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DOI: 10.17803/2713-0533.2025.2.32.428-452

An Examination of the Protectability of Photographs: A Comparative Analysis of Germany, France, Italy and China

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Abstract: The majority of states nowadays grant legal protection to photographs. Most often, photography is the object of related rights. However, legislative solutions are not limited to this approach. The legal protection of photographs varies significantly across different jurisdictions, often due to historical, cultural, and legal influences. For example, in some countries, photographs are protected as objects of neighboring rights or as a separate group of objects. This article explores the legal protectability of photographs through a comparative analysis focusing on four countries: Germany, France, Italy, and China. It reveals that while all these countries offer some form of legal protection to photographs, the nature and extent of this protection can differ markedly. Based on the comparison of approaches, the peculiarities of legal regulation of photography (as an object of intellectual property rights) are revealed. This comparative study reveals notable differences in the legal criteria and scope of protection, reflecting diverse cultural and legal traditions associated with intellectual property rights. Understanding these distinctions is essential for photographers, legal practitioners, and policymakers involved in intellectual property rights, ensuring that the protection granted is appropriate to the cultural and legal context. This exploration highlights the ongoing need for international dialogue and convergence in the standards of photographic protection, particularly in an era of rapid technological advancement and global digital dissemination.

***Keywords*:** photographs; comparative analysis; copyrights; related rights; legal protection; originality; legal standards

Acknowledgements: The research was carried out within the support of the Russian Science Foundation, grant No. 24-28-00567. Available at: https://rscf.ru/project/24-28-00567/.

***Cite as**:* Petkilev, P.I. and Pokrovskaya, A.V., (2025). An Examination of the Protectability of Photographs: A Comparative Analysis of Germany, France, Italy and China. *Kutafin Law Review*, 12(2), pp. 428–452, doi: 10.17803/2713-0533.2025.2.32.428-452

Contents

I. Introduction

The history of photography spans less than two centuries. Compared to the overall history of human society, this is not such a long time. However, the impact that photography has had and continues to have on human beings and culture cannot be overestimated.

The activity of creating photographs did not immediately become part of the cultural life of society. History knows examples of skeptical or even negative public attitudes towards photographs. For example, the newspaper *Leipziger Stadtanzeiger* wrote about the godlessness of photography, because, according to the authors of the article, the fixation of fleeting images is unnatural and therefore offends religious feelings by its existence (Benjamin, 1996, p. 2). The approach of the authors of the magazine article was that photography actually “stops

time", which, in their opinion, should not be done by a human being. Today, such views are not dominant, and photographs are actively created by both professional photographers and ordinary people in the course of their everyday activities.

In the past, creating a photograph required a lot of effort and cumbersome equipment. Today, however, creating a photograph has become extremely easy. In fact, the minimum required to create a photo today is a smartphone. At the same time, a smartphone allows you to carry out further processing of the photo, which will improve its aesthetic perception. In other words, today a person is not limited in the means of expressing their creative nature through photography.

In this regard, the issues related to intellectual rights to such an object are of particular relevance. For example, is it permissible to grant legal protection to photographs where the creative personal contribution of the author is not so obvious? Can a photograph be only a work or also an object of related rights? Are the rules on the protectability of photographs in separate laws or in full-fledged intellectual property codes? All these questions are answered in the legislation and court practice.

II. Approaches of Different States

Each State responds to these questions in a different way. While there is some commonality of approaches, there are also significant differences. This article analyzes the approaches developed by the judicial practice and legislation in Germany, France, Italy, and China.

II.1. Germany

Photographs are protected in Germany. They have been protected since 1907 with the adoption of the Copyright Act for Works of Fine Arts and Photography (*Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie*)[1] (hereinafter KUG).

[1] Available at: https://www.gesetze-im-internet.de/kunsturhg/BJNR000070907.html [Accessed 10.08.2024].

The adoption of the law depended largely on the need to protect not only photography, but also the right of the individual to decide on the distribution and public display of his or her image. The literature notes that the body of the deceased Bismarck was photographed without the consent of his relatives, which predetermined the debate over the need for comprehensive regulation of photographic rights and the imminent adoption of the KUG (Osterrieth and Marwitz, 1929, p. 161; Wandtke and Bullinger, 2014, p. 221).

Later on, a law was passed to protect two types of photographs. According to Art. 2 of the Act on Copyright and Related Rights *(Gesetz über Urheberrecht und verwandte Schutzrechte)*[2] (hereinafter UrhG), photographic works are protected works in the literary, scientific, and artistic domain. Only the author's own intellectual creations are works within the meaning of German law. Those photographs that do not meet these criteria are not works, but objects of related rights. For example, such objects may be photographs taken spontaneously, family photographs, photographs of paintings, or other two-dimensional objects in the public domain. In other words, the objects of related rights include photographs that are not the product of the author's creative activity, but perform only the function of fixing the surrounding reality.

It is noteworthy that, at the level of European Union law, only photographs that are the result of creative activity are protected. Namely, Art. 6 of Directive No. 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights[3] states that photographs that are original in the sense that they are the author's own intellectual creation shall be protected in accordance with the Directive. However, the act does not exclude the possibility of the state protecting other photographs as well, as the legislator in Germany has done.

The evaluation of a photograph for compliance with these criteria shall be carried out by the court. German jurisprudence has numerous

[2] Available at: https://www.gesetze-im-internet.de/urhg/ [Accessed 10.08.2024].

[3] *Official Journal of the European Union*. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:372:0012:0018:EN:PDF [Accessed 10.08.2024].

examples of a photograph being classified as a work or an object of related rights. This fact indicates a high degree of judicial discretion on this issue. In 2018, for example, the German Federal Court of Justice considered the case I ZR 104/17,[4] which concluded that photographs of paintings or other two-dimensional objects in the public domain (public) are not copyrightable, but are protected under the rules of Art. 72 UrhG. That is, they are subject to the legal regime of related rights. That does not exclude the responsibility of a museum visitor for photographing paintings and publishing them in the public domain on the Internet, if there is a prohibition established in the contract.

A different approach is reflected in the court practice with respect to other photographs. For example, a photograph of another photograph cannot be recognized as a protected subject matter. In Case I ZR 14/88[5] the Court concluded that there was no obvious need to protect such photographs, since to do otherwise would allow the legally defined period of protection of the photograph to be extended at the will of the individual through reproduction (photocopying) processes. The Court reached this conclusion with reference to authors such as Nordemann, Fromm and Hertin (Nordemann, 1987; Fromm et al., 1988).

Thus, it is incorrect to assume that photographs in Germany are protected either as works or as objects of related rights. In some cases, photographs are not protected at all. In this regard, it is acceptable to speak about three legal regimes of protection of photography: 1) an object of copyright; 2) an object of related rights; and 3) an unprotected object.

The discussion on the approaches to jurisprudence is also noteworthy. For example, Grischka Petri analyzed the doctrinal positions of scholars and concluded that a dispute has arisen among German jurists over the above-mentioned judicial acts, namely, whether it is justified to grant

[4] Bundesgerichtshof, Urteil vom [Federal Court of Justice, judgment]. 20.12.2018 — I ZR 104/17. Available at: https://openjur.de/u/2135129.html [Accessed 10.08.2024].

[5] Bundesgerichtshof, Urteil vom [Federal Court of Justice, judgment], Urt. v. 8. November 1989 — I ZR 14/8. Available at: https://www.prinz.law/urteile/bgh/I_ZR__14-88 [Accessed 10.08.2024].

protection to photographs of paintings or drawings, but to deny legal protection to photographs of other photographs (Petri, 2021, p. 69).

The discussion on this issue draws attention to itself. On the one hand, a situation arises in which one object is in a more "privileged" position compared to another object. A photograph of a photograph is not protected by law, while a photograph of a painting, which is freely available, acquires legal protection. Specifically, from this position, the approach of adopted in the judicial practice may seem debatable. However, if we proceed from the fact that in one case the object of the photograph is initially in free access, and the other object is not, the court's approach seems less controversial.

The differences in the legal regulation of photographs as objects of copyright and objects of related rights also lie in the term of protection. The general rule of 70 years after the death of the author applies to copyrighted photographs, according to Section 64 of the UrhG. The term of related rights for photographs in Germany is defined in Section 72 UrhG. Thus, the term of legal protection ceases if the photograph is not published within 50 years after its creation. At the same time, the term of legal protection will be extended for 50 years if the first publication of the photograph takes place during this period. For example, a photograph was created in 1950. If the photograph was first published in 1999, it is from 1999 that the 50-year term of its legal protection will begin to run.

However, such time limits have not always existed. For example, Section 26 of the KUG initially defined a term of 10 years from the date of publication; later, the term was changed to 25 years. On this basis, it can be assumed that in the future, the terms of protection for the named objects will be revised again. Of particular interest is the question of whether such terms will be revised upward or downward.

German law also provides grounds for the use of photographs without the consent and remuneration of the copyright holder. For example, Section 46 of the UrhG allows the use of photographs for educational purposes. The specificity of the legal technique of the UrhG is also noteworthy. In its essence, it is neither a code nor a part of a code, but only a law regulating copyright and related rights. Relations connected with trademarks or patents, for example, are regulated by

separate laws. Whereas in other European Union States, full-fledged intellectual property codes can be found. It seems controversial to assess which legislative solution (a code or a law) is better in the framework of this study, as this issue requires a separate article.

Conceptually, the German legislator's approach seems to be balanced, as it allows legal protection to be granted to a wide range of photographs. It seems that any photograph may not be a product of creative activity, but will most often be the result of human labor. The situation when the product of human labor is subject to legal protection seems to be justified. A different approach should probably be established with regard to photographs created with the help of technical means.

II.2. France

The French approach to the protection of photographic rights is that a photograph can only be an object of copyright — a work. By virtue of Article L112-2 of the French Intellectual Property Code (*Code de la propriété intellectuelle*),[6] photographic works are one of the 14 types of works named in the Code.

As France is a member of the European Union, photographic works are subject to the general rule established by Art. 6 of Directive No. 2006/116/EC of the European Union. 2006/116/EC of the European Parliament and of the Council of December 12, 2006 on the Term of Protection of Copyright and Certain Related Rights. The French legislator does not classify photographs as objects of related rights. This distinguishes the approach of French law from German law, where photographs that are not works of art are related rights objects.

The assessment of a photograph as a work is made by the court. In this regard, the current court practice on this issue is of interest. The degree of judicial discretion in France on the issue of qualifying a photograph as a work seems to be high.

[6] Available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006069414/ [Accessed 10.08.2024].

Thus, on 11 May 2023, the Court of Justice of Paris (*Tribunal judiciaire de Paris*) considered the dispute (No. 21/06001)[7] between a photographer and a theater about copyright infringement. The theater used the plaintiff's photograph, namely printed it, and installed it on the wall of the theater for the purpose of announcing the next theatrical season (2020–2021). According to the theater, the photo could be freely used, as it was not a work, but it offered compensation in the amount of 1.500 euros, which did not satisfy the photographer. The photographer went to court to protect his rights. In this connection, the question of the criteria for qualifying a photograph as a work became one of the main issues for the correct resolution of the dispute.

The Court referred to Art. 6 of Directive No. 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights in the context of the criteria of a photograph as a work. Moreover, the Court considered that a systematic interpretation of the provisions of the Intellectual Property Code leads to the conclusion that the original form of a work bears the imprint of the personality of its author. That said, when the originality of a work is challenged, the one claiming authorship must define and explain the contours of the originality of the work. The author, not the judge, can identify the elements that reflect his personality and justify his spiritual monopoly over the work.

The photograph was taken during a theatrical performance, therefore, the court came to the following conclusions in evaluating the photograph: 1) the photographer had no control over the production, the scenery, the costumes, or the lighting; 2) the photograph was taken on the spot, so that the photographer could not control the pose and facial expressions of the dancers during the shooting; and 3) the photographer did not use the equipment settings (choice of manual mode, lens, aperture). On the basis of it, the court concluded that under such circumstances, it is impossible to recognize the photograph as a work, and therefore such a photograph is not protected by copyright.

[7] Available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000047636349?fonds=JURI&page=1&pageSize=10&query=Les+oeuvres+photographiques&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT [Accessed 10.08.2024].

It follows that in France, there is no presumption of creative contribution in the creation of a work. On the contrary, the burden of proving originality and creative contribution in the creation of a work lies on the presumed author. This approach seems to be more oriented to the interests of society than to the interests of the author, since the absence of a presumption of creative contribution predetermines the need for the author to take active steps to protect his own rights.

In the case No. 21/08452,[8] the Court of Justice of Paris on 16 December 2022 (*Tribunal judiciaire de Paris*) also evaluated a number of photographs to determine whether they could be considered works and reached the following conclusions with regard to photographic correction. Correction in the form of light and sharpening alone does not indicate that the photograph is different from what any photographer in the same situation would have done. Neither cropping a photograph nor increasing the contrast indicate the same. In other words, the court concluded that only the correction of light, sharpness, and contrast and the cropping of the photograph were sufficient to recognize the photograph as a work of art.

However, it seems important to consider the extent of such manipulation of the photograph. To do otherwise would predetermine that the court's conclusion would be followed by the regime of a universal rule applicable to all photographs, which is not obvious. It seems that the court's finding in the above case should not be applied as a universal rule, but should be taken into account in conjunction with other positions of courts due to the high degree of judicial discretion in this category of disputes.

In the case No. 20/09672,[9] heard on 23 June 2023, the Court of Justice of Paris (*Tribunal judiciaire de Paris*) concluded that photographs created by bloggers for promotional purposes to be used

[8] Available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000047454931?fonds=JURI&page=1&pageSize=10&query=Les+oeuvres+photographiques&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT [Accessed 10.08.2024].

[9] Available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000047878963?fonds=JURI&page=1&pageSize=10&query=Les+oeuvres+photographiques&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT [Accessed 10.08.2024].

on a social network were not works in themselves. The court came to this conclusion because the photos were taken with an ordinary model camera, and some of the photos were taken with a smartphone. In this case, the creative freedom of the bloggers was limited by the advertising campaign itself. Moreover, all the photos correlate with classic advertising clichés. For example, the advertising of tour operators and hotels in tropical locations is accompanied by images of beaches, palm trees, sunsets, water activities as well as tennis and golf on the one hand, and luxurious amenities designed for physical well-being in preserved environments, on the other hand, as well as by seaside fashion: unnatural attitudes and positions emphasizing clothing, silhouettes of models and locations. In addition, none of the photographed objects deviate from the aforementioned themes, which are particularly limited visually and conceptually. The creative nature of the photography is not evidenced in the sunset photograph, as the light in this photograph is a result of the place and its natural beauty.

From the analysis of the above-mentioned judicial acts alone, it is possible to formulate certain relationships and indications for understanding when a photograph does not qualify as a work in France:

1) a photograph will not be recognized as a work if the photographer did not control the staging, the scenery, the costumes, the lighting, the pose and facial expressions of the dancers during the shooting, nor did he use the settings of the equipment (choice of manual mode, lens, aperture);

2) a photograph will not be recognized as a work if only light, sharpness, and contrast correction and/or cropping of the photograph has been carried out;

3) a photograph created with an ordinary camera or a smartphone will not be recognized as a work if creative freedom has been restricted by an advertising company and created with classic advertising clichés (tour operators and hotels in tropical locations: beaches, palm trees, sunsets, water activities, as well as tennis and golf on the one hand, and luxurious amenities designed for physical well-being in preserved conditions, on the other hand, as well as seaside fashion: unnatural attitudes and positions emphasizing clothing, silhouettes of models and locations).

The term of protection of the author's right to use his work in any form and to profit financially from it is 70 years. In fact, this is a classic term of protection of intellectual property rights, typical for most legal orders. There is no other term for the protection of rights to photographs, since photographs in France are protected as works.

In general, the approach of the French legislator seems to be less diversified in comparison with the approach of the German legislator, for example, since in France only works that appeared as a result of creative labor are protected. In fact, photographs created accidentally, in a home environment or photographs of paintings that are freely available will not be protected either under the rules of copyright or related rights, since related rights in respect of such objects are not provided for.

The legislative technique of regulation of relations concerning photographs in France is characterized by the fact that mainly the norms of law are contained not in a separate law, but in the whole Code of Intellectual Property of France (*Code de la propriété intellectuelle*). Thus, the regulation of intellectual property rights in France is codified.

II.3. Italy

In Italy, photographic works are protected by Law No. 633 of 1941[10] on copyright and other related rights. However, they are not all treated equally and do not enjoy the same rights. The legal system distinguishes between three different types of photographs:

(1) copyright photographs (*le opere fotografiche*), or photographic works (Art. 2 of the Copyright Act);

(2) simple photographs (*le fotografie semplici*), or simple photographs (Art. 87 of the Copyright Act);

(3) purely documentary photographs, or photographic reproductions (*le riproduzioni fotografiche*) (Art. 87(2) of the Copyright Act).

[10] Law No. 633 of 22 April 1941, on the Protection of Copyright and Neighboring Rights (Italy), as amended by Legislative Decree No. 68 of 9 April 2003. Available at: https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/it/it211en.html [Accessed 10.08.2024].

Only the first type of photographs is fully protected by copyright. The second and the third types are protected by rights related to copyright. They are not protected as intellectual works, but may be protected by other laws, such as trade secret or personal data protection laws. To know when a photograph can be reproduced, on the Internet or on paper, and under what conditions, it is necessary to understand which of the three categories it falls into.

Article 2 of the Copyright Act contains a non-exhaustive list of copyrighted works. In 1979, the legislator finally included in this list "photographic works and works expressed in a similar manner". However, in the same article he specified, "unless it is a mere photograph", which instead enjoys another, weaker protection provided for copyright-related rights.

Photographic works, or copyrighted photographs, are protected in the same way as a painting, sculpture, music, book, or any other intellectual work protected by copyright. The term of protection is 70 years after the death of the author (*la protezione giuridica dell'opera per i 70 anni successivi alla morte dell'autore*).

But how can we determine that we are looking at a photographic work and not just a photograph? The answer lies in the requirement of "creativity" (*opere dell'ingegno di carattere creative*). Thus, a photograph is "authorial" if it fulfills the requirement of creativity, that is, if it is the result of the author's intellectual creativity (Galli, 2013). This means that the photographer must go beyond the mere representation of reality. He must convey his imagination, personal taste, sensitivity, and interpretation of reality in the photograph. Creativity has nothing to do with the artistic value of the work. A photograph may be considered ugly, technically poor, or devoid of any artistic merit. Nevertheless, if it is the result of the photographer's creative choices, it is considered a photographic work.

The creativity of the artist may be manifested at different stages of photographic production. The choice of lens, the positioning of light, the positioning of the subject or photographer, the composition of the image, the moment of capture, post-production, the choice of tones, printing, etc. (Pappani, 2019, p. 578). In each of these stages, the artist can put a part of himself. However, an author's photograph can also

be an extemporal, unreasoned snapshot, the result of lightning-fast intuition.

Thus, for example, Italian jurisprudence has affirmed that "The creativity that distinguishes the photographic work and differentiates it from mere photographs cannot disregard an activity of interpretation of the object datum that moves from the reading of that datum according to the author's personality and aims to isolate and transmit to the user of the work the communicative and emotional core contained therein";[11] "It is endowed with sufficient creativity in which the imprint of the author's personality shines through from more than one element, such as the choice and arrangement of the objects to be reproduced, their juxtaposition, the selection of lights and light sources, the dosage of light tones and in dark tones";[12] "Photographs that are the result of a personal creative activity of the photographer consisting in the originality of framing, perspective, setting of the image and the ability to evoke suggestions are works of the mind";[13] "A photograph constitutes a photographic work under Art. 2 that represents an artistic achievement, given the originality of the framing, the setting of the image and the ability of the image to evoke suggestions that transcend the common aspect of the reality depicted".[14]

The Court of Justice of the European Union has also affirmed a similar principle, ruling that photographic works are those "reflecting the author's personality", which "is the case if the author has been able to express his creative abilities in the making of the work by making free and creative choices".[15]

[11] Court of Appeal of Milan, Judgment of 20 September 2010. Available at: https://www.tribunale.milano.it [Accessed 17.08.2024].

[12] Court of Appeal of Milan, Judgment of 5 November 1993. Available at: https://www.tribunale.milano.it [Accessed 17.08.2024].

[13] Tribunal of Venice, Judgment of 17 June 2011. Available at: https://www.tribunale.venezia.giustizia.it [Accessed 17.08.2024].

[14] Tribunal of Florence, Judgment of 16 February 1994. Available at: https://www.tribunale.firenze.giustizia.it [Accessed 17.08.2024].

[15] EU Court of Justice, Case C-145/10 1 January 2011. Available at: https://www.lexology.com/library/detail.aspx?g=16806e75-1106-4f29-b6c9-e5966fc7b092 [Accessed 10.08.2024].

The principle that emerges from the decisions is thus crystal clear: a photograph is a "work" when the author does not limit himself through the mechanical instrument to reproducing reality, but manages to extract from the real datum what corresponds to his personal way of seeing, feeling, and interpreting it.

Another aspect worth mentioning regarding the defense of photographic works is the second type of photographs, "simple photographs" — are "depictions of persons or aspects, elements, or facts of natural or social life (...), including reproductions of works of fine art and cinematographic film stills" when they do not fulfil the above-mentioned requirement of creativity (Musso, 2010).

Unlike copyright photographs, "mere photographs" are protected only if they bear the name of the photographer (or the company for which he or she works, or the client) and the year the photograph was taken. In the absence of such indications, their use is free. Unless it can be proven that the user is aware of this information because mere photographs enjoy less protection than copyright photographs. Consequently, anyone who wants to use a photograph should know whether it is still protected (or whether it has been 20 years since its creation) and who should be contacted for permission. If this is not possible, one can use is freely.

In light of these considerations, it could be argued that for digital photographs, it is not necessary to include the author and the date of creation on the image. It should be considered sufficient to include this information in the metadata.

The third and final category of photographs is described in the second paragraph of Art. 87 of the Copyright Act: "photographs of written works, documents, business papers, tangible objects, technical drawings, and similar products". These include passport photographs for driving licenses, ID card photographs for enrolment in courses, photographs of the shape of a product for the design of a three-dimensional trademark, etc. What distinguishes them from simple photographs is their purpose. The former have a merely documentary purpose, while the latter may have other purposes, such as advertising or descriptive. The latter type of photographs are not protected by copyright or related rights.

However, their reproduction may be prohibited by various rules, such as privacy or industrial secret rules.

It is also worth noting that there are also certain exceptions to copyright in the area of photographic works. Thus, the new Copyright Directive provides in Art. 5 for the possibility of digital use of works and other copyrighted material for illustrative purposes for educational use only, to the extent justified by the non-commercial purpose pursued, provided that such use (Finocchiaro, 2020, p. 199):

(a) is made under the responsibility of an educational institution, on its premises, elsewhere, or through a secure electronic environment accessible only to students or students and faculty of that institution;

(b) is accompanied by an acknowledgement of the source, including the name of the author, unless this is not possible.

The *Cox v. Marras* case[16] concerns the legal dispute between a professional photographer, Richard Cox, and a visual artist, Giovanna Marras, concerning Marras's unauthorized use of Cox's photographs in her marketed artwork. Cox found that Marras had found her photographs on Google Images and used them as the basis for her multimedia creations, then sold these works without obtaining Cox's permission. The tribunal had to decide whether Marras's use of the images infringed Cox's copyright and whether Marras's artistic changes were sufficiently transformative to constitute a new independent work. In the end, the court ruled that Cox's photographs, while accessible through Google Images, were still protected by copyright. Moreover, Marras's edits were not found to be sufficiently transformative to create a new, independent work, so the unauthorized use of the images constituted infringement of Cox's rights. Therefore, the court ruled in favor of Richard Cox, recognizing the infringement of his copyrights by Giovanna Marras. "Copyright not only protects original creations, but also reinforces the need to obtain permission to use such works, regardless of artistic intentions or the means through which they were sourced. The accessibility of images on public platforms such as Google Images does not negate the rights of the original author". This quote

[16] Tribunal of Milan, the Case of Cox v. Marras. Judgment No. 2539/2020, 23 April 2020.

underscores the importance of respecting copyright even when original works are easily accessible online and the fact that unauthorized use, even resulting in an artistic transformation, can constitute infringement if not approved by the rights holder.

To conclude, the analysis of Italy's copyright laws with various case studies sheds light on the intricate framework that governs the protection and usage of photographic works within the country. Italy's Law 633/41 grants photographers a combination of moral rights and economic exploitation rights, each carrying distinct conditions and durations.

The distinction between different types of photographs under Italian copyright law — including copyright photographs, simple photographs, and purely documentary photographs — indicates varying degrees of protection afforded to these works. Copyright photographs, characterized by their creative nature and originality, enjoy full copyright protection akin to other intellectual works. On the other hand, simple photographs, which lack a certain level of creativity, are safeguarded to a lesser extent and require specific attribution to the photographer for protection.

Moreover, the differentiation between photographic works and mere photographs highlights the significance of creativity in determining the eligibility for copyright protection. A photograph is considered a "photographic work" only if it highlights the author's creativity and intellectual input beyond a mere representation of reality. This emphasis on creativity underscores the broader scope of protection offered to works that exhibit artistic ingenuity and individual expression.

II.4. China

Copyright Law of China[17] establish that a "photographic work" is a type of work. The Copyright Act grants copyright holders of photographic works a number of rights, including the rights to reproduce, distribute, exhibit and transmit on information networks. This means that reproduction, distribution (e.g., publishing a collection of photographic

[17] Copyright Law of the People's Republic of China (2010 Amendment), 1990. Available at: https://www.wipo.int/wipolex/en/text/466268 [Accessed 10.08.2024].

works, printing other people's photographic works as decorations on product packaging, etc.), public exhibition or distribution on the Internet (e.g., posting photographic works on a web page for others to view and download) in principle requires the permission of the copyright holder of the photographic work, otherwise it is an infringement of the copyright in the photographic work.

The Copyright Act also provides for the use of a work without the copyright holder's permission or payment of remuneration, which is referred to as "fair use", including the use of a work for personal study, research or enjoyment, and the use of relevant quotations from published works for the purpose of presenting, commenting on or explaining a particular work (Ma, 2016, p. 151). For example, if a landscape photograph taken by another person is enlarged and printed and then hung at home for enjoyment, although this involves reproduction of the photographic work, it does not require the permission of the copyright holder. For example, when teaching Copyright Law in an open online course, in order to discuss whether a photograph belongs to a photographic work, it is necessary to show the photograph in the teaching material (Zhang, 2023, p. 240). Even if the photograph does belong to a photographic work, such reproduction and distribution of the photograph online is an example of fair use. Copyright in a photographic work is usually held by the person who took the photograph (the author), and the best way to obtain permission is, of course, to contact the author directly (Wang, 2022, p. 79).

The definition of *originality* is the key to solving many copyright problems of photographic works, and the copyright problems of photographic works in the all-media era are closely related to the unclear definition of originality (Egloff et al., 2016). At present, almost all photographs taken in the judicial field are regarded as original works, making the definition of originality, which is an important rule of copyright in photographic works, almost futile. In recent years, scholars have criticized the low level of "originality" required to determine the originality of photographic works in the judicial sphere, and the fact that few courts across the country have even denied the originality of photographs, and have almost unanimously argued that courts should raise the standard for determining the originality of photographic works.

Regarding the judge's position on the standard for determining the originality of a photographic work, most scholars in China believe that the existing standard for determining the originality of a photographic work in Chinese jurisprudence is too low, which has led to many photographs lacking originality being recognized as photographic works (Liu, 2014, p. 75). For example, scholars believe that "courts in China need to raise the standard for determining the originality of photographic works". Other scholars believe that "the copyright system does not specify specific criteria for determining the originality of a work, the judicial practice of adopting a lower standard for determining the originality of photographic works leads to the inclusion of most mediocre photographs in the category of photographic works, which is contrary to the legislative intent of the copyright law to protect creative intellectual achievements". It can be said that due to the special nature of photographic works and the limited capacity of judges, there is little that judges can do in assessing the originality of photographic works, with the result that the vast majority of photographs are recognized as photographic works. In fact, judges face many difficulties in assessing the originality of photographic works. Photographic works differ from most other works in that they are created by technical means, are recordings of objective images, and are the least "creative" works. After all, the creation of a work of art, a musical work, or even a written work requires the creator to abstract objective facts (including thoughts, emotions, or objective images), and no one can "create" a work of art, a musical work, or a written work without thinking about it. This is not the case with photography: when an ordinary citizen takes out his mobile phone to photograph a beautiful landscape while sightseeing, he may not even feel that he is creating a work of art. As an extreme example, if a person takes a photograph without being able to see the scene clearly (perhaps because of poor eyesight), will the judge recognize the photograph as a photographic work? If so, on what basis would the judge deny the originality of the photograph? Of course, there are scholars who argue that most judges are not versed in photography (Liang, 2017, p. 143), and using their personal aesthetics as a criterion for determining whether a photograph is original or not inevitably gives them too much discretion. It is therefore safer for most judges to decide that all photographs are original, regardless of how they were taken.

This raises the question of how a judge determines whether a photograph is original (Wang, 2012, p. 3243). Generally, originality is determined by considering the creative process (dynamic), individual expression (static), or similarity to other photographic works (comparison). However, it is very difficult to consider these three aspects. The creative process (dynamics) of a photographic work is often very simple — the moment the shutter button is pressed. Especially in the case of capture photography, is its originality in the angle, distance, shutter, aperture, exposure and other factors of capture, or is it in the "search", "wait" or "cost", or "cost of investment" is a really subtle question. It is even more difficult to find the individual expression (static) of a photographic work, because it is possible to obtain almost the same work by using photographic equipment, and there is no shortage of such cases either at home or abroad.

As for the specific work, the Supreme People's Court can define the basic principle of "a photograph ≠ a photographic work" for courts around the world, guided by typical cases,[18] directing judges to determine the originality of a photograph through factors such as "the photographer's purpose in taking the photograph", "the method of taking the photograph" and "the aesthetic value expressed in the photograph". The People's Court can direct judges to determine the originality of a photograph through factors such as "the photographer's purpose in taking the photograph", "the photographer's way of taking the photograph" and "the aesthetic value expressed in the photograph", and then determine whether it is original or not, combined with the type of photograph, so as to appropriately raise the standard for determining the originality of a photographic work (Liang, 2014, p. 143). Back in the 1990s, in the case of *Jinzheng Technology Electronics Co. v. Motorola (China) Co.* the judge in that case held that the idiom "Real gold is not afraid of fire" was not original and rejected the plaintiff's request for litigation, which served as a good guideline. The definition of originality has been highly controversial since the inception of the copyright system,

[18] Beijing No. 1 Intermediate People's Court (196) No. 14 Civil Judgment (First Intermediate People's Court, 196); "World Winds and Oriental Love" Copyright Dispute Case, Shanghai Xuhui District People's Court (1993) No. 1360 Civil Judgment (First Intermediate People's Court, 1993).

and the two legal systems also support different concepts and judges adopt different standards of definition for different types of works in specific cases. Therefore, it is difficult to define a standard of originality for photography. However, at the end of the day, photography is the use of mechanical equipment to capture an objective image of the behavior of photographs created through photography should be from an "artistic and aesthetic" point of view to determine whether there is even "a little bit of creativity" in it, rather than avoiding the question of originality. In addition, the similarities between a photograph and a video recording should be reconciled in determining originality, and the controversial phenomenon of recognizing an automatic video capture as a photographic work should not arise. Overall, the standard of originality of photographic works should be improved, and the large number of mediocre photographs lacking "artistic aesthetics" should be excluded as photographic works.

From the perspective of the legislation, the law should meet the necessary requirements, especially the copyright legal system, which is greatly influenced by technological development. In recent years, media integration has been increasing, new media have flourished, and we have entered the era of all media. The discussion on the originality of photographic works should be in the context of the all-media era. While it is difficult for the law to create the legislation that is too far ahead of its time, responding to the demands of the times is essential to the viability of the law. Scholars have been quite critical of the lowering of the originality standard (Sun, 2005, p. 223). Some scholars argue that it is "inconsistent with the legislative policy of originality that courts simply assume that all photographs reflect the photographer's individual choices, or substitute a judgement of the originality of a photograph as an expression for the technical judgement (choices) necessary to create the photograph" (Wang, 2012, p. 3246). One can agree with the idea of raising the standard for judging the originality of photographic works. But as a judge, especially a civil law judge, it is very difficult to accurately determine the originality of a photographic work in the absence of appropriate adjustments in the law. After all, photography and other works are recordings of objective scenes, and the recording process is often difficult to reproduce, the presence of

the photographer's personalized creativity is very difficult to judge. In this case, the judge is likely to be involved in the case of recognizing a photograph as a photographic work.

In conclusion, the analysis of China's copyright laws regarding photographic works illuminates a nuanced legal framework designed to balance the rights of creators with the needs of society. China's Copyright Law provides robust protection for photographers, granting them exclusive rights to control the reproduction, distribution, and public display of their works. The concept of "works" versus "mere photographs" underscores the importance of creativity and originality in determining the level of protection afforded to photographic works. By emphasizing the author's creative input, China's copyright laws aim to incentivize artistic innovation while safeguarding the rights of photographers. Furthermore, the recognition of moral rights in photographic works highlights the cultural and personal significance of these creations, reinforcing the importance of respecting the author's integrity and attribution rights. Overall, China's copyright laws reflect a commitment to promoting creativity, cultural heritage, and authorship in the realm of photographic works, contributing to the vibrant visual landscape of the nation.

III. Comparative Analysis

	Germany	**France**	**Italy**	**China**
A photograph is subject to legal protection	Yes	Yes	Yes	Yes
Copyright on a photograph	Yes	Yes	Yes	Yes
Related rights to a photograph	Yes	No	Yes	No
A type of act that regulates relations	Law	Code	Law	Law

All the countries under consideration — China, France, Germany, Italy — recognized photographs as legally protected works. This indicates the high importance these countries attach to copyright protection for photographic works. However, despite the common principles,

approaches to the details and mechanisms of protection may differ significantly.

Copyright in photographs is enshrined in the legislation of all four countries. In this respect, China, France, Germany, Italy and China show unity in recognizing the importance of protecting the creative rights of photographers. However, not all countries recognize related rights in photographs in the same way, which is a key point of difference.

In particular, related rights in photographs are recognized in Germany and Italy. This means that these countries have additional legal mechanisms in place to protect the interests of those involved in the creation and distribution of photographs other than the author. In contrast, in France and China, related rights in photographs are not recognized, which may limit the range of persons protected by the law and affect the distribution of rights and obligations in the field of photographic works.

The type of the legislation governing the protection of photographs also varies among countries. In China, Germany, Italy and Germany, such relationships are regulated at the level of laws. This may indicate a detailed and elaborate legal framework for the protection of photographs. The protection in France, on the other hand, is established by a code, which may indicate a more systematic approach to the legislation and possibly the integration of photo protection into the general body of intellectual property law.

These findings underscore the importance of international analysis and comparative law in understanding and harmonizing legal rules on the protection of photographs. Differences in the recognition of related rights, as well as in the types of regulations governing the protection of photographs, show that legislative approaches may vary according to national traditions and legal systems.

IV. Conclusion

The example of the States examined shows that photography is now recognized as an independent object of intellectual property law. In general, the States are unanimous on the need to grant legal protection to photographs. All of the States examined establish copyright in

photography. As a general rule, photographs with characteristics of originality, made through creative endeavor, are subject to legal protection.

A number of the countries considered in this article also grant legal protection to photographs as an object of related rights. As a rule, these are photographs where the creator's creativity is not so strongly expressed. For example, these are family photographs. The most diversified approach is observed in Italian law, where, in addition to the object of copyright and related rights, a photograph may be included in the third group of objects (these include, for example, photographs for documents).

It can be stated that the approaches of the countries considered in this article are identical in most of the issues (the fact of protection of a photograph, copyright on a photograph, urgency of protection). However, some issues have not yet been resolved in a uniform manner for all countries. This is most clearly manifested in the issue of establishing different legal regimes for photography (somewhere it is only the object of copyright, somewhere it has other legal regimes).

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Received 13.11.2024
Revised 23.12.2024
Accepted 27.12.2024