

[Coat of arms of Ukraine]
COURT OF APPEAL OF THE CITY OF KYIV
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Case No. 22-ii/796/4436/2013

Presiding judge at the court of first instance: N.H. Prytula
Reporting Judge: V.V. Sokolova

**DECISION
IN THE NAME OF UKRAINE**

21 May 2013

Kyiv

The panel of judges of the judicial chamber for civil cases of the Court of Appeal of the city of Kyiv composed of:

presiding judge: V.V. Sokolova
judges: H.I. Usyk, V.A. Nezhura
with secretary: T.V. Okhnevskya

having considered in an open court session the appeal filed by Stacey Fingerle-Druce against the decision of the Shevchenkivskyi District Court of the city of Kyiv dated 18 January 2013 in a court case initiated by Stacey Fingerle-Druce against Roman Oleksandrovykh Romanov, Human Works Technologies Limited Liability Company regarding protection of copyright,

HAS ESTABLISHED

In May 2012 the plaintiff brought an action to court with the mentioned claims arguing that she is the sole holder of the exclusive property rights, namely copyright, in the selection and arrangement of tarots made by her in the form of a collection titled *Dore Bible Tarot*. By infringing the copyright of the plaintiff the defendants included the mentioned collection into databases, reproduced, made it available for information of the public, offered it for sale and distributed the collection. Therefore, since the defendants infringed the right of the plaintiff as the author, the plaintiff brought an action to court.

The claim for protection of copyright filed by the Stacey Fingerle-Druce against Roman Oleksandrovykh Romanov, Human Works Technologies Limited Liability Company was dismissed by the decision of Shevchenkivskyi District Court of the city of Kyiv on 18 January 2013.

Disagreeing with the court's decision, representative of the plaintiff filed an appeal, since she believes that the judgment delivered is inconsistent with the facts of the case due to incomplete analysis, that the circumstances referred to by the plaintiff were not properly appraised, that the judgment was delivered in contravention of the substantive and procedural legal provisions. In particular, the appellant noted that the court of first instance violated provisions of article 213 of the Civil Procedural Code of Ukraine, the Law of Ukraine "On Copyright and Related Rights" and considered that according to the Regulation of the Plenary Session of the Supreme Court of Ukraine of 04 June 2010 she was not obliged to prove infringement of her rights by the defendants who in their own turn had not refuted her claims by their evidences. On the ground of the aforesaid the appellant requests the court to cancel the decision of the Shevchenkivskyi District Court of the city of Kyiv and to deliver a new decision on the substance of the claim by satisfying it in full.

Representative of the plaintiff affirmed the appeal in the court session for reasons contained in the appeal and requested to reverse the decision of the court of first instance and deliver a judgment on satisfaction of the plaintiff's claim.

The defendant, R.O. Romanov, opposed to the arguments set out in the appeal, considers that the court's decision is lawful and justified, requested to uphold it.

Other defendant, Human Works Technologies LLC, did not send its representative to the court session, having been duly notified of the time and place of the hearing, and did not explained the reasons of default.

Having heard the report of the judge, explanations of the parties participating in the court hearing, having verified the lawfulness and reasonableness of the court's decision in view of the arguments of the appeal, the panel of judges proceeds from the following assumptions.

Dismissing the claim, the court of first instance assumed that the claiming party did not prove that the defendant reproduced the illustrations registered by the US Copyright Office, the plaintiff had no copyright in the collection (it is not registered), no evidence were provided to the court proving that images submitted for registration to the US Copyright Office are in terms of their selection and arrangement of their constituent parts the result of intellectual work, and therefore the court did not find any grounds to satisfy the claim.

Nevertheless, the panel of judges cannot agree with such conclusions of the court of first instance.

The court has established that the plaintiff received the Copyright Registration Certificate issued by the US Copyright Office. According to that certificate, on 15 June 2006 Stacey Fingerle submitted for registration her work titled *Dore Bible Tarot* created in 2006. As noted in the statement of claim, the work of the plaintiff is based on the Bible illustrations of Gustave Dore and represents a compilation of images and names. The registration became effective on 30 June 2006 / case pages 26-31/. Materials in the case file include photocopies of the work registered by the plaintiff and certified as true copy by the US Copyright Office /case pages 13-25/.

The work in question was published by the plaintiff in the Internet on her own web-site <http://www.moonchild.ch/Tarot/DBT/>.

And defendants by using their web-site <http://www.pyroskin.com.ua> distribute and offer the collection titled *Bible Tarot of Gustave Dore*.

According to paragraph 1 article II of the Universal Copyright Convention: "Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory and protection specifically provided by this Convention."

According to article 6 of the Law of Ukraine "On Copyright and Related Rights", foreign nationals and stateless persons shall enjoy the same rights provided by this Law as Ukrainian nationals according to international treaties or reciprocity principle.

Based on the above regulations the plaintiff is therefore entitled to the protection of her infringed rights in Ukraine, and national law shall be applied.

According to paragraphs 1, 5 article 433 of the Civil Code of Ukraine, article 8 of the Law of Ukraine "On Copyright and Related Rights", copyrighted works include compilation of data (data bases) if in terms of their selection and arrangement they represent a result of intellectual activity. Compilations of data (data bases) or other materials are protected as such. Such protection does not extend to data (data bases) or material itself and is without prejudice to the copyright in the data or materials contained in the compilation.

The term "compilation of data" is defined in article 1 of the Law of Ukraine "On Copyright and Related Rights", in which "database (compilation of data) is a collection of works, data or any other independent information in arbitrary form, including electronic one, and selection of such collection and arrangement of its constituent elements is a result of creative work, constituent parts of such collection are accessible individually and can be found by using special search system based on electronic means (computers) or other means.

According to article 5 of the World Intellectual Property Organization Copyright Treaty adopted on 20 December 1996 in Geneva, compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

The scope of protection of the data (data base) compilation according to that article including to article 2 of that Treaty is consistent with article 2 of the Bern Convention and relevant provisions of TRIPS.

Hence, the result of creative work in a compilation means the selection, organization, systematization of specific works or other information in a physical form.

According to paragraph 1 article 19 of the above Law, the author of the collection and other composed works (compiler) has the copyright to the selection and arrangement of works and/or other data made by him/her, which is the result of creative work (arrangement).

Under provisions of articles 1, 19 of the Law, paragraph 1 article 433 of the Civil Code of Ukraine, provisions on collections and composed works may apply to compilations of data which are the result of intellectual work in terms of selection or arrangement of its constituent parts. This position was stated by the Supreme Court of Ukraine in the Regulation of its Plenary Session No. 5 of 04 June 2010 "On Application by Courts of Laws in Cases regarding Protection of Copyright and Related Rights" (paragraph 17).

Likewise pursuant to the position of the Supreme Court of Ukraine, the plaintiff should prove that he/she has the copyright and/or related rights, fact of violation or threatening violation of his/her rights by the defendant, amount of damage (except for claim for compensation) if incurred, and cause-effect relation between the damage caused and acts of the defendant. The court should assume substantive presumption of authorship (part I article 435 of the Civil Code of Ukraine, article 11 of the Law). The primary person holding the copyright is the author of the work. In the absence of proof to the contrary, the author of the work shall be the person mentioned as the author on the original or copy of the work (presumption of authorship). This provision shall apply also in case of publication under the pseudonym identifying the author.

The defendant arguing against the claim shall prove his/her compliance with the Law in his/her use of the copyrighted work and/or related rights and disprove the presumption of guilty infliction of damage as provided for by civil legislation (articles 614 and 1166 of the Civil Code).

The fact that the plaintiff has the copyright is proved by the certificate of registration of copyright in compilation of images and names, and more specifically in compilation of Tarot cards with prints of iconographic scenes by Gustave Dore which was titled by the plaintiff as Dore Bible Tarot. Existence of that certificate confirms that said compilation is the result of intellectual activity of the plaintiff.

According to explanations of the defendant, R.O. Romanov, on his web-site <http://www.pyroskin.com.ua>, he distributes and sells his independent work of authorship titled *Bible Tarot of Gustave Dore* /v. 1, case pages 135-141/. As confirmation of the fact that said work is the result of his creative intellectual efforts the defendant, R.O. Romanov, refers the existence of certain differences between mentioned compilations in that he used traditional number of Tarot cards and traditional names. He also noted that he created a graphic concept, industrial card design *Bible Tarot of Gustave Dore* and their publication as industrial product in 2006.

No petition for expert examination was filed by the parties in the course of the judicial proceedings. The court of appeal for the purpose of complete and comprehensive clarification of the facts in the case stated that it would be reasonable to appoint a forensic expert examination, since said questions require special knowledge; the defendant, however, motivating his refusal by the lack

of funds for paying the fee, did not make such motion stating that the materials of the case were sufficient. The position of the plaintiff is based on the registered copyright.

Before proceeding to comparison of the compilations of the plaintiff and of the defendant, it should be noted that Tarot cards appeared about XIVth - XVIth century, and according to their meaning are a system of symbols composed of 78 cards currently used predominantly in fortune telling. It is believed that images on Tarot cards have a difficult interpretation in terms of astrology, occultism and alchemy, and therefore the use of Bible scenes is not traditional for them.

Gustave Dore is a famous French painter who lived from 1832 to 1883. According to different sources, he created 233 to 250 illustrations to the Bible, which were used in its various publications beginning from the 19th century.

Hence, systematization of Tarot cards and illustration to the Bible by Gustave Dore are not the copyrighted works in connection with the expiration of time limits, said compilation is nevertheless the result of creative intellectual property and according to the above regulations is the copyrighted work.

According to photocopies of the works registered by the plaintiff and contained in the case materials, the true copy of which being certified by the US Copyright Office, it is evident that the plaintiff registered the copyright to a compilation of names and images of 82 Tarot cards /volume 1 case pages 13-25/. The defendant used the traditional number cards, i.e. 78. Nevertheless, names and illustrations on 78 cards are completely the same, i.e. there is the same selection, arrangement, ordering of individual components in the compilations of the plaintiff and defendant.

Arguments of the defendant as to differences in the use of Tarot card names are unreasonable in the opinion of the panel of judges, since essentially the same card names are used; the difference is only in the absence of “the” article which is common in the English language in the USA.

In accordance with part 1, 5 article 11 of the Law of Ukraine “On Copyright and Related Rights”, the primary copyright proprietor is the author of the work. In the absence of proof to the contrary, the author of the work shall be the person mentioned as the author on the original or copy of the work (presumption of authorship). This provision shall apply also in case of publication under the pseudonym identifying the author.

To certify his/her authorship (author’s right) for a published or non-published work, fact and date of publication of the work or contracts relating to the right to the work, the copyright proprietor may at any time during the copyright protection period have his/her copyright registered at the appropriate public authorities.

Accordingly, in view of the registered copyright of the plaintiff in the compilation of Tarot cards and Bible illustrations of Gustave Dore, the use of such compilation by the defendant, R.O. Romanov, for the creation of his own work in the form of compilation is an infringement of the plaintiff’s copyright, in particular of the exclusive right to use the work.

References of the defendant, R.O. Romanov, to the absence of the material form of compilation are also rejected by the court.

According to the legal positions of the Supreme Court of Ukraine contained in the Regulation of its Plenary Session No. 5 of 04 June 2010, copyright comes into existence by the mere fact of creation through intellectual creative efforts of the author or coauthors of a work of science, literature or art. A work is deemed created upon its initial presentation in any objective form with regard to the essence of the work (in particular, written form, electronic form, verbal form).

Placement of works in the Internet in the form accessible for public use is the presentation of works to the public domain so that the public can access the works from any place and at any time at their absolute discretion according to paragraph 9 part 3 article 15 of the Law. Moreover, in view of the last provision, such placement will be lawful only if made with consent of the person owning the copyright.

Thus, compilation of the plaintiff which was placed on the web-site <http://www.moonchild.ch/Tarot/DBT> is an objective form of said work, and distribution of such compilation by the defendant on the web-site <http://www.pyroskin.com.ua> infringes the plaintiff's copyright to the use of the work without her consent.

The fact that R.O. Romanov is the owner of the domain name <http://www.pyroskin.com.ua> is confirmed by the letter of the registrar of said domain name No. 44-informer dated 29 November 2011 /volume 1 case page 32/ and was not denied by him during the proceedings in the case.

Other defendant, Human Works Technologies LLC, sold *Bible Tarot of Gustave Dore* cards which is confirmed by invoice No. 4658 of 26 November 2011, receipt No. 2 of 30 November 2010, forwarding agent's receipt dated 30 November 2010 /volume 1 case pages 41-43/ and was not refuted during the proceedings of the case.

Pursuant to the provisions of article 424 of the Civil Code of Ukraine and article 15 of the Law of Ukraine "On Copyright and Related Rights", property rights of the author (other person owning the copyright) include: a) exclusive right to the use of the work; б) exclusive right to the consent or prohibition to use the work by other persons.

As provided by article 32 of the Law of Ukraine "On Copyright and Related Rights", the author and other person owning the copyright, has an exclusive right to give consent to other persons to the use of the work by any or all known means based on the copyright agreement. The use of the work by any person shall be only pursuant to the copyright agreement, except for cases provided for by articles 21-25 of the Law.

A ground for the judicial protection according to article 50 of the Law of Ukraine "On Copyright and Related Rights" could be performance of any actions infringing property rights of copyright proprietors as defined in articles 15, 39, 40, 41 of this Law with regard to the restrictions provided in articles 21-25, 42 and 43 of the Law.

Pursuant to article 52 of said Law, in the event of infringement by any person of the copyright as provided in article 50 of the Law, incompliance with the contractual terms of use of the works, copyright proprietors may bring an action to court claiming, in particular, to restore the infringed right and/or termination of the acts infringing the copyright, claiming moral (non-material) damage (material damage), including loss of profit or payment of compensation, requesting, including in a judicial procedure, that publication be made in mass media of the information on the infringement of the copyright and/or related rights and judgments relating to such infringements.

According to part 2 of said article the court may make a ruling, in particular prohibiting the publication of works, their performance or staging, issue of copies of audio records, video records, their announcement, termination of their distribution, and payment of compensation as determined by the court, in the amount of 10 to 50000 minimum salaries, instead of compensation of damage or collection of profit.

As prescribed by the Supreme Court of Ukraine, compensation shall be paid if the fact of infringement of the copyright proprietor's rights are proved, and not the amount of the inflicted damage. Thus, for the claim for compensation to be satisfied it is sufficient that the commitment by a person of any acts considered to be the infringement of the copyright and/or related rights be proved be evidence.

By resolving the issue of payment of such compensation to the plaintiff for the infringement of her copyright, the panel of judges has regarded to the essence of the infringement, amount of the eventual profit of the plaintiff which could be received by her, and general principles of the civil law as provided by article 3 of the Civil Code of Ukraine, i.e. fairness, good faith and reasonableness, and deems it fit to set such compensation in the amount of 20 minimum salaries to be collected from the defendants in equal parts amounting to UAH 11,470 (eleven thousand four hundred seventy hryvnias) from each of them.

For the purpose of terminating any acts infringing the copyright, the panel of judges deems it necessary to prohibit to R.O. Romanov to include the collection in question to the data base and reproduce materials of the collection titled *Dore Bible Tarot*, and to other defendant, Human Works Technologies LLC to sell and distribute copies of the set of Tarot cards titled *Bible Tarot of Gustave Dore*.

The above considerations were not taken into account by the court of first instance, and for this reason the decision of that court shall be reversed, since the court of first instance violated provisions of the substantive law giving ground to cancel its decision and to deliver a new decision on the partial satisfaction of the claim.

According to paragraph 4 part 1 article 309 of the Code, violation or improper use of the substantive and procedural legal provisions shall be a ground to reverse the decision of the court of first instance and to deliver a new decision or change the decision.

In accordance with article 88 paragraphs 1, 5 of the Civil Code of Ukraine, the judicial expenses in the amount of UAH 654.30 in respect of the initial statement of claim and UAH 330.85 in respect of the appeal should be reimbursed in favor of the plaintiff in equal parts $(654.30 + 330.85)/2 = 492.58$.

In accordance with articles 303, 307, 309, 313, 314 316 of the Code of Civil Procedure of Ukraine, the panel of judges:

RESOLVED AS FOLLOWS

To satisfy the appeal claim of Stacey Fingerle-Druce in part.

To reverse the decision of the Shevchenkivskiy District Court of the city of Kyiv of 18 January 2013 and to deliver a new one.

To satisfy the Claim of Stacey Fingerle-Druce against Roman Oleksandrovyh Romanov, Human Works Technologies LLC on the protection of copyright in part.

To collect compensation for the infringement of the copyright in amount of ten minimum salaries, i.e. 11,470 (eleven thousand four hundred seventy hryvnias) from Roman Oleksandrovyh Romanov in favor of Stacey Fingerle-Druce.

To collect compensation for the infringement of the copyright in amount of ten minimum salaries, i.e. 11,470 (eleven thousand four hundred seventy hryvnias) from Human Works Technologies LLC in favor of Stacey Fingerle-Druce.

To prohibit Roman Oleksandrovyh Romanov to include into his collection or to reproduce materials of the collection titled *Dore Bible Tarot*.

To prohibit Human Works Technologies LLC to include into his collection or reproduce materials of the collection titled *Dore Bible Tarot*.

To collect Judicial expenses in the amount of UAH 492.58 (four hundred ninety two hryvnias 58 kopecks) from Roman Oleksandrovyh Romanov in favor of Stacey Fingerle-Druce.

To collect Judicial expenses in the amount of UAH 492.58 (four hundred ninety two hryvnias 58 kopecks) from Human Works Technologies LLC in favor of Stacey Fingerle-Druce.

This decision shall become effective upon its announcement and may be appealed to the High Specialized Court of Ukraine for civil and criminal cases within twenty days.

Presiding judge /signature/

Judges /signatures/

Stamp:

True copy

Judge [*signature*] V.V. Sokolova
Assistant [*signature*] O.P. Sokoliuk

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