements in various fields, but also the economy as a whole.

The expression *Advertising is the engine of commerce* which is attributed to Ludwig Metzel, who opened the first advertising agency in 1878 in Russia, became a winged aphorism and is still appropriate nowadays. The advertising business is constantly criticized for misleading consumers of goods/works/services, as well as imposing certain trends, habits and stereotypes on society. Our legislator actively fights against unfair, unreliable, unethical, deliberately false and hidden advertising, misleading consumers, prohibits the advertising of certain goods/works or services (alcohol, tobacco products, financial pyramids and etc.). Of course, it is this side of the coin that is important to the end consumer, a consumer does not see the other side, behind which are great human and financial resources.

Advertising and copyright are an important part of the marketing plan of every organization that sells goods/works/services and is interested in their successful promotion. The main purpose of any advertising is to attract as many customers as possible and to ensure recognition of the advertised brand, and often advertisers, wishing to capture the market, always remain *on their ears*, use already known and recognizable works, which result is the violation of intellectual property rights of the third parties.

Taking into account the wide expansion of advertising on television, radio, print media, outdoor advertising, the Internet and mobile applications, there is also a wide variety of types of advertising - it can be visual, audio-visual, text, graphics and etc. Each type of advertising, of course, is the result of the creative activity of not only the authors, but also, as a rule, the owners of the related rights.

Today, major advertisers for the creation of advertising try to apply to advertising agencies/production studios, which are professionally engaged in the creation of promotional materials and, often, concluding agreements for creation of promotional materials, few people think about respect for copyright, all aimed at ensuring recognition of the advertised object and, consequently, to increase sales. Most marketers know how effective the well-known images, melodies, photos, slogans can be when it comes to attracting customers, mistakenly believing that one can easily take any work on the Internet, and if it does not have a copyright sign, it probably is not protected by copyright and can be used freely and when an advertising campaign is launched, claims from authors and copyright owners with requests to eliminate violations and pay huge sums of money are encountered by the advertiser.

Of course this is not true, one cannot just take any work: a photograph, a picture, music from the Internet and use it in your advertising campaign. It is important to remember that the Internet is not a free-access space, no matter how easy it may seem, where you can take and use anything you want for your own benefit, any work posted on the global network has an author and the author has his legal rights, which he is empowered to protect.

Initially, for legitimate and due use of any work, including in advertising, it is necessary to identify the person whose creative work resulted in the object of intellectual property.

Under the Article 2.1 of the Law of the Republic of Kazakhstan On Copyright and Related Rights, the author of the work **is only an individual**, whose creative work resulted in a work of science, literature and art. Thus, for example, animals cannot be authors, although in practice they can “make” photos and “draw” during various shows paintings.

https://xn----8sbiecm6bhdx8i.xn--p1ai/node/2692

In the court practice of various countries, there are examples when animals were tried to be recognized as authors separately or in co-authorship with an individual who contributed to the creation of the work. One may recall a famous case in which a monkey, a crested baboon (a crested macaque), took selfies with the help of photographic equipment set up by the British photographer David Slater.

https://nat-geo.ru/nature/znamenitoe-selfi-obezyany-novoe-reshenie-suda-ob-avtorskikh-pravakh/

However, both the U.S. Copyright Office and a U.S. federal court initially ruled that the monkey could not own the copyright on the photos he created, but neither did the photographer, since they were not taken by him and therefore should go into the public domain. However, the photographer continued to assert his rights, and after two years of litigation, the San Francisco Court of Appeals ruled that 25% of royalties from the monkey's photos should go to conservation funds dedicated to saving Indonesia's crested baboons.

There are also more and more disputes nowadays regarding the recognition of authorship of works created with the help of artificial intelligence. For example, in a case in China, Shenzhen Tencent Computer System Co., Ltd. v. Shanghai Yingxun Technology Co., Ltd., a judge ruled that an article written with artificial intelligence should be considered copyright because it contains "original wording", as a result the copyright was recognized for Shenzhen Tencent Computer System Co, a developer of artificial intelligence, and the defendant, Shanghai Yingxun Technology Co., Ltd. which copied the article and posted it on its resources indicating that the article "was automatically written by Tencent Robot Dreamwriter", the court ordered

the company to remove the article from its website and pay compensation of $217. https://habr.com/ru/news/t/483620/.

Perhaps in the future, with the development of digital technology, the copyright shall undergo global changes, however today, only an individual can be an author, the age or his legal capacity do not matter, that means an author can be both a child and an individual restricted in the disposal of his rights and obligations.

A legal entity cannot be an author, but it can be the copyright holder, that means the one to whom the author has transferred his property (exclusive) rights to his work and who has the right to use the work at his own discretion in any way that is not contrary to the law. For example, if a photographer submits his photographs to a publication or a website, he will still be the author and the editorial office will be the copyright holder, or when the work is created as part of his official duties (service work), the author, the employee who created it shall be always and remain the author, and all property rights shall pass to the employer, the copyright holder, provided that the creation and transfer of the work from the employee to the employer is properly registered.

In order to be protected as an object of copyright, the work must be original and creative, and at the same time, the object of copyright is protected regardless of the merits of the purpose, thus, a painting by a famous artist and a painting by an amateur shall be protected in exactly the same way.

In Kazakhstan, as in most countries, copyright arises from the author by virtue of the fact of creation of a work and does not require mandatory registration. In addition, copyrights on works created by Kazakh citizens are protected in all countries - parties to the Berne Convention (as of 2020 there are 179 member countries), regardless of where they were registered and whether they were registered in principle, as well as copyrights of citizens of other countries that are parties to the Berne Convention are protected in Kazakhstan equally with copyrights of citizens.

In order to notify about their rights the author and/or copyright holder have the right to use the copyright sign, consisting of the Latin letter *C* in a circle, the name (title) of the owner of exclusive copyrights and the year of first publication of the work.

It should be remembered that the author/owner has the right however not the obligation to use the signs of protection, but, unfortunately, when analyzing legal practice in Kazakhstan, a sad conclusion can be made that Kazakh courts of first instance often still refuse authors and/or right holders to protect their rights, explaining their decisions by the fact that when using disputed objects of copyright, most often in such court decisions there was no copyright sign and signature of the author, so the rights have not been violated. It is encouraging that appellate courts eliminate such gross violations of substantive law and support the authors and/or copyright holders, recognizing their rights regardless of the presence or absence of copyright signs on the work, which was illegally used by another person.

However one should certainly understand that the indication of protection trademarks and registration of copyright can help to facilitate the protection of one's rights in case of infringement. In Kazakhstan, registration of copyright is carried out by entering information about the created work with the Patent Office Register. The owner of the registered copyrights acquires additional ways of legal protection, in comparison with unregistered rights, in particular, in the USA - the right to a punitive payment without the obligation to prove in court the amount of the damage caused.

The legislation provides for cases of free use of works, which are in free access, without author's permission and without payment of royalties, including, but not limited to, when used by an individual for personal purposes, when quoted to the extent justified by the citation, when used as illustrations in various publications, when reproduced and other uses, primarily not related to profit-making, use in advertising works without the consent of the author and without payment are not permitted.

Therefore, when creating advertising one must either create works - photos, music, pictures and other objects of copyright and related rights yourself, or, if one wants to use someone else's, it is obligatory to obtain permission of the author or copyright holder. It's not uncommon when the author/right holder, when contacted, gives his consent to use the work created by him at all without payment or for a minimal cost, but even if he asks for a significant amount, your right to refuse and choose another work or pay, which is much cheaper than in case of unauthorized use, you will be presented with demands to eliminate violations and compensate the damage caused, which certainly results in serious reputational risks.

Today there are many "databases" of works https:// www.shutterstock.com, www.pexels.com, https://pixabay.com and etc., where you can use photos, pictures and music absolutely legitimately, even for free or for a small license fee; the main thing is to carefully read the license conditions for each work in order to understand what property rights are being transferred by the author/right holder.

There are databases where you can find many photos, images and drawings under a free license for use in personal and commercial projects, blogs, websites, applications and other places - Creative Common Zero, for example: Public Domain Pictures, From Old Books, WPClipart and others, however you should also carefully read the terms of use of images, as there are a number of restrictions, especially when a person is depicted in the picture.

Also, when choosing works one should not forget that copyright in the territory of Kazakhstan is valid for the lifetime of the author and 70 years after his death, and the term of 70 years starts to be valid not from the date of death of the author, but from January 1 of the year following the year of death of the author. But at the same time, the right of authorship, the right to name, and the right to protect the reputation of the author are protected indefinitely, so it is always necessary to specify the name of the author or his pseudonym, if he did not wish to remain unknown.

The expiry of the term of protection of the author's property rights means that the work is now belongs to the public domain. However, we should not forget that in addition to the author's personal non-property rights, the rights of other rights holders may also be violated, so before using works that are in the public domain, it is necessary to carefully consider everything so as not to violate the third party's rights. As an example, the Hermitage court case against the Russian fashion designer Iya Yots in which the museum demanded that the designer be prohibited from using a monochrome white drawing, which was a reproduction of Thomas Gainsborough's painting "Lady in Blue", on her website and on the door of a clothing store in St. Petersburg. The designer believed that the image of the painting, which had become public domain since the artist died back in 1788, could be freely used by anyone without anyone's consent or permission and without payment of royalties. However, on May 12, 2014, the Arbitration Court of the Stavropol Territory upheld the Hermitage suit. According to the court, the reproduction of the Gainsborough painting in the form of the disputed drawing in the photographs posted on the designer's website violates the rights of the Hermitage as the owner of the painting, which is included in the museum fund of the Russian Federation and is in storage at the museum. Additionally, the legislature imposed on the museum a regulatory function to create conditions aimed at eliminating the possibility of arbitrary use for commercial purposes of reproductions of objects included in the collection. Designer tried to challenge this decision in the judicial panel for economic cases of the Supreme Court of the Russian Federation, but her complaint was left without satisfaction https://ria.ru/20150710/1124968249.html.

At the same time, in contrast, the Metropolitan Museum of Art in New York has made 375,000 art photos available for download without restriction as part of its Open Access policy. Photographs of thousands of works of art were digitized and made publicly available back in 2014, but until now, only non-commercial use had been allowed. Now, these works have been placed under the free CC0 license, allowing anyone to freely use, copy, distribute and modify (remix) the works. https://roskomsvoboda.org/post/nyu-jorkskij-metropoliten-muzej-pere/.

The GOLDEN RULE should be remembered all the time, if you did not create any work (photo, picture, music and etc.) it does not belong to you and you have no right to use it. You must not use any random image found on the Internet unless the copyright owner has given you written permission to do so, or you purchased it under a special license that allows you to use it in advertising.

At the same time, when obtaining the written consent of the author or copyright holder to use the work, it is necessary to agree very precisely and specify in the permission/agreement the specific way of using the work, term and territory to avoid any issues connected to such use, for example, if the consent or agreed states that you have the right to use the photo in online advertising, using it in TV and radio ads, as well as for other purposes will be a violation. It is also necessary to discuss the issue of personal rights of the author, whether he wants his name or pseudonym to be necessarily indicated when placing an advertisement, whether it is possible to make any changes, to correct his work, because you are responsible for the violation of personal rights of the author.

Some marketers believe that they can change someone else's work by 20 percent or more to prevent copyright infringement. This is a misconception; it is not legally provided for. The standard for infringement is whether the second work is substantially similar to the original, that is, whether the average person who sees the two works recognizes that the second work is a copy of the original work with repetition of style, design and other features.

A recent case in point is the Norwegian photographer Stig Dirdal accused Bazelevs, Timur Bekmambetov's studio, of plagiarism, which, in his opinion, was committed during the design of the promotional poster for the movie "Christmas Tree 8". The placement of actors in green jumpsuits with candles in their hands on the poster is visually reminiscent of a Christmas tree. Stig Dirdal took a similar picture several years ago as a Christmas card. Bazelev studio of Timur Bekmambetov, despite the fact that it did not agree with the violations, but publicly in social networks apologized to the photographer and was ready to pay compensation. It is not yet known how the dispute ended, as the photographer Stig Dirdal offered the Russian and Norwegian viewers to independently determine whether there was an infringement to his copyrights and the amount of compensation (https://dtf.ru/cinema/1028778-poster-vosmyh-elok-okazalsya-chastichnoy-kopiey-otkrytki-norvezhskogo-fotografa-sdelannoy-v-2015-godu).

Use of music in commercials, of course is even more complicated, since this is usually a set of composite work, the creation of which gives rise not only to copyrights to the melody, poetry, but also to related rights, since the recording of a musical work usually involves many more people than the writing of the same painting.

Many believe that by using recordings with music that has passed into the public domain when more than 70 years have passed since the author's death or with recordings of sounds of nature - the sound of water, rain, birds signing and etc., there can be no claims from the third parties. But even if the music used has no author or the performed work is already in the public domain, using ready-made recordings, also found in the free access, it is possible to violate related rights - the rights of the performer, sound engineer, recording studio and etc., whose use also requires consent by analogy with copyright.

Before using any object of copyright or related rights in advertising, you should study everything thoroughly, even if you think that the object has passed into the public domain and you can use it without hesitation, it is better to double-check. As an example, take the Eiffel Tower whose creator-author died in 1923, however photos of the tower taken at night cannot be used in social networks even for personal purposes, let alone commercial ones, because the lighting on the famous tower was installed in 1985 and is considered to be a separate work of art that is still covered by copyright, and until 2055 (unless EU laws change) any pictures of the illuminated tower will violate the copyright https://perito-burrito.com/posts/no-night-photos-of-eiffel-tower.

However, even if you use your own works in advertising, you also need to legally formalize the relationship with the authors and holders of related rights, because usually a whole team works on the creation of advertising materials - the scriptwriter, operator, photographer, composer, performer, also actors involved in filming, announcer, designer, IT-specialists and other persons involved in the creation of advertising.

In addition, in order to decrease the risk of claims from authors or right owners it is advisable to make preliminary monitoring of the market of goods and services and study not only the competitors' products, however also the advertisement in order to avoid any infringements.

Moreover, even if the holders of copyright and/or related rights are employees of the company that creates advertising, it is necessary to legally establish the procedure of creating each work and its transfer to the employer as an employee's work, so that in future no disputes arise concerning the rights to the created objects between employees and employers.

As a rule, the relationship between the advertiser (customer) and an advertising agency/production studio (executor) to create advertising concludes contracts for the provision of services, in which the parties agree on the basic requirements for the commercial, timing of creation, payment procedure. But such contracts must also contain elements of the copyright agreement under which the contractor in addition to the finished product - a commercial, must also transfer to the customer property (exclusive) copyright and related rights to the advertising material, and the transfer must be formalized in a separate act of acceptance.

The agreement or annex to it should contain:

- a detailed description of the advertising material, not just its name, including a script, timing, preferably a storyboard, text and other characteristics that allow to accurately identify the object to be transferred to the customer after its creation;

- exact terms and conditions of transfer of copyright and related rights and their scope;

- specific ways of using the advertisement, territory and term;

- the value of created and transferred copyright and related rights;

- detailed report of the commercial, if it is necessary to provide the mass media with data on the musical works used in the commercial;

- receipt by the contractor of consents from all persons whose images or names are used in advertising materials, permission to use their images and/or names in the advertisement, necessary for the use of these materials by the customer, in the amount, manner and within the time limits agreed upon by the parties;

- obtaining from all persons involved in the creation of advertising - the director, artists, musicians, photographers, actors, models and other third parties who are the authors and/or performers in the advertising materials, consent to the transfer of property rights belonging to them, in the agreed volume, for the agreed period and territory;

- other terms and conditions agreed upon by the parties.

If you are an advertiser, do not be afraid to ask the performer, who created your commercial, documents confirming the rights to copyrights and related rights contained in the commercials. Of course, this may delay the process of transferring rights, but you can check for yourself and be sure that no third party rights were violated when creating ads for your company and you do not risk anything.

The author/owner of rights, as well as the owner of related rights, having discovered the violation of his rights, tomorrow will not search for the creator of advertising, to find out exactly who decided on the unauthorized use of his work, he will make claims to the advertiser, which can be a threat to disrupt the entire advertising campaign and be the cause of significant losses.

Today more and more often large brands involve for collaboration well-known personalities, who act as brand ambassadors on a certain territory for an agreed period of time. Agreements with such ambassadors also need to be drawn up legally correctly and carefully monitored to ensure that neither the rights of the company, nor the rights of the ambassadors were not infringed, because in practice there are also many infringements of copyright and related rights. For example, quite often an advertiser, having agreed with a famous person, uses her/his available photos freely for his promotional materials, believing that once there is consent from the person depicted in the photo, it is safe to use, not thinking about the violation of copyright of the photographer for these works; also there are frequent violations of the

terms and methods of advertising with the participation of an ambassador, which should be clearly stated in the agreement and monitor their observance.

Unfortunately, the number of violations of the rights of authors and owners of related rights grows from year to year. Sometimes this is due not only to easy accessibility, but also to the fact that in a competitive environment it is faster and easier to steal someone else's often already well-known work and make your brand more famous than to create your own intellectual property. However when creating a marketing strategy, one must never forget not only to comply with the legislation on advertising, but also to respect the rights of the authors and other rights holders to the works used in advertising.

Legislative recognition, enshrining and protection of copyright and related rights at the state and international level is designed primarily to stimulate interest in creating new and original objects - works of art, music, literature, science, as well as to encourage the creative expression of authors and performers and in the pursuit of profit should be avoided violations of rights guaranteed by the state.

To prevent infringements, Bolotov & Partners team https://ru.bolotovip.com/ is ready to assist in:

- registration of any copyright objects in Kazakhstan and any country party to the Berne Convention;

- development of copyright and other agreements in the field of intellectual property;

- protection of copyright and related rights in pre-trial and court proceedings.