

COPYRIGHT AND PHOTOGRAPHS
An International Survey

Editors:
**Ysolde Gendreau, Axel Nordemann
and Rainer Oesch**



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Preface

The idea for this book occurred to us during a meeting of the Association Littéraire et Artistique Internationale (ALAI). Each of us had been writing a doctoral thesis on the protection of photographs, but in a language other than English, namely Finnish, French and German. Because of our respective researches, we knew that there was little material on the topic that was available in English. Thus, we thought of pooling our resources to produce a book in English on photographs and copyright law.

Photographs make up a very special category of works because, over the years, they have enjoyed various forms of protection. The aim of this book, therefore, is to show the various ways in which they have been protected. It was, of course, impossible to cover all the countries of the world; but we have expanded the scope of the book to include other countries in order to give more nuances to our presentation. An overview chapter provides an immediate comparative analysis and, since each chapter follows the same outline, the reader should be able to come to his or her own conclusions with respect to the various issues. Purely international questions, however, are dealt with in a separate chapter on international conventions.

We should like to thank the editors-in-chief of the Information Law Series, Professors Egbert Dommering and Bernt Hugenholtz, for having accepted our project in the series. Our thanks also go to Gwen M. R. de Vries and Lukas Claerhout of Kluwer Law International who have patiently waited for our manuscripts. Last, but certainly not least, we are indebted to our contributors who so gracefully accepted the time and format constraints we had devised.

Rainer Oesch, Helsinki
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March 1999

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Part 1

International Aspects

Overview

Axel Nordemann and Rainer Oesch

The relationship between reality and a photograph is not simple. Photographs can tell us something about the reality, but at the same time they can also effectively give false information. The latter is especially true today, in the digital age, when picture material can be stored, altered and transmitted effectively and efficiently around the globe in large quantities. Photography as a medium is actually as unreliable as every other means of communication.¹ In spite of this, a photographic picture can have economic or aesthetic or even documentary value. Irrespective of the truth of the contents of a photograph, a piece of photography is always undoubtedly an important instrument of freedom of expression.

Over the centuries, people have repeatedly tried to find criteria and standards to define the notion of 'art'. A definition was, however, never achieved. At times, art was understood as the sum of capacities used by man to embellish the world; others claimed that art was what artists did. There were also times when painting was put in the same class as handicraft rather than with the fine arts and, in the Renaissance era, 'art' was confined to a few geniuses. Even today, people hardly agree as to what art is and what should be part of it. This disagreement did and does exist not only among art specialists, but also among the entire population. Who has not yet discussed with his friends or family, when confronted with a piece of modern art, whether it really was 'art' or not? The definition of art or non-art depends, to a high degree, on respective personal perceptions and subjective notions of art. Considering art's many forms of appearance as well as the contrary sentiments concerning art, a very broad understanding of art seems to prevail at present, which permits the inclusion of nearly everything that is considered art by anyone. This must be based upon the fact that art always concerns communication between men, in order not to let art become absurd. Such a wide definition of art conceives art as everything enabling man to perceive something profoundly. Art would thus be everything that has been formed to tell something, to someone else, that is, to deliver a message. Whether the message is purely aesthetic or emotional, does

¹ F. Ritchin, *In Our Own Image. The Coming Revolution in Photography. How Computer Technology Is Changing Our View of the World*, New York, 1990, p. 81.

not make a difference. Art is made by the creator searching for something, interpreting, condensing it into a message which he makes visible, be it by means of a clear, easily perceptible message or coded, integrated into a concept, and thus comprehensible only after the opening up of the concept itself.²

But what is photography? Is it an art? Photography means abstraction from a three-dimensional reality to the two-dimensional photograph. Photography engenders a particular reality that is independent of actual reality. Furthermore, photography means the transcription of reality by symbols into the photographic world. Photography is thus very strongly marked by subjective elements. The creation of the photograph is done in the mind: the photographer — in contrast to the pictorial artist — does not work point by point, line by line, but composes the whole (in most cases) at once. A photograph may be formed by organising the elements of the picture, the choice of the visual angle, the lines and lineation, the geometric areas and forms, the light and illumination, and the contrasts, colours and colour contrasts. But the photograph is also composed by experimental creation, by photomontage and by digital or other alteration of the picture after its taking.

Photography is a particular form of vision — photographic vision — producing pictures of autonomous existence, as painting does. The photographer has indefinite possibilities for the transcription of three-dimensional reality into a two-dimensional picture, not only with technical equipment and its setting, but also with what nature provides, to produce a picture communicating his personal, subjective idea of his environment to the viewer. The photographer can thus objectify the intellectual contents of his visual message in the photograph's structural unity, that is transmit a message. If the question about whether photography achieves its message by forming, i.e. creation, and is thus an art, is to be answered, conventional conceptions of art must be left aside. It is very difficult to grasp photography using these conceptions because photography has changed the general character of art. Photography has freed painters from their representational function, from the duty of information, because photography is much more apt to fulfil this task. The process of photographic creation implies the combination by the photographer of technical and visual elements of creation to form a whole; he must condense the reality he is faced with into a message in his picture. It should thus be clear that photography can engender art. One could even go as far as to claim that, among the visual arts, photography is, by its realistic character, best suited for clear and uncomplicated messages.

Photographs are legally protected everywhere. The norms of protection have traditionally been placed in the law of copyright, which safeguards economic and personal interests of human creators and gives protection especially against illegal copying and other kinds of unlawful public use of a photograph. In copyright, the form, not the idea, is protected. The rationale of copyright in general also applies to photographic protection: to encourage creativity, to

² See Koschatzky, *Die Kunst der Photographie*, 1987, p. 11 at p. 18; Schmoll, *Vom Sinn der Photographie*, 1980, p. 232; and Steltzer, *Die Kunst der Photographie*, 1978, p. 125 at p. 153.