PROTECTING PRESS PHOTOGRAPHS PHOTO-IP

Summary :

- **Courts often deny photojournalists the existence of free, creative choices, thereby depriving them of copyright protection. Pressed to report on current events, photojournalists can only render what they see, without any personal input. The scenes and the moment captured would be totally foreign to him. What's more, the technical performance of digital cameras reduces the choices he can make when shooting to a minimum.**

- **While it is undeniable that jurisprudence takes up these arguments, it nevertheless leaves room for originality, particularly when the photojournalist has set the scene for his or her subject. Moreover, it admits that the originality of the moment captured can confer sufficient creativity to a photograph. In any case, the originality requirement could lead to a shocking lack of protection were it not for the existence of secondary protections.**

- **Most often considered under the rubric of parasitism and unfair competition, the appropriation of another's work in the numerous cases of simple copy/paste does not appear to fall under these concepts. Appropriating the work of others without any effort other than a digital copy, while refraining from paying the price, clearly constitutes a fault in the classic sense of common law civil liability. Thus, subject to work and commercialization, a photograph should not be exploited without prior payment to its author.**

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Press photography, "capturing an event on the spot"[1] , is a means of information with an immediate power to convince, combining raw information with the feelings and emotions that its author has been able to capture and convey.

However, for several years now, the photojournalism sector has been undergoing major economic upheavals, due to the combined effects of the press crisis and the digital revolution[2] . Unauthorized use of photographs represents a major loss of income for image professionals. Even if, to our knowledge, there are no public data on the number of illicitly exploited photographs, practitioners in this field have to deal with mass litigation, many of which are fortunately settled out of court.

There are relatively few court rulings in this area. A reading of this case law leaves a bitter taste, as the originality requirement leads to subtleties and contradictions from which it is difficult to derive general principles. By all too often denying press photographs copyright protection, this case law could give the impression of the existence of a new category of *res nullius,* or things without a master, whose use would be common to all.

[1] Académie de Paris, https://www.ac-paris.fr/portail/jcms/p2_2049703/la-photographie-de-presse.
[2] Le photojournalisme cherche un nouveau souffle après des années de crise, article by Michèle Warnet, Les Echos, September 4, 2017.

As part of freedom of expression and information, an essential foundation of a democratic society, press photographs clearly require protection to ensure fair remuneration for the professionals who produce and distribute them. Copyright protection **(I)** must therefore be complemented by so-called secondary but no less essential protections **(II)**.

I. COPYRIGHT PROTECTION

Is photojournalism compatible with a creative approach?

The widespread availability of smartphones, digital cameras and the global success of social networks have undoubtedly made photography and its uses commonplace[3] . The technical performance of mass-market tools means that everyone can take high-quality shots. So what happens to the originality required to qualify a photographic creation for copyright?

While article L.112-2, 9°, of the French Intellectual Property Code considers photographic works to be works of the mind, without distinction as to genre, copyright protection remains subordinate to the demonstration of a creative approach specific to the author and bearing the imprint of his or her personality[4] .

In this respect, photojournalism, whose primary objective is to report information using still images, seems *a priori to* suffer from a congenital incompatibility with the originality required by the intellectual property code. Shouldn't the journalist's desired neutrality in gathering and processing information preclude any personal approach likely to affect the accuracy of the fact he or she is reporting? Is the freedom to inform not opposed to the legal appropriation of a news image, a resource belonging to all[5] ? For example, it has been ruled that photographs taken on the spot, showing players in action in a stadium, certainly reveal technical skills, but not the imprint of a personality, "since the photographer, charged with capturing the outstanding actions of the match", "had no choice as to the moment or the singularity of the positions, since these elements, resulting from the conditions and circumstances of the match which he must faithfully report, were beyond his control"[6] .

But just as a press article "whose structured composition, served by a style unique to the author, offers an insight that characterizes that author"[7] , reveals a creative intellectual approach and therefore originality in the copyright sense, press photography is not necessarily the simple transfer of a raw fact.

What remains to be clarified in practice is what characterizes the originality of a journalistic cliché, both in terms of the rulings that reject it and those that accept it.

Free and creative choices

The photographer must demonstrate that he or she has made free and creative choices, as the mere capture of reality, even with talent but without aesthetic bias or creative work, is insufficient[8] . The same applies to technical know-how. In the absence of a process

[3] "Between 2010 and 2020, 10,000 billion photos were taken worldwide, 8 times more than in the previous decade", Frédéric Filloux, "La photographie, entre dévastation et démocratisation", L'Express n° 3671, November 10 to 17, 2021.
[4] Court of Cassation, Civil, Civil Division 1, May 15, 2015, 13-27.391.
[5] On "resource information", see M. Vivant and J.M. Brugière, Droits d'auteur et droits voisins, Précis Dalloz, p. 197, n° 150 et seq.
[6] Versailles Court of Appeal, July 15, 2015, no. 13/07057, Dalloz Avocat.
[7] Cour d'appel de Paris, Pôle 5, Chambre 2, Arrêt du 28 mars 2014, Répertoire général nº 13/13814, Lamyline.
[8] Versailles Court of Appeal, December 8, 2017, no. 15/08737, Dalloz Avocat.

creative, technical know-how cannot lend originality to scenes inherent to extreme sports[9] .

It is up to the photographer to demonstrate the existence of personal and arbitrary choices, "of the subject, of the staging of the photographed object, of the composition of the framing, of the angle of the shot, or of the modifications made after the shots were taken"[10] , and any one of these choices may be sufficient.

erIf we follow the method of analysis advocated by the CJEU in its judgment of December 1, 2011[11] , the originality of a photograph can thus result from the creative choices made either during the preparatory phase, or when the picture was taken, or when the print was made and retouched.

Limited choices in the preparatory stage

At the preparatory stage, the photojournalist's freedom of choice is limited.

- **The imposed nature of the subject**

The events he attends are dictated by current events. Except in special circumstances, he does not interfere in the scenes he is asked to report on. The imposed nature of the subject, characters and settings excludes *a priori* the photographer's freedom. Such is the case with classic sports photography. As the attitude and behavior of the players photographed, as well as the lighting, are imposed on the photographer by the configuration of the location and the progress of the game, no personal choice on the part of the author can be accepted[12] .

Unoriginal is the shot whose characteristics result from the event, i.e. a press conference at a venue chosen by the soccer club, showing the coach speaking into a microphone[13] .

The situations photographed are nothing more than banal game scenes or soccer actions that have been featured for decades in every sports magazine or review[14] .

- **Passivity of the photojournalist**

The passive behavior of the photographer, who simply set up his lens in the direction of a ski lift in order to have a window of view, between the trees, and triggered his camera when the celebrities concerned appeared, again attests to an absence of choice, the shot being imposed on him by the circumstances[15] .

A photograph taken on the spot, essentially depicting the spontaneous gesture of one of the protagonists in the scene captured, merely renders the moment captured without any personal input from the photographer[16] .

[9] Montpellier Court of Appeal, May 3, 2012, no. 11/00762, Dalloz Avocat.
[10] Paris Court of Appeal, Pôle 05 ch. 2, January 22, 2021, no. 19/10814, Lamyline
[11] Case C-145/10 Painer v Standard Verlags GmbH, judgment of the Court (Third Chamber) of December 1, 2011.
[12] Paris Court of Appeal, February 24, 2012, no. 10/10583, Dalloz Avocat.
[13] Nancy Court of Appeal, December 2, 2013, no. 12/02809, Lamyline.
[14] Paris Court of Appeal, February 24, 2012, no. 10/10583, Lamyline.
[15] Paris Court of Appeal, December 5, 2007, no. 06/15937, Lamyline.
[16] Paris Court of Appeal, February 4, 2020, no. 024/2020, Lamyline.

A photograph that merely shows a player in a classic position trying to control a ball with his toe does not have the originality required by copyright law[17] .

- **Purely documentary**

Photographs of activities and events in Arles (bullfighting, ancient monuments, theater and music, antiques, sports, children, tourism)" are devoid of originality, since "their characteristics in terms of framing and angle of view, as well as light, for shots intended to illustrate either daily newspapers and magazines or websites, are of a purely documentary nature, with a simple reproduction of reality"[18] . However, it has also been ruled that the documentary value of photographs is irrelevant when it comes to demonstrating their originality[19] .

- **Acknowledged originality due to the staging used**

On the other hand, the portrait of a young hopeful of French soccer, "calm in his attitude and confident in his future", observing figurines of former French players with prestigious records, reveals, through an original montage, the imprint of the author's personality[20] . Similarly, the photographer's orchestrated staging of two young players from the new generation of rugby wrestling each other gives the photograph[21] its originality. The fact that the photographs have been worked on in advance, on the instructions of the photographer, who has chosen the background to give an effect or to provide particular information, contributes in any case to the originality of the shots[22] . Thus, if the photographer has staged his subject while adopting a specific angle of view and lighting techniques, the originality of his shots will be more easily accepted[23] .

The choice of shot

When shooting, the photographer's choices can be constrained by many factors.

- **Shooting technique excluding choice**

The absence of choice can be deduced from the technique used. Such is the case with continuous shooting. The process excludes the instantaneous capture of a particular movement by the athlete, the only way, it seems, for the Montpellier Court, to demonstrate a creative choice[24] . A photographer cannot rely on a particular framing, an angle of view, and even less on the moment when the shots were taken, since the moment at which he triggered his camera was exclusively controlled by the appearance, for a few seconds, of the people he targeted[25] .

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[17] Paris Court of Appeal, February 24, 2012, no. 10/10583, Lamyline.
[18] Aix-en-Provence Court of Appeal, June 27, 2019, no. 2019/260, Dalloz Avocat.
[19] Lyon Court of Appeal, May 9, 2012, no. 12/04563, Dalloz Avocat.
[20] Paris Court of Appeal, February 24, 2012, no. 10/10583, Lamyline.
[21] Paris Court of Appeal, February 24, 2012, no. 10/10583, Lamyline.
[22] Aix-en-Provence Court of Appeal, November 19, 2015, no. 17/04320, Dalloz Avocat.
[23] Paris Court of Appeal, June 11, 2010, no. 09/12560, Dalloz Avocat.
[24] Montpellier Court of Appeal, May 3, 2012, no. 11/00762, Dalloz Avocat.
[25] Paris Court of Appeal, December 5, 2007, no. 06/15937, Lamyline.

Digital technology allows the shutter and speed to be set automatically, so that shooting sports action requires a minimum of manual intervention[26] . Photographs taken during a soccer match are not original if the journalist has merely recorded images of phases of the game or a player's expression, using the technical capabilities of his camera as any photographer with a high-performance camera would do[27] .

- **Insufficient choices**

Highlighting the subject - in this case a car - is not in itself indicative of originality, given the purpose of the photograph, which was intended to illustrate a report on the test drive of this vehicle[28] .

Simply adjusting the brightness of the image cannot be considered as a sign of the photographer's personality, since the shot was taken on the spot[29] . Following an editor's recommendations is not a creative choice, since such advice is part of learning the basics of photojournalism[30] .

While the photographer does indeed make a choice when he zooms in on a subject and decides to trigger his camera, the photograph taken during a match without the protagonists' knowledge is merely the fruit of chance, originating in the animated phases of the game, with the photographer merely intercepting a fleeting moment[31] .

- **Recognized originality due to the composition of the photograph**

However, a composition that departs from the banal soccer clichés is indicative of a creative process, with the photographer having chosen the angle, contrast and framing[32] . The same is true of a shot that stands out from conventional photographs of groups of footballers through the positioning of the players, the framing, the light and the diversity of the characters[33] .

The choice of t h e moment seized is therefore not sufficient without the addition of a

The "composition" is nothing more than a chosen "original" moment, at odds with the normal, predictable course of events, and technical choices demonstrating a minimum of creative research.

- **Originality linked to the choice of moment captured**

In the eyes of the courts, the banality of the subject, even when accompanied by aesthetically appealing technical options, is a major obstacle to the recognition of originality. For example, photographs of footballers and scenes from the game constitute

They are not the fruit of "personal research" but of "ordinary subjects".

However, the Bordeaux Court of Appeal was able to rule that "even if the choice of subjects is often banal because dictated by the commission", the photographer, "beyond the technical constraints of shooting", sought, during his reports, to highlight an atmosphere, a person or an object by placing them in a context.

[26] Paris Court of Appeal, February 24, 2012, no. 10/10583, Lamyline.
[27] Nancy Court of Appeal, December 2, 2013, no. 12/02809, Lamyline.
[28] Versailles Court of Appeal, December 8, 2017, no. 15/08737, Lamyline.
[29] Paris Court of Appeal, February 4, 2020, no. 024/2020, Lamyline.
[30] Montpellier Court of Appeal, March 19, 2010, no. 13/01834, Lamyline.
[31] Paris Court of Appeal, February 24, 2012, no. 10/10583, Dalloz Avocat.
[32] Paris Court of Appeal, February 24, 2012, no. 10/10583, Dalloz Avocat.
[33] Paris Court of Appeal, February 24, 2012, no. 10/10583, Dalloz Avocat.

[34] . Similarly, if the elements making up the photograph are actually known,
Although the photographs "belong to the universe of tandem skydiving photographs" and "taken separately, belong to the universe of tandem skydiving photographs", the choice of positioning, point of view, framing, colors and atmosphere created by the combination as depicted give rise to a specific physiognomy, and the assessment of originality must be carried out globally[35] .

In the case of shots of equestrian events, it has been held that "while some of the elements making up the shots in question are necessarily known, using technical know-how, and that, taken separately, they belong to the common fund of the world of photography ... their combination ... shows arbitrary choices conferring on each of them a particular physiognomy" which distinguishes them "in a sufficiently clear and significant way from other shots of the same kind"[36] .

Touch-ups and journalistic ethics don't mix

It's a fine line between retouching and manipulating information, and one that photojournalists must not cross[37] . It's true that retouching software offers a wide range of tools for giving a photograph an originality it would otherwise lack. However, acceptable retouching cannot go beyond a slight cosmetic makeover. In our opinion, there is not much to express a creative effort within the meaning of copyright law.

An attempt at synthesis

Regardless of the originality derived from the composition of the photograph, it is clear from the above decisions that the originality of the scene captured - an originality to which the photographer is nevertheless a stranger - can confer creativity on a photograph. The photographer's eye, sense of observation and sensitivity have enabled him to capture, in a jumble of banal images, the very fleeting moment when an emotion is revealed. If he can combine this with technical know-how, he will undoubtedly convince his judge of his creative approach. For example, a photojournalist who has made a special effort to position his subjects and frame his images, by arbitrarily retaining a detail of a character or situation, has created a particular dynamic, demonstrating creative choices that merit copyright protection[38] . The ability to perceive better than anyone else the singular significance of a situation justifying the triggering of the camera at a precise moment could in itself characterize the originality of the shot[39] .

If, on the other hand, the author enjoys a certain notoriety, in particular through the awards he or she has won, judges, on the bangs of the law, will be more inclined to recognize the benefit of this protection[40] . In fact, if a photojournalist deserves a prize, awarded by the French Minister of Culture, for a shot taken on the evening of an OM match, it's because the profession recognizes the originality of this type of photography[41] .

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[34] Bordeaux Court of Appeal, November 12, 2019, no. 17/06297, Dalloz Avocat.
[35] Paris Court of Appeal, March 10, 2010, no. 08/08911, Dalloz Avocat.
[36] Paris Court of Appeal, February 15, 2019, no. 17/21451, Dalloz Avocat.
[37] For an example of the controversy, see Emmanuelle Jardonnet "Le photojournaliste Steve McCurry tombe dans un panneau cubain," Le Monde, May 26, 2016, www.lemonde.fr.
[38] Paris Court of Appeal, February 2, 2018, no. 16/25462, Dalloz Avocat.
[39] Lyon Court of Appeal, January 15, 2019, no. 17/04320, Dalloz Avocat - Aix-en-Provence Court of Appeal, November 19, 2015, no. 17/04320, Dalloz Avocat.
[40] Lyon Court of Appeal, January 15, 2019, no. 17/04320, Lamyline.
[41] Aix-en-Provence Court of Appeal, November 19, 2015, no. 17/04320, Dalloz Avocat.

The constraints imposed by the genre, by limiting the photojournalist's freedom of choice, *ultimately* leave little room for originality. The protections wrongly referred to as subsidiary take on an essential character here.

II. OTHER PROTECTIONS

Protection that is sometimes inadequate

In the case of the unauthorized use of one or more images not protected by copyright, some of the so-called subsidiary protections are clearly inadequate.

Such is the case with the protection applicable to databases listing photographs, where the producer can only prohibit the extraction and re-use of all or a qualitatively or quantitatively substantial part of the database's content (art. L342-1). Although repeated and systematic re-use of insubstantial parts may also be penalized (art. L342-3), in practice such cases are rare.

Parasitism: an unworkable classic?

Parasitism, which consists of "interfering in the wake of others in order to profit, without spending anything, from their efforts and know-how"[42] , is not easy to handle, given the conditions laid down by case law. In any case, isn't the notion alien to the hypothesis we're dealing with here?

Even if a competitive situation is no longer a criterion for unfair competition[43] - the name of which should no doubt be changed - the unauthorized user of a few photographs does not really have - except in specific circumstances - the will to interfere in the wake of the owner of said photographs. What's more, in principle, the parasite must be acting within the framework of a commercial activity, which is not always the case with indelicate users.

However, the appropriation of another's work is generally viewed as parasitism. In this case, however, such appropriation only appears to be wrongful if it proves to be unfair and, consequently, accompanied by actions contrary to the practices of civilized commerce. The analysis here consists of reasoning within the framework of freedom of competition. Imitating or copying a product is not only lawful, it is encouraged by the economic need to offer substitutable products on a given market. The French Supreme Court regularly rules that "in the absence of any private rights, the mere fact of marketing products identical to those distributed by a competitor is not wrongful"[44] . A risk of confusion is therefore necessary. Unfair competition may arise from the mere fact that the imitation has "the effect of creating confusion between the products in the mind of the public", since proof of intentional fault is not required[45] .

[42] Court of Cassation, Civil, Commercial Division, March 17, 2021, Légifrance 19-10414.
[43] Cour de Cassation, Commercial Chamber, November 21, 2000, Légifrance 98-17478: "... the situation of competition between the parties ... is not a condition of the action for unfair competition, which only requires the existence of a fault" - Cass. Com. February 12, 2008, Légifrance n° 06-17501.
[44] Cour de cassation, Chambre commerciale, Arrêt nº 928 du 9 juin 2004, Pourvoi nº 03-10.136, Lamyline.
[45] Cour de cassation, Chambre commerciale, July 2, 1991, Légifrance no. 89-14042.

Parasitism in name only

The risk of confusion is sometimes widely appreciated, if not simply ignored. For example, in a ruling handed down on September 21, 2017, the Tribunal de Paris, after noting that the "parasite" had taken the shots used on its site via the Google Image search engine, ruled that "the reproduction of the litigious shots on the website of the company S., without untying the purse, consequently characterizes a parasitic act on the part of the latter"[46] .

If this is indeed a case of "parasitism", it has to be said that, legally speaking, it is not. in name only. Wouldn't "parasitic behavior" simply be a matter of
Is it possible to "parasitize" a very classic civil liability under common law?

Faulty appropriation unrelated to any notion of unfair competition

The unauthorized user of a photograph does not limit himself to imitating it; refraining from
lazily to create a cliché similar to that of the
"it simply makes a copy of it by simply duplicating it.
format allows.

The mistake here is to reason under the ticklish auspices of the holy competitive market. However, in our hypothesis, there is no need to preserve freedom of competition as long as there is no operating monopoly to prevent users from drawing inspiration from existing clichés to create their own, or have them created.

In what way would direct appropriation of another's work only become wrongful in the presence of unfair practices? Such appropriation, which is contrary to moral standards[47] , is in itself wrongful. Moreover, in the case of imitation, shouldn't the "parasite" "individualize his product and thus avoid confusion between the two products"[48] , such individualization in the case of a copy-paste being, by hypothesis, excluded?

The French Supreme Court (Cour de cassation)[49] , in a case concerning spare parts, while noting that "the parts reproduced, which were not protected by a private right, had been produced on the basis of drawings supplied by the customer ... the mere similarity, which was compulsory, of these parts did not prove the unfair appropriation of the work of others", nevertheless ruled that the existence of a fault would have been demonstrated if the victim of this copy had established the existence of overmolding, which is after all only a particular technique of
"copy and paste".

The act of copying and pasting elements from a competitor's site and thus "profitably appropriating the work and investments of others constitutes parasitic behavior for which the author is liable"[50] .

There's no need to resort to the notion of "parasitism" when the user simply reproduces a third party's photograph as is. Common law civil liability is sufficient.

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[46] TGI Paris, September 21, 2017, no. 16/13818, unpublished.

[47] "Remain in this house, eating and drinking of what they have, for the worker deserves his wages", Gospel according to Saint Luke, Chap. 10, verse 7.

[48] Marie Malaurie-Vignal, Le parasitisme des investissements et du travail d'autrui, Recueil Dalloz 1996, p. 177.

[49] Cour de cassation, Commercial Chamber, May 16, 2000, Légifrance no. 98-10230.

[50] Aix en Provence Court of Appeal, April 17, 2002, JurisData no. 2002-179519.

For an autonomous application of article 1204 of the Civil Code

A fault, a loss and a causal link: these are the components of a claim for damages. liability, which must of course be demonstrated.

The direct appropriation of another's work engages the user's responsibility as soon as the photograph is marketed and, if used without the owner's authorization, its indelicate operator is exonerated from paying its price and the work required to obtain a similar photograph. Each of the constitutive elements and prerequisites of fault deserves further development.

1er building block: a job

Since we're talking about professional photographers, it goes without saying that taking the shot involves a great deal of work and investment. Depending on the type of photograph, this work and investment can be more or less substantial: travel, accreditation, equipment used, preparation, studio, retouching... In addition to the actual production of the photograph, there are the investments required for its distribution. Building up an image bank and setting up the tools, traditional or digital, needed for promotion and marketing require heavy investment.

2ème key element: marketing

Marketing can be direct and/or indirect. It is direct when the photographer markets his images himself, usually for the benefit of his client or the press. It is indirect when he entrusts distribution to an agency or image bank, which usually agrees to pay him a percentage of the price of the licenses granted. When marketing is indirect, the intermediary, holder of the right of ownership over the image contractually conferred by the photographer, is in turn entitled to seek, in his or her own name, the liability of indelicate users. The work involved in collecting, organizing, promoting and selling the images alone merits adequate protection.

3rd constituent element: lack of authorization

Without doubt, the absence of authorization is sufficient in itself, whether the result of simple negligence or a deliberate desire to bypass the constraints of obtaining the necessary licenses. However, the absence of authorization more often than not implies ancillary actions that reveal a hunter/gatherer mentality from the earliest days of humanity. The utopia of a free Internet is a thing of the past, and it should be remembered that payment of a price is not always the quid pro quo obtained from Internet users exposed to online advertising and more or less willing providers of judiciously re-exploited personal data. By downloading a photograph onto his or her hard disk with a view to exploiting it, the Internet user is behaving like a passer-by on a boulevard who, seeing keys left in the ignition of a car, deems it legitimate to use it to get to work. Shouldn't the bad faith of the indelicate user be presumed, with the onus on him to overturn it if particular circumstances allow him to do so?

4th constituent element: a self-interested operation

Only the self-interested exploitation of a photograph is such as to engage the liability of its indelicate operator. Such exploitation will necessarily result from the use of a public site for illustration purposes, whether commercial or not. A site is only of interest because of its content, and the images that adorn it are precisely designed to attract the attention of the surfer, so that illustrations and photographs contribute to the attractiveness of the medium and enhance its value. This enhancement is done on the cheap, without any purse strings attached, even though the offending publisher benefits indirectly by increasing the potential traffic to his site. In so doing, he ruins an entire economic sector, in proportion to the extent of his "borrowings".

Injury and causation

Damage, which is a prerequisite for a liability action, can be defined in the classic way: loss of earnings, costs of research and amicable resolution of unauthorized use, trivialization of the photograph, disruption of distribution channels, to which can be added damage to the reputation of the owner of the photograph, whose name, in violation of[51] , will most often have been obscured. There is no particular difficulty here in establishing a causal link.

Objections, Your Honor!

What's wrong with making users responsible for copying and pasting?

Marie Malaurie-Vignal[52] reminded us in 1996 that "in the absence of confusion, one may hesitate to protect a simple work ... which does not present originality and ... belongs to the public domain ... [and] can be copied". [and] can be copied".

Copying someone else's work by putting in the effort required to make the "copy" is, in principle, no more than a legitimate appropriation of the "concept" imagined by the original worker, or of the result he was able to obtain. Borrowing remains in the ethereal realm of the idea or intuition which, from the point of view of copyright, we know belongs to everyone. This is not the case here, as there is no effort involved.

Is there not a risk of re-establishing an unwanted monopoly? What kind of monopoly could we be talking about here, given that, as we have already pointed out, no one intends to oppose the production of identical or similar photographs? Each photograph, the fruit of an individualized and unique work, remains the property of its producer or the person to whom it has been assigned. It is hard to see how this property right, limited to the very object to which it relates, could generate a monopoly that would infringe on the freedom of third parties.

Isn't it shocking that this property is likely to persist over time, whereas the monopoly of the creator of a protected work must legally expire at the end of the term of protection?

The objection is that the monopoly of exploitation enjoyed by the author of a work of the mind has little to do with the liability for fault that the owner of an unprotected photograph may be able to invoke. The latter's supposed monopoly does not extend to partial or total imitations of his photograph. He can only prohibit the uses concerned, not all reproductions or representations.

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[51] Not to be confused with the moral rights of authors of protected works.

[52] Le parasitisme des investissements et du travail d'autrui, Recueil Dalloz 1996, p. 177.

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The appropriateness of less stringent requirements when it comes to assessing the originality of press photographs is, let's face it, debatable. At the very least, here as elsewhere, a clarification of jurisprudence is called for. This is no easy task. Everyone must contribute. And for those clichés that are the fruit of labour and which should be denied copyright protection, a reasoned application of common law civil liability, without the need for a detour via the notion of parasitism, should no doubt suffice. In any case, a mortifying vacuum would be deeply shocking.
