

Legal opinion (extract)

Protection of webcam recordings under copyright law

The following report investigates the extent to which webcam recordings, i.e. recordings made by what are usually permanently installed cameras (e.g. situated on the roofs of buildings for the purpose of promoting tourism or recording weather conditions), and from which pictures are transmitted live to the Internet, are protected by copyright.

1. Works that can generally be protected by copyright

Works that are protected by copyright are defined in Art. 2 para. 1 of the Copyright Act as follows:

“Works are defined as [...] intellectual literary and artistic creations, that have individual character.”

This definition comprises two essential elements:

- a) the works must constitute **intellectual creations**, in other words they must be the product of human intellectual activity. This criterion must however be verified more carefully in cases where work products are generated by the use of technical procedures, such as – for example – in the case of computer graphics or photography.
- b) The works constituting an intellectual creation as defined above must have **individual character**. This means that they must differ sufficiently from other works of the same type, so that it may be assumed that an identical or near identical work would not have been done by a different person.

Works that are characterized not by the individual influence of their creator but by input of a technical or functional nature, so that the composition of the work products is crucially predetermined by purpose-oriented criteria, are not protected.

2. Audiovisual works

Under Art. 2 para. 2(g) of the Copyright Act, *“photographic, cinematic and other visual or audiovisual works”* may be protected under copyright law. This means that copyright protection of webcam recordings is also possible in principle.

However, **in order for the protection to apply**, even for audiovisual works and, therefore, also for webcam recordings, **it is necessary for the said works to meet the aforementioned, general conditions for protection under Art. 2 para. 1 of the Copyright Act, namely that they must constitute “intellectual creations” with “individual character”**. Not every photograph or webcam recording, therefore, is protected by copyright, only those that satisfy the specified criteria for the existence of a copyright-protected work.

3. Copyright protection for photographs

The issue of the copyright protection of webcam recordings has not yet been specifically dealt with in Switzerland, either in case law or in legal literature.

In order to assess the eligibility of webcam recordings for copyright protection, therefore, it is necessary to resort to the criteria that have been deemed to be definitive for photographs. Both the relevant judgments of the Swiss Federal Court in the cases of “Bob Marley” (BGE 130 III 168) and “Christoph Meili” (BGE 130 III 714), and the legal literature, are generally rather restrictive in their assessment of the conditions for the copyright protection of photographs.

3.1 The criterion of “intellectual creation”

Since photographs are generated using technical equipment, the answer to the question as to whether photographs are principally “intellectual creations” for the purposes of copyright law, i.e. products of human creativity, is not considered to be self-evident. On the contrary, it is necessary to justify in detail why photographs should not – as a rule – be regarded as the result of purely technical processes.

In this respect, it is generally necessary to refer to the variables available for the production of photographs in terms of the choice of camera, type of film (monochrome or color, color-sensitivity, etc.), lens aperture, exposure, choice of location, positioning of the subject, interplay of light and shadow (or lighting), the precise moment of shutter release, etc. **Because of these influencing factors, photographs may indeed essentially be determined by human creativity and may therefore also be regarded as being “intellectual creations” for the purposes of copyright law.**

3.2 The criterion of “individuality”

The criterion of “intellectual creation” is essential for copyright protection as mentioned above, but is not sufficient on its own. It is also necessary, in each specific case, for the existing creative options to have been exercised in such a way for the photograph in question to have “individual character” for the purposes of copyright law, in other words the said photograph must be an expression of an idea with individual character and, as such, must display a human creative intention. In this context, however, it is stressed that copyright protection may also be obtained particularly because of the potential for photographs to be subsequently processed, for example they may be distorted during the development process or used in the production of photomontages or collages.

In contrast, however, it is necessary to point out that many photographs, the purpose of which is essentially to reflect the reality encountered by the photographer and which, therefore, are not associated with any claim to creativity, do not enjoy copyright protection. Apart from the usual holiday snaps, other examples of photographs that cannot be protected by copyright include press photographs and scientific photographs.

The primary purpose of such photographs is not normally to create an individually characterized work, but to reproduce an encountered reality as accurately as possible. The human influencing factors available at the time of taking the photograph would not be used in this case to affect the individual composition of the resulting photograph, but for the purpose of achieving a picture that is as close as possible to the original subject. This does, however, mean that it cannot be protected by copyright.

4. Copyright protection of webcam recordings

Taking into account the prevailing, restrictive approach to the copyright protection of photographs, **the issue of protecting webcam recordings appears to be highly problematic.**

For one thing, the purpose of the recording is not usually to produce an individually composed image, but to reflect the actual conditions at a particular location. Furthermore the human influence on the recording cannot be applied for each individual recording: such factors must either apply generally for all recordings, such as – for example – the choice of webcam location and image frame, or at least for a whole series of recordings, for example the settings relating to color or brightness.

Under these conditions, webcam recordings are comparable to scientific photographs for which copyright protection is generally refused in the legal literature.

5. Summary

Copyright protection of webcam recordings appears to be highly problematic. In the production of these images there are sufficient options for influencing them so that they might be regarded as a product of human creativity and not as the result solely of technically controlled processes. **In most webcam recordings, however, such influencing factors are exercised not with a view to creating an individually characterized recording, but for the purpose of reproducing a defined extract of reality as accurately as possible. It is therefore highly likely that webcam recordings would lack the individuality necessary for copyright protection.**

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