

# Kluwer Copyright Blog

## France: Mankowitz's photo of Jimi Hendrix is finally protected by copyright in appeal

Brad Spitz (REALEX) · Friday, August 18th, 2017



*On 21 May 2015, the IP specialist chamber of the High Court of First Instance of Paris handed down one of its worst rulings in copyright law: in breach of the most basic EU and French copyright law rules, it refused copyright protection to a famous photograph of Jimi Hendrix (reproduced above), taken by Gered Mankowitz. On 13 June 2017, the Court of Appeal of Paris reversed the first instance judgment and awarded copyright protection to this photograph.*

A few days after the judgment was handed down by the 1<sup>st</sup> section of the 3<sup>rd</sup> Chamber of the Paris High Court of First Instance (*Tribunal de Grande Instance*), I published a post on the Kluwer

Copyright Blog criticising this judgment for ruling, in breach of EU and French copyright law, that this photograph of Jimi Hendrix is not original and therefore not protected by copyright (see **In breach of EU copyright law, Paris Court refuses to protect Mankowitz's photo of Jimi Hendrix**). The Paris High Court, one of France's nine first instance courts specialising in intellectual property matters (with exclusive jurisdiction), has rendered several very worrying rulings of the same kind over the years (see Brad Spitz, *Le droit d'auteur en France : un monopole menacé?*, 94 RLDI (2013)).

### **1. The judgment of the High Court of First Instance of Paris**

A French company that sells electronic cigarettes reproduced the portrait of Jimi Hendrix and used it in its advertisements, replacing Jimi Hendrix's cigarette by one of its products, i.e. an electronic cigarette. Gered Mankowitz and his assignee had not been asked for authorisation.

In the brief filed before the Court, the rightholder explained the originality of this obviously original work, by presenting the author's choices (thus complying with French and EU copyright law): 'this extraordinary and rare photograph of Jimi Hendrix succeeds in capturing in a fleeting moment, the striking contrast between the lightness of the artist's smile and the curl of smoke, as well as the darkness and the geometric rigor of the rest of the image, created in particular by the lines and angles of the torso and arms. The capturing of this unique moment and its enhancement by light, the contrasts and the narrow framing of the photograph on the torso and head of Jimi Hendrix, reveal the ambivalence and contradictions of this man who is a music legend, and make the photograph a fascinating work of great beauty which bears the imprint of the personality and talent of its author.'

The French Supreme Court (e.g. 30 April 2014, 13-15517), in line with the European case law (Case C-5/08, *Infopaq*) and Case C-145/10, *Painer*), has defined originality as the expression of the personality of its author. The French courts (and all the national courts of the European Union) must therefore take into account the choices of the author, including his most simple choices. Mankowitz's photograph of Jimi Hendrix is therefore original, since the choices stated in *Painer* were sufficiently explained by the plaintiff, i.e. framing, light, contrasts, the positioning of Jimi Hendrix, the moment the photograph was taken, etc.

But the Paris Court of First Instance dismissed the plaintiff's action, ruling that the latter simply presented the aesthetic characteristics, and not those relating to the originality of the photograph, thereby placing the Court and the defendant in a situation that makes discussion on the originality of the work impossible. This is a trick often used by the High Court of Paris: it does not rule that the work is not original (in the present case, it would be difficult...), it contends that the plaintiffs do not prove that the work is original (see Brad Spitz, *Défaut d'originalité d'un livre: une décision contra legem de plus*, 96 RLDI 14, No. 3178 (2013)).

### **2. The judgment of the Court of Appeal of Paris: of course the photograph is original!**

As in the judgment of the Court of First Instance, in its ruling of 13 June 2017 the Court of Appeal of Paris recalls that under French law the burden of proof of the originality of the work lies on the shoulders of the plaintiff, who has to characterise the originality of the work; in other words he must justify the fact that the work is the expression of the personality of its author.

The copyright holders' lawyer certainly reinforced, in the briefs filed in appeal, the explanations as to the choices and efforts made by the photographer when creating the work, in order to

characterise the originality of the photograph. That being said, the explanations given in the briefs filed in the first instance, which are presented in the judgment of the Paris Court of First Instance (see 1 above), more than sufficiently characterised the originality of the photograph.

The Court of Appeal of Paris explains that the appellants argue that Gered Mankowitz organised the session in which the photograph in question was taken in February 1967, and guided and directed Jimi Hendrix during the shooting. Mankowitz asked him to pose in the manner reproduced in the photograph in question, chose to take the photograph in black and white to create the image of a serious musician, and pointed out that the photographer opted for a Hasselblad 500c camera with a 50mm Distagon lens to bring a wide-angle touch to the portrait without it being distorted. Moreover, the appellants argued that Mankowitz chose the decoration, the lighting, the angle of view and the framing.

Interestingly, the Court of Appeal also took into account the fact that Gered Mankowitz is an internationally recognised photographer, especially as he was the photographer of the Rolling Stones.

The Court of Appeal concludes that the photograph in question is the result of free and creative choices made by the photographer reflecting the expression of his personality, and that the originality of the photograph is therefore established, enabling it to benefit from copyright protection.

The judgment of the first instance court is therefore overturned and the copyright holders are awarded EUR 50,000 in compensation for the infringement of their economic rights, and EUR 25,000 in compensation for the infringement to their moral rights. But there is a slight problem: in the meantime the infringer became bankrupt and was liquidated, and the victims might never recover any compensation. Maybe if the Paris Court of First Instance had, in May 2015, rendered a ruling in compliance with EU and French law, the victims would not have had this problem. In my blog post on this first judgment I mentioned the practical implications of such case law for the exploitation of rights (see **[In breach of EU copyright law, Paris Court refuses to protect Mankowitz's photo of Jimi Hendrix](#)**); this is yet another illustration...

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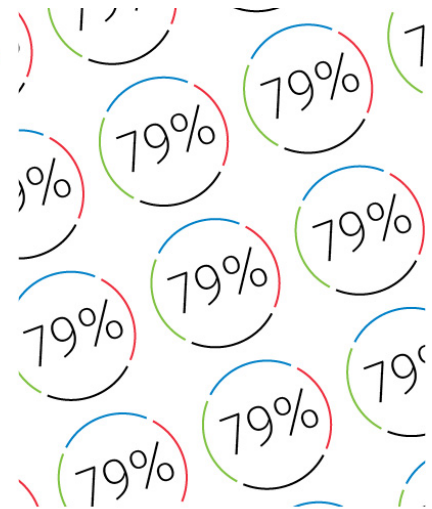
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