**Not sufficiently 'transformative' appropriation of a photograph held infringing by French court**

Cour d’Appel de Versailles, *Alix* *Malka v Peter Klasen*, 1ère chamber 1ère section, RG No 15/06029, [16 March 2018](http://www.legipresse.com/media/klasen-arret.pdf)

In a longstanding litigation concerning unauthorized appropriation of a photograph for inclusion in a painting, the Versailles Court of Appeal has held that the defendant had infringed the claimant’s copyright and that neither the parody defence under French copyright law nor freedom of (artistic) expression under the European Convention on Human Rights (ECHR) would be applicable to the case at issue.

**Legal context and facts**

Photographer Alix Malka authored three portrait photographs of a model that were published in 2005 in the beauty section of Italian women’s magazine *Flair* together with an indication of his name as the author of the works. Malka later discovered that reproductions of these photographs had been incorporated (without his authorization) in a number of paintings by Peter Klasen. He thus initiated proceedings for copyright infringement against him.

In 2012 the TGI Paris (Court of First Instance) dismissed his action, but the following year the Paris Court of Appeal reversed the decision at first instance and awarded Malka damages for EUR 50,000. The case was appealed the French Supreme Court, which in 2015 noted that a fair balance must be struck between copyright protection and the protection of third parties’ freedom of expression, which includes artistic expression. According to France’s highest judicature the Court of Appeal had failed to undertake properly this assessment and explain in what sense freedom of expression could be compressed within Article 10(2) ECHR. This provision sets the conditions on the basis of which freedom of expression may be restricted. Therefore, the court sent the case to the Versailles Court of Appeal for a new assessment.

**Analysis**

The substantial analysis of the Versailles court began with an assessment of whether the claimant’s photographs could be regarded as protectable, ie sufficient original in the sense of being their author’s own intellectual creation. The court recalled that, to this end, it is for the claimant to demonstrate where the originality of his/her work lies. It held that Malk had sufficiently demonstrated the original character of his creations, which were found to carry his own personal touch. The court dismissed the defendant’s argument that the photographs at issue would be devoid of originality, and also noted that it would make no difference if the original works were used for advertising purposes or simply to illustrate an article detailing beauty trends.

The court then turned to consider whether the defendant could escape liability by relying on the parody defence within Article L 122-5 No 4 of the Code de la propriété intellectuelle (CPI). According to this provision, once a work has been published, the author cannot in fact prevent “La parodie, le pastiche et la caricature, compte tenu des lois du genre.” Klasen had argued that his use of the claimant’s photographs would be protected as a parody, because with his work he had sought to denounce the excesses of consumerism and the ‘advertising subculture’ through the image of women in the media. He had also noted that no confusion or association could occur between his own work and the works of the claimant. The Versailles court did not accept the defendant’s argument. It held that no distortion of the original works had taken place. The additions by Klasen did not really alter the meaning of the original photographs. Even if the photographs had been ‘appropriated’ and incorporated into the new work, no parody or derision could be discerned.

Finally, the Versailles court addressed the interplay between copyright protection and freedom of expression under the ECHR. To this end, Klasen had invoked the decision of the European Court of Human Rights (ECtHR) in *Ashby Donald* et al *v France* (Application No 36769/08). This is arguably an odd choice, especially considering that in that case the ECtHR concluded that there had been no undue interference with the applicants' freedom of expression and that French copyright laws and their application had not repressed freedom of expression in a way that would exceed the limits of Article 10(2) ECHR. Unsurprisingly, the Versailles court rejected Klasen’s argument, and stated that it was rather up to him to set a fair balance between the protection of his own freedom of expression and the fact that permission is generally required to use someone else’s work, especially if the use is of such works without any substantial alteration.

The court also dismissed Klasen’s claim that appropriation art is such that permission cannot be obtained to use third-party objects and images. The analogy with Andy Wharol’s representation of the Campbell Soup cans was not appropriate, as in the case of Wharol nothing suggested (as it was instead the case of Klasen) that he was responsible for the graphics of the Campbell Soup cans. In other words, in the present case appropriation was not apparent.

The Versailles court concluded that Klasen had infringed Malka’s economic and moral rights, and ordered him to pay damages for EUR 50,000.

**Practical signifance**

The decision of the Versailles court is not particularly surprising, especially with regard to the assessment of originality and availability of the parody defence.

Starting from the former, the standard of originality for photographs has been expressly harmonized at the EU level by Article 6 of Directive 2006/116 (the Term Directive). The Court of Justice of the European Union (CJEU) has had the opportunity to clarify the meaning of the phrase ‘author’s own intellectual creation’ on a number of occasions. With particular regard to photographs (and portrait photographs) the most enlightening decision remains the one in *Painer*, C-145/10, EU:C:2011:798, in which the CJEU spoke of the need for: ‘free and creative choices’ that can be done at different stages of the production of a photograph; and a creative result that ultimately displays the ‘personal touch’ of its author.

Turning to parody, although it would have been interesting to review the availability of defences other than this one, the decision appears consistent with the CJEU judgment in *Deckmyn*, C-201/13, EU:C:2014:2132. In that case the CJEU held that a parody has two essential characteristics: first, to evoke an existing work while being *noticeably different* from it, and, secondly, to constitute an expression of humour or mockery. What has appeared crucial is the fact that the Versailles court did not find any use of the claimant's works that could be regarded as truly transformative. But: transformative in what sense? Since the focus was on parody, the degree of transformation was considered from this perspective. Should the lens have been different (eg quotation, criticism/review), perhaps a different outcome might have been possible.

In any case, reliance on freedom of expression alone appears reserved to quite exceptional cases, and the Versailles court seemed to confirm this point.

Dr Eleonora Rosati

JIPLP and University of Southampton

Email: eleonora@e-lawnora.com