Kluwer Copyright Blog

Copyright Protection of Photographs: a Comparative Analysis Between France, Germany and Italy

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Photo by Soragrit Wongsa on Unsplash

Photographs are included in Article 2(1) of the Berne Convention as copyrightable artistic works. All Berne Union Member States must thus provide copyright protection to photographic works. As is known, originality has always been the essential requirement of copyright law, and only works that show some minimum amount of this attribute usually fall within the scope of protection. Nevertheless, the Berne Convention does not explicitly state that only original photographic works can be protected, nor does it contain any precise statutory definition of "originality".

According to EU law, all EU Member States must provide copyright protection for 70 years *post mortem auctoris* to any photograph that is original in the sense that it is its author's own intellectual creation, i.e. whenever the photograph is the result of free and creative expressive choices taken by the photographer in the preparation, execution and/or selection of the photograph (as clarified by the CJEU in Painer.

At the same time, however, Article 6 of the Term Directive (Directive 2006/116/EC) also states that "Member States may provide for the protection of other photographs" and thus leaves to each Member State's own discretion the decision of whether to provide some protection to non-original photographs in addition to "original" ones. As I will show, these Member States have adopted three different systems of photographic protection, which I will call respectively "the monistic system", the "dualistic system" and "the threefold system".

France

France has adopted a "monistic system", where photographs are protected as any other work of authorship as long as they have «*un caractère original*» (original character). French Courts adopt the originality criterion elaborated by the CJEU and hence consider whether artists could express their own personality in a work by making «*choix personnels*» (personal choices) in selecting a specific expressive form. By contrast, originality is presumed to be absent when the form of the work is mandated by technical elements, the content of the representation, functional characteristics or other restraints that deprive the author of any artistic discretion.

French law does not grant any protection to non-original photographs, regardless of their content or their technical value . As a consequence, photographs of mere documentary nature are deprived of any protection in France. For instance, copyright protection has been denied to photographs taken by paparazzi and photographs of sport events.

Germany

Germany has adopted a "dualistic system" which protects both original and non-original photographs. Photographs that are the personal intellectual creation ("*persönliche geistige Schöpfungen")* of their author are protected as *Lichtbildwerke* (photographic works) and enjoy the same protection as any other work of authorship under Section 2(1) of the German Act on Copyright and Related Rights (*Urheberrechtsgesetz – UrhG*) for 70 years *post mortem auctoris*. According to the German courts, to qualify as *Lichtbildwerke* photographs need to be characterised by individuality and a minimum level of creativity. In conformity with the CJEU's jurisprudence, these requirements are usually met whenever the photographer has made free and creative choices concerning several artistic factors, such as light, framing, background or exposure.

However, under German copyright law, photographs that do not meet the originality requirement under Section 2(1) of the UrhG can still be protected as *Lichtbilder* (photographs) by means of a specific related right under Section 72 of the UrhG. This does not require any creativity but simply a *de minimis* "personal intellectual effort" (*ein Mindestmaß an perso?nlicher geistiger Leistung*) or a "mere technical effort" (*rein technische Leistung*). The threshold to meet these requirements is similar to the traditional common law «skill, labour and judgement» test, and is often met whenever the photograph was not copied and shows a modicum of technical skill.

Non-original photographs enjoy protection that is substantially identical to that provided to original photographic works. In fact, Section 72 UrhG basically extends to *Lichtbilder* the same protection provided to *Lichtbildwerke* under Section 2(1) UrhG. The only significant difference relates to the term of protection, since the duration of the related right is limited to 50 years after publication or production of the photograph, while the full copyright protection extends to 70 years *post mortem auctoris.*

Italy

Differently again, Italy has adopted a "threefold system" for the protection of photographs. The Italian Copyright Act (Legge sul diritto d'autore) distinguishes between i) photographic works

(*opere fotografiche)*, ii) simple photographs (*fotografie semplici*) and iii) photographs of mere documentation (*fotografie di mera documentazione*).

Photographic works

Photographic works are granted the same protection as any other literary or artistic work and are thus protected by copyright for 70 years *post mortem auctoris*. To qualify as a photographic work, a photograph must meet the general "creativity" (*creatività*) threshold. While the older jurisprudence required a rather high creativity threshold consisting of authors showing their own personality within the work, the more recent case law has opted for a lower threshold in line with the EU *acquis Communautaire* on the originality of artistic works. Therefore, creativity is usually found whenever the photograph incorporates an expressive form that is the result of free and creative choices ("*scelte libere e creative"*) by the camera operator. By contrast, the technical quality and the content of the photograph are immaterial to the determination of the creativity threshold.

Simple photographs

Photographs that do not meet the abovementioned creativity threshold do not automatically fall in the public domain, but are protected by a related right as simple photographs. Namely, according to Article 87(1) of the Italian Copyright Act, "the images of persons, or of aspects, elements or events of natural or social life, obtained by photographic or analogous processes, including reproductions of works of figurative art and stills of cinematographic film" are protected by a related right.

This form of protection does not require creativity but focuses rather on the technical skills of the photographer and on their ability to capture the specific moment represented in the picture. Within this category of simple photographs, one can include pictures of sporting events, photo-reportage, pictures of three-dimensional objects and photographs of social/political events.

This related right lasts 20 years from the date of production of the photograph, and grants the photographer the exclusive right of reproduction, dissemination, and marketing of the image. By contrast, the author of a simple photograph is not granted any moral right.

That said, Article 90 of the Italian Copyright Act establishes additional specific conditions for a simple photograph to enjoy the protection afforded by the related right. Accordingly, simple photographs must indicate the name of the photographer or of their employer/commissioner; the year of production and, if applicable, the name of the photographed work of art. If these conditions are not met and the copies do not bear these particulars, their reproduction or use shall not be deemed infringing.

Photographs of mere documentation

Some photographs are explicitly excluded from any protection. This is the case for "photographs of writings, documents, business papers, material objects, technical drawings and similar products". These are photographs of mere documentation (*fotografie di mera documentazione)* that are intended to merely reproduce existing objects or documents. The *rationale* of this provision is to deny protection to photographs the purpose of which is to merely reproduce a material object. Such photographs are intended to merely document such objects, without any appreciable technical or professional effort by the photographer: in this case, the legislator has considered that the public interest in the information prevails over the economic right of the photographer. By contrast, photographs of "writings, documents, business papers, material objects, technical drawings and similar products" that serve specific purposes other than mere documentation are protected by the related right.

Conclusion

While all EU Member States provide full copyright protection to original photographs that meet the originality criterion as interpreted by the CJEU, the national rules vary significantly concerning the protection of non-original photographs. For example, on the one extreme, France has adopted a monistic system that does not grant any protection to non-original photographs. On the opposite extreme, Germany has adopted a "dualistic system" that grants a very similar substantial protection to both original and non-original photographs. In between these two systems, Italy has adopted a threefold system that provides both a full copyright protection to original photographs and a minor related-right protection to simple photographs, while denying any protection to photographs of mere documentation. This implies that non-original photographs might be granted copyright or related-right protection in one of these countries, while falling in the public domain in another.

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