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We are Experienced! Jimi Hendrix in Historical Perspective

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This article reflects on the decision of the Paris Tribunal de Grande Instance concerning copyright protection for a photograph of Jimi Hendrix by Gered Mankowitz (*Bowstir Limited and Gered Mankowitz v. Egotrade SARL* (2015)) and subsequent critical comment about the case, by providing an historical perspective on originality and photographic copyright. In doing so, it uncovers previously untold details of the history of photographic copyright and the first statutory originality criterion: introduced by section 1 Fine Arts Copyright Act 1862¹ and subsequently considered in *Graves' Case*.² It argues that, while the decision in *Bowstir* seems surprising today, the points that complicated the Court's reasoning are familiar from the standpoint of copyright history. An historical perspective, therefore, enables us to engage more critically with these issues. In commenting on the decision, the article draws on significant original research to be fully published in a forthcoming book (*Art and Modern Copyright: The Contested Image*, CUP, forthcoming 2016/17³) which, in excavating a variety of little known perspectives on artistic copyright, shows history to be a rich terrain of ideas about copyright and the objects that it regulates.

The Decision in *Bowstir and Mankowitz v. Egotrade*

On 21 May 2015, the Paris Tribunal de Grande Instance, delivered a judgment in the case of *Bowstir Limited and Gered Mankowitz v. Egotrade SARL*.⁴ At issue was a photograph by British photographer Gered Mankowitz, depicting musician Jimi Hendrix puffing smoke from a cigarette. The photograph was reproduced by the French defendant in an advertisement for electronic cigarettes, without the authorisation of the claimant, an English company that had taken a copyright assignment from Mankowitz. Bowstir and Mankowitz commenced proceedings in

¹ 25&26 Vict. c.68.

² (1868-69) L.R. 4 Q.B. 715.

³ The forthcoming book develops PhD research supervised by Lionel Bently at the University of Cambridge: E. Cooper, *Art, Photography, Copyright: A History of Photographic Copyright 1850-1911* (2011).

⁴ Decision of the 3rd Chamber 1st section. A Full copy of the judgment can be found at http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=4612.

France: Bowstir claimed against the defendant for copyright infringement and Mankowitz for infringement of his moral rights.

An essential element of the claimants' case, was that the photograph in question was 'original', a legal pre-requisite for the protection of copyright works. As readers of the *EIPR* will know, the originality of photographs has long been the province of European Union law. The Term Directive, first passed in 1993, provides that copyright protection applies to photographs that are 'original in the sense that they are the author's own intellectual creation'.⁵ The Recitals of the same Directive indicate the standard to be 'the author's own intellectual creation reflecting his personality'.⁶ In *Eva Maria Painer*, the Court of Justice of the European Union stated that in relation to a portrait photograph, 'originality' would be satisfied by 'free and creative choices' in the production of a photograph:

In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.⁷

The expression of these choices by the photographer were, in the view of the European Court, such as to 'stamp the work created with his "personal touch"'.⁸

Referring to these passages from *Painer*, the Paris Tribunal de Grande Instance, Third Chamber, First Section, – a first instance court that has special jurisdiction for intellectual property matters – reviewed the evidence presented by the claimants. Mankowitz gave evidence that the photograph was original on the following basis:

...this photograph of Jimi Hendrix, as extraordinary as it is rare, succeeds in capturing a fleeting moment of time, the striking contrast between the lightness of the artist's smile and the curl of smoke and the darkness and geometric rigor of the rest of the image, created particularly by the lines and angles of the torso and arms. The capture of this unique moment and its

⁵ Art 6 Term Directive 93/98/EEC, now contained in Art 6 of the codified version, 2006/116/EC.

⁶ Recital 17 Term Directive 93/98/EEC, now contained in Recital 16 of the codified version, 2006/116/EC.

⁷ *Eva Maria Painer v. Standard Verlags* (2011) C-145/10, para. 91.

⁸ *Ibid.* para. 92.

enhancement by light, contrasts and the narrow framing of the photograph on the torso and head of Jimi Hendrix reveal the ambivalence and contradictions of this music legend and make the photograph a fascinating work of great beauty which bears the stamp and talent of its author.

The Tribunal de Grande Instance, however, did not consider this to meet the test of originality set out in *Painer*; Mankowitz was merely ‘highlighting the aesthetic characteristics of the photography which are distinct from its originality’. In particular, the evidence did not explain who was responsible for ‘the choices made regarding the pose of the subject, his costume and his general attitude’; were these choices the imprint of the personality of Mankowitz or Jimi Hendrix? As the Court concluded:

...nothing [in the argument] allows the judge and the defendants to understand if these elements, which are essential criteria in assessing the original features claimed, that is, the framing, the use of black and white, the light décor meant to highlight the subject, and the lighting being themselves typical for a portrait photograph showing the subject facing, with his waist forward, are the fruit of the reflecting of the author of the photograph or the subject, and if the work bears the imprint of the personality of Mr Mankowitz or of Jimi Hendrix.

Accordingly, the claimants’ claim failed as the evidence did not establish that originality, as defined in *Painer*, was attributable to Mankowitz.

In the months following the ruling, the decision has been the subject of critical comment. Legal commentators criticising the decision, argued that the Court should have held that the test in *Painer* was met by the photograph; as one French lawyer argued Mankowitz’s photograph was an ‘obviously original photographic work’.⁹ The decision was presented as an irregularity; it was wrong in law, being ‘contrary to the elementary rules on copyright law’.¹⁰ An even stronger criticism was that it was deliberately wrong: part of a broader ‘ideological aim’ on the part of the French courts ‘to dismantle’ EU copyright law.¹¹

Photographers also objected to the ruling; the reasoning of the Court was unreceptive to the particular aesthetic of photojournalism as expressed in Mankowitz’s evidence. As one photographer commented, Henri Cartier-Bresson –

9 B. Spitz, *In Breach of EU Copyright Law*, Kluwer Copyright Blog, 26.5.2015.

10 Ibid.

11 Ibid.

‘the French photographer who is considered to be the father of photojournalism’ – must be ‘rolling over in his grave over the French Court’s ruling’; the essence of the aesthetic of photojournalism is precisely as Mankowitz’s statement described: the capturing of a ‘fleeting’ and ‘unique moment’ by the photographer - to use Cartier-Bresson’s phrase, ‘The Decisive Moment’.¹² Yet, that was the basis on which the Court considered it to be unclear that Mankowitz was responsible for relevant creative choices as defined in *Painer*, such as framing, posing and lighting.

From the standpoint of today, then, the TGI ruling has sparked controversy; the ruling is surprising as we assume that Mankowitz is an author that copyright *should* protect. Yet, as this article shows, for a copyright historian the issues at play in both the Court’s reasoning and subsequent comment are familiar territory; the particular themes complicating photographic copyright are far from new. This article now provides a brief overview of the early history of photographic copyright and originality, before returning to the decision in *Bowstir*.

Legislative Reform in 1862: Photographs, Originality and Creativity

The first statute to include a statutory criterion of ‘originality’ was the Fine Arts Copyright Act 1862, which was also the first legislation expressly to provide for the subsistence of copyright in paintings, drawings and photographs. An aspect of legislative history, neglected by existing scholarship,¹³ is that the inclusion of an originality requirement appears to have been directly related to debates over the nature of the labour involved in photography. ‘Originality’ was included in section 1 of the 1862 Act, as a result of a vote of a Committee of the House of Lords, and the proposal for the inclusion of ‘originality’ was tabled together with a second proposal that photographs be excluded from the Bill.¹⁴ The first amendment, regarding originality, was accepted by a majority of the Lords (9 votes in favour of the amendment, and 5 against), and the second, that photographs be excluded from

12 N.S. Levi, *French Court’s Copyright Infringement decision devastating to Intellectual Creativity in France*, NSL photography blog, 1.6.2015.

13 See Ronan Deazley, ‘Breaking the Mould? The Radical Nature of the Fine Arts Copyright Bill 1862’ in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property: Essays on the History of Copyright* (OpenBook Publishers 2010) Chapter 11, which is an earlier version of Ronan Deazley, ‘Commentary on Fine Arts Copyright Act 1862’ in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)*, (www.copyrighthistory.org, 2008).

14 Report from the Select Committee of the House of Lords on the Copyright (Works of Art) Bill with the Proceedings of the Committee; P.P 1862 (172 – I).

protection, was rejected by a majority of the Lords (9 voting against this proposal, and 5 for).¹⁵

The immediate background to this vote were the debates of the House of Lords on the Bill's second reading; these debates included statements to the effect that 'originality' denoted creativity,¹⁶ as well as other comments which implied that the labour of the photographer did not involve creativity.¹⁷ In the wider press, one member of the Lords Committee - Lord Overstone, an art collector who was a trustee of the National Gallery and friend of the photographer Julia Margaret Cameron¹⁸ - was reported to have visited the photographic studio of Robert Vernon Heath before the Committee vote, to ascertain the creativity involved in taking photographs of places; as one article in the photographic trade press expressed, the underlying question was whether 'the artist's individuality is sufficiently impressed on his works.'¹⁹ Heath had spent 1861 taking photographs of Burnham Beeches²⁰, in the view of one art historian these photographs 'were considered some of the finest photographs of the time.'²¹ Therefore, while a detailed record of the debate in the Committee does not survive, it appears that 'originality' was related to questions over whether the labour of the photographer could be creative; the vote on the second resolution, not to exclude photographs from protection, suggests that it was accepted that photography could meet that standard.

Photographs, Originality and the Celebrity Image

15 *Ibid.* p.5-6.

16 Lord Overstone advocated a requirement that protected works be 'new and original'; 'the work should be, in the true sense of the word, an invention – something new and creative on the part of the person seeking those privileges...' See Parl. Deb. 3rd S. vol.166 col.2014 (22.5.1862).

17 On the second reading of the Bill, comments by Lords Westbury and Stanhope seemed to deny that photography involved creativity on the part of the photographer; Lord Stanhope commented that it 'was quite possible for two or more persons to take photographs of the same scene, building or work of art from the same spot, and under the same circumstances, and of course producing similar results.' *Ibid.* col.2016. Lord Westbury responded to this criticism of the Bill by arguing that photographs were different, because of the different conditions under which they were taken: it would not be possible for two people to take a photograph 'under exactly the same conditions of light, position and other circumstances'. *Ibid.* col.2019.

18 *Lord Overstone and Art*, The Times 29.11.1883 p.2. J. Cox, C. Ford, *Julia Margaret Cameron: The Complete Photographs* (2003, Thames & Hudson, London), 496. While Julia Margaret Cameron is generally thought not to have begun to take photographs until after 1864, Cox and Ford. argue that her later 'artistic work' stems from her early activities in the late 1850s. *Ibid.* p.95. In 1865 Cameron gave Lord Overstone an album of her photographs as a gift. *Ibid.* p.503.

19 'Fine Arts' Copyright', *Photographic News* 16.6.1862 p.240.

20 V. Heath, *Recollections* (1892, Cassell & Co, London) 60.

21 R. Taylor, *Impressed by Light: British Photographs from Paper Negatives 1840-1860* (2007, Metropolitan Museum of Art, New York) 324.

Whatever the motivation behind the inclusion of ‘originality’ in the 1862 Act, however, its interpretation by the courts, and its application in cases of photographic copyright, was a different story. The 1862 Act was the first statute to provide for the recovery of pecuniary penalties for infringement through the cheaper and quicker procedures of the magistrates’ courts (or sheriffs’ courts in Scotland), as an alternative to the slower and more expensive route of the courts of common law and equity.²² Summary proceedings was the most common means by which the 1862 Act was enforced. In *Art and Modern Copyright*, I tell the detailed story of how magistrates treated photographic copyright, as a law protecting an underlying object of value that the photograph recorded, rather than the labour of the photographer.

For instance, in the case of photographs of celebrities (such as actors, actresses and literary authors) photographic copyright was thought to protect the sitter’s face or image, rather than the labour of the photographer. Accordingly, a photograph was ‘original’ because it was taken from a ‘living original’; it was the face of the sitter that established originality, not the photographer’s labour. These decisions were delivered, I argue, at a time when photographic copyright was being traded in as if it was what we would think of today as a ‘publicity right’: a right protecting the commercial value of the celebrity image, that was privately owned by the celebrity and traded in by the photographer with the celebrity’s consent. This was a product, amongst other things, of the intersection of the physical exclusivity over the ‘face’ (as limits in photographic technology meant that portraiture was confined to the studio) with the particular scheme of copyright ownership rules contained in section 1 1862 Act, that allowed for different copyright ownership rules to apply to public and private photographs.

Photographs, Originality and Engravings

The labour of the photographer was also effaced in cases concerning the infringement of photographic copyright brought by printsellers. Printsellers, such as the claimant in *Graves’ Case*, Henry Graves, were art publishers who sold engravings of famous modern paintings (e.g. *The Light of the World* by William Holman Hunt) and they brought a number of copyright cases against manufacturers and sellers of unauthorised photographic copies. Engravings were protected by copyright under a copyright statutes passed in the eighteenth and nineteenth centuries (the Engraving

²² 1862 Act, s.8, s.9 and s.11.

Acts²³) and, following a petition to the Home Office by Graves and others,²⁴ section 8 of the 1862 Act provided that summary proceedings could be brought for the recovery of ‘all pecuniary penalties’ for infringement of copyright under the Engraving Acts (in addition to infringement of the substantive provisions of the 1862 Act applying to copyright in paintings, drawings and photographs).

However, within months of the passage of the 1862 Act, the printsellers encountered a problem with the operation of this provision; in *Gambart v. Powell*, Bow Street Magistrates delivered a ruling, the effect of which was that the printsellers could not bring summary proceedings against defendants for the act of selling infringing copies.²⁵ This was a serious concern to the printsellers, as it was often the case that it was the seller of an infringing copy that was the defendant, manufacturers being harder to trace. Accordingly, printsellers began to frame their cases for infringement under the substantive provisions of the 1862 Act (i.e. for the infringement of painting or photographic copyright) so the litigation could be brought using the quicker and cheaper procedures of the magistrates courts. Where the printsellers did not own copyright in the underlying painting,²⁶ they would claim infringement of copyright in a photograph of the engraving in question; these were photographs that the printsellers had authorised, and obtained a copyright assignment from the photographer, for no other reason than litigation. As I illustrate in *Art and Modern Copyright*, before magistrates, the case for infringement of photographic copyright advanced by the printsellers was that the infringing photographs reproduced the underlying object of value that the copyright photograph recorded: the ‘lines and dots’ of the engraving. The labour of the photographer was absent from this analysis. In numerous cases, magistrates accepted such claims, and one such example was the first instance decision in *Graves v. Walker* decided by Southwark Police Court, which was appealed to the Court of King’s Bench and reported as *Graves’ Case* (1869). In *Graves’ Case* Blackburn J (with whom Hannen J and Mellor J agreed) implicitly

23 8 Geo. II c.13 (1735); 7 Geo. III c.38 (1767); 17 Geo.III c.57 (1777); 6&7 Will IV c.59 (1836); 15&16 Vic. c.12 (1852) s.14 (hereafter ‘the Engraving Acts’).

24 ‘Artistic Copyright’, *Journal of the Society of Arts* 11.1.1861 p.113.

25 “Bow-Street”, *The Times* 3.11.62 p.9; “Bow-Street”, *The Times* 10.11.62 p.11. *Gambart v. Powell* held that section 8 of the 1862 Act only enabled the recovery of penalties for those infringing acts for which penalties were designated under the Engraving Acts; the Engraving Act 1767, upon which the printsellers relied, did not include the act of selling or exposing for sale amongst the infringing acts for which penalties could be recovered.

26 In *ex parte Beal* (1868) L.R. 387, 394 the Court of Queen’s Bench held that a ‘copy from an intervening copy’, such as an engraving, would infringe copyright in a painting, per Blackburn J., with whom Mellor J. and Lush J. agreed.

disapproved of this practice; while a photograph of an engraving of a painting *was* original, there would only be infringement if the photograph itself was copied.²⁷

Therefore, unlike the decisions of magistrates, the ruling in *Graves' Case* made clear that the principle underpinning infringement was the relation between the photographer and the photograph. What, though, did *Graves' Case* decide about the meaning of originality as it applied to photographs? The judgment of the Court on this issue was exceptionally brief²⁸ and, prior to the European Court's rulings on originality, its meaning was the subject of much debate by scholars and practitioners, including comment in the *EIPR*.²⁹ One point that these discussions overlooked was the wider framework of copyright statutes at that time. The Fine Arts Copyright Act 1862 did not repeal existing legislation, and this included the Copyright Act 1852, which arguably protected photographs regardless of originality, as prints taken by a 'any... mechanical process'.³⁰ One report of *Graves' Case* records that Blackburn J., during the course of argument, stated that *all* photographs would satisfy the requirement of originality.³¹ This may well have reflected the fact that he considered all photographs to form part of the proper subject matter of copyright (under the 1852 Act). Further, it would have been well known to the judges that decided *Graves' Case*, from the context of that litigation, that there were technical problems in claimants

27 (1868-69) L.R. 4 Q.B. 715, 723.

28 'The distinction between an original painting and its copy is well understood, but it is difficult to say what can be meant by an original photograph. All photographs are copies of some object such as a painting or a statue. And it seems to me that a photograph taken from a picture is an original photograph, in so far that to copy it is an infringement of this statute.' Ibid. per Blackburn J.

29 The impetus for this comment was the ruling of the Southern District Court of New York in *The Bridgeman Art Library v. Corel* (25 F. Supp. 2d 421 (S.D.N.Y. 1998); 36 F. Supp. 2d 191 (S.D.N.Y. 1999)). R. Deazley, 'Photographing Cases in the Public Domain: A Response to Garnett', 2001 European Intellectual Property Review, 179; R. Deazley, 'Letter: Copyright; Originality; Photographs; Works of Art', 2001 European Intellectual Property Review, 601; S. Stokes, 'Graves' Case Revisited in the USA', 2000 Entertainment law Review, 104; S. Stokes 'Photographing Paintings in the Public Domain: A response to Garnett', 2001 European Intellectual Property Review, 354; K. Garnett, 'Case Comment: Copyright in Photographs', 2000 European Intellectual Property Review, 229.

30 15 Vict. c.12. Section 14 of the 1852 Act provided that protection under the Engraving Acts would also apply to 'prints taken by lithography or *any other mechanical process* by which prints or impressions of drawings or designs are capable of being multiplied indefinitely' (emphasis added). In the cases of *Gambart v. Ball* ((1863) 14 C.B. (N.S.) 306) and *Graves v. Ashford* ((1867) 2 C.P. 410, 420-421) it was held that photography was a 'mechanical process' under the 1852 Act for the purposes of infringement. While it would have been open to a court to take a different view on subsistence, it was at least arguable that photographs, regardless of originality, were part of copyright subject matter under the 1852 Act.

31 This is apparent from an exchange during the course of argument in which Counsel E.M. Underdown argued that if a photograph of a picture was held to be original it 'will follow that every photograph must be original, and that the word 'original'... has no force whatever.' To this Blackburn J. replied that he was 'of the opinion that every photograph is original in that sense.' (1869) XX L.T. 877, 880.

using summary proceedings to recover penalties under the Engraving Acts for acts of selling (following *Gambart v. Powell*). Accordingly, the Court may well have been motivated by a wish to interpret ‘originality’ liberally, so as to facilitate the recovery of penalties before magistrates under the 1862 Act, in respect of photographs that were arguably part of the proper subject matter of copyright under the 1852 Act and for which the legislature had intended to provide summary remedies under s.8 of the 1862 Act. On this analysis, therefore, *Graves’ Case*, divorced originality in photographic copyright from questions of the photographer’s creativity and individuality.

Photographs, Authorship and Creativity

By contrast, as I show in *Art and Modern Copyright*, when the Court of Appeal came to interpret the meaning of ‘authorship’ of a photograph, in *Nottage v. Jackson*, it drew on the ‘fine arts’ wording of the preamble to the 1862 Act, defining authorship by reference to creation and invention, by analogy with painting and drawing; authorship of a photograph involved, according to Cotton LJ ‘originating, making, producing, as the inventive or master mind’,³² and to Bowen LJ, it was the person who ‘represents or creates, or gives effect to the idea or fancy, or imagination’.³³ In foregrounding the role of the person that ‘superintended the arrangement, who ... actually formed the picture by putting the people into position’,³⁴ the decision also reflected wider aesthetic thinking about creativity in photography through posing and lighting (or composition and chiaroscuro); these were conceptions of the photograph that broke new ground when they were first given serious theoretical treatment in a book published by Henry Peach Robinson in 1869³⁵ and gathered force in the decade that followed. Yet, in applying ideas of creative authorship in photography to *all* photographs, as was the result of a black-letter reading of *Graves’ Case* and *Nottage* together, including the mundane portrait photograph in question in *Nottage*, a discord resulted between law wider ideas about creativity in photography. Further, the emphasis in *Nottage* on ‘arrangement’ would later sit uneasily with new aesthetic currents, for instance, the press photographer, ‘the realist of photography’ whose

³² *Nottage v. Jackson* (1882-3) LR 11 QBD 627, 634.

³³ *Ibid.* 636-7.

³⁴ *Ibid.*, 632 per Brett MR.

³⁵ H.P. Robinson, *Pictorial Effect in Photography* (1869, Piper & Carter, London).

pictures did not involve posing or lighting, but rather ‘show persons as they are in every day life’.³⁶

Conclusions

How does an historical perspective on photographic copyright enable us to think again about the decision in *Bowstir*? As I noted at the outset, from the standpoint of today, *Bowstir* has been presented as an irregularity: it is a decision that must be wrong, as the result – that Gered Mankowitz is unprotected by copyright – goes against our expectations. A historical viewpoint enables a more complex engagement with the case. As this brief overview shows, ambiguities in how the photograph is understood – including the relation between photographer and what is photographed - have long been intertwined with legal developments. The question raised by the TGI - as to the relation between photographer and sitter - is therefore perhaps worthy of more detailed consideration. Further, this article illustrates that understandings of the photograph are dynamic; they change over time. This in turn highlights the contingent nature of the ideas about the photograph that underpin legal tests (such as that in *Painer*), and the potential conflict when the law is faced with photographic practices that are premised on a different way of thinking (e.g. the photojournalist aesthetic of ‘the Decisive Moment’). Therefore, while the context in the past was very different, history provides us with a vantage point from which to grapple more critically with the particular issues which complicated the Court’s engagement with the visual image: the relation between sitter and photographer, and whether legal tests inevitably contain an implicit aesthetic bias.

36 ‘Photography as a Profession’, *British Journal of Photography*, 4.3.1894 p.192: ‘The newspaper photographer ... does not study light and shadow, has no regard for the position of the head, hands, or feet of the persons whose appearance he is about to perpetuate – in short, he is the realist of photography; his pictures show persons as they are in everyday life, in their usual pursuits or on extraordinary occasions.’