

Recreated Subjects, Reconstructed Copies: Considerations on the Photographic Process

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Abstract This article considers the dichotomy of originals and copies in the specific context of photographs of objects that recreate an existing work of art or a documentary photograph. The examples span the period from the mid-nineteenth century to contemporary photographic practices. The traditional legal regulation of such copies is unsatisfactory compared with more recent theoretical approaches, as those proposed here. These approaches encompass the two modes of photographic copies after recreated realities: they simultaneously preserve identities and create original alterations.

Keywords Originality. Copy. Photography. Theory. Copyright law.

Summary 1 Introduction. – 2 A Stereoscopic Photograph After a *Tableau Vivant* and Other Photographic Reproductions in the Nineteenth Century. – 3 Contemporary Reconstructions of Photographic Subject Matter. – 4 Conclusion.

1 Introduction

The principles appear clear-cut: copies are regulated by copyright law, and it is the author who controls his originals and their reproductions. Since the 1970s, appropriation artists have explored the area between the original, the copy, fair use and the originality of derivative works in the medium of photography. Examples of this kind of works include Sherrie Levine's re-photographic series *After*, most famously *After Edward Weston* (1979) and *After Walker Evans* (1981), as well as Richard Prince's series known as the *Untitled Cowboys*, which consist of re-photographed Marlboro cigarette advertisements with the branding removed. In his famous essay, written in 1935, Walter Benjamin focuses on the mechanical reproduction of

works of art,¹ which has been understood as a point of reference for the contextualisation of appropriate photographs.

There is, however, a group of apparent photographic copies that does not fit into the typical exploitation chain from the original to its derivatives. These are works that do not copy an existing photographic work (like Levine's and Prince's) but instead recreate the photographic subject for a new photograph.² They do not appropriate photographic products but reflect the process of (re-)production. This article will highlight instructive examples of such photographs: copyright proceedings that took place in Dublin in 1859, Sturtevant's photographic re-enactments, a contemporary Swiss art-

¹ Benjamin [1935] 1968.

² Cf. Vahrson 2006, 134-7, for a comparison of Sturtevant's and Levine's concepts.



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ist duo (Jojakim Cortis and Adrian Sonderegger) exploring iconic photographs, hobbyist photographers whose aim is to emulate 'The Gurskyesque', and the recreation of computer wallpapers.³ I suggest that these cases provide fundamental insights into photographic images in general by provoking a distinction between 1) a processual understanding of photography that accommodates elements of creativity and 2) a discrete, inter pictorially informed understanding of pictorial identity that integrates the relationship between original and copy. This perspective offers a more flexible alternative to the legal notion of the fundamental incommensurability of original and copy.⁴

As I will not deal with the mechanical reproduction of photographs, this essay for the most part deals with areas outside the scope of Benjamin's text.⁵ (However, Benjamin's argument will be touched on again later in the context of the consideration of the political aspect of reproduction.) In terms of intellectual vicinity, the photographs discussed in this article stand closer to Gilles Deleuze's *Différence et répétition* (1968) than to Baudrillard's *Simulacres et simulation* (1981).⁶ Contrary to Baudrillard's claim of the infinite reproduction that results in the loss of its original reference and the disappearance of "the sovereign difference",⁷ these photographs reinstate that difference in an attempt to return the simulacrum to its distanced source by means of a visual operation that can be described as the x-ray of simulation.⁸ Arguably, re-creative strategies may even reinstate the Benjaminian aura.⁹

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2 A Stereoscopic Photograph After a *Tableau Vivant* and Other Photographic Reproductions in the Nineteenth Century

In 1859, Irish courts had to examine the issue of the reproduction of paintings in a case stemming from stereoscopy that incidentally offers insights into the market conditions for reproduction prints at the time when photography first became commercially competitive. The oil painting *The Death of Chatterton* [fig. 1] by Henry Wallis (1830-1916) enjoyed great success at the Royal Academy's annual exhibition of 1856. John Ruskin enthusiastically wrote in the year's *Academy Notes*: "Faultless and wonderful: a most noble example of the great school. Examine it well inch by inch: it is one of the pictures which intend, and accomplish, the entire placing before your eyes of an actual fact – and that a solemn

one. Give it much time".¹⁰ Indeed, the scene that unfolds before us is represented with meticulous care for the details: the vial of arsenic, the extinguished candle, the view over the roofs of London. Thomas Chatterton, the depressed young poet, lying in his chamber after having poisoned himself. While the incident it depicts took place in 1770, the painting is the fruit of the painter's imagination, albeit rendered in a mode of quasi-photographic precision. Henry Wallis permitted the publication of a wood engraving in the first issue of the *National Magazine* before selling the painting to the artist Augustus Egg for 100 guineas (£105).¹¹

In 1857, the painting was shown at the Manches-

³ Further examples of this approach have been analysed by the authors of the essay collection edited by Krüger, Weiß and Crasemann (2011).

⁴ Cf. Lucas, Lucas-Schloetter, Bernault 2017, par. 111. University of London Press Ltd vs. University Tutorial Press Ltd 1916, per Peterson J at 609, also stipulates that an original work "must not be copied from another work - [...] it should originate from the author". In this paper, the conventions of legal citation have given way to the publisher's style sheet. All cases cited are listed in the Table of Legal Cases preceding the bibliography.

⁵ In fact, Elaine Sturtevant's appropriative strategies have been described as "perturbant profondément le schéma de Walter Benjamin" (Dressen 2010, 12). Cortis and Sonderegger (2018, 107, 109) emphasise that they work with their hands, not mechanically, and that they do not use Photoshop.

⁶ Deleuze 1968; Baudrillard 1981. They will be quoted by their English translations, Deleuze 1994 and Baudrillard 1983. In 2006, Sturtevant referred to the "ugly head" of the simulacrum (reprinted in Esparceil 2010, 45). However, the concept of simulation drew attention to Sturtevant's practice in the 1980s, as Bowring (2008, 87) observes.

⁷ Baudrillard 1983, 2-3 = Baudrillard 1981, 10-11.

⁸ Of course, this does not mean that Baudrillard's theory of the simulacrum has become obsolete. Its present relevance can be found in other areas such as the processing of digital photographs through artificial intelligence, which blurs the difference between photographs and renderings. Coincidentally, Adorno (2006, 1), remarked that "true reproduction is the x-ray image of the work". The statement was made with regard to a theory of musical reproduction. Indeed, the recreation of a photographic subject resembles the performance of a musical composition.

⁹ Cf. Frohne 2000, 285-6, for the case of Sturtevant's photographs.

¹⁰ Ruskin 1856, 26.

¹¹ *National Magazine*, 1, 1856, 33. The contract is reprinted in Greenhill 1981, 205.



Figure 1 Henry Wallis, *The Death of Chatterton*. 1856. Oil/canvas, 622 × 933 cm. London, Tate Britain

ter Treasures Exhibition, again to great acclaim.¹² In the age of reproduction engraving, such a famous painting offered excellent investment potential, as Augustus Egg knew. On 18 March 1859, he transferred the reproduction rights to Robert Turner, a publisher from Newcastle, for £150. The contract also stipulated that Turner was to be given exhibition rights to solicit subscribers for the engraving and that he was to be allowed to keep the painting for two years to produce the engraving from the original. Its insurance value of £1,000 indicated the painting's commercial potential.¹³

Soon, Turner exhibited *The Death of Chatterton* at Cranfield's Gallery in Dublin (115, Grafton Street). The photographer James Robinson saw the

painting and apparently followed Ruskin's instruction ("Examine it well inch by inch") very closely. It is unclear whether he used a photograph or a precise sketch to stage a *tableau vivant* after the painting, which he photographed and distributed as a stereoscopic card [fig. 2]. Just a few days after Turner's exhibition had closed, Robinson advertised his "stereoscopic pictures of the last moments and death of the poet Chatterton". Robert Turner considered this to be an infringement of his copyright and took legal action against Robinson and brought the case before the Rolls Court in Dublin.¹⁴ The case is interesting from several legal perspectives, as it touches on issues of common law copyright before the implementation of the Fine Arts

¹² Sadly the painting is missing from the published volumes of photographs of that exhibition (Caldesi, Montecchi 1858).

¹³ Pellerin, May 2014, 25.

¹⁴ Turner vs. Robinson 1860, 121-50.



Figure 2 James Robinson (after Henry Wallis), *The Death of Chatterton*. 1856. Two photographs, hand-tinted albumen prints on paper mounted on card. London, Collection Dr Brian May

Copyright Act of 1862 as well as the question of when a work of art is properly published.¹⁵ Moreover, it also highlights the problems that arise whenever there is an extended ‘transmission chain’ between an original and copies thereof and the role of various distinct stages of recreation within this transmission.

Robinson contended that he had not taken a stereoscopic photograph of Wallis’s painting because this it was technically impossible to create such an image from a flat object. Instead, he had recreated the scene depicted in the painting in his studio. Stereoscopic photographs, Robinson contended, were fundamentally different from a painting and, thus, could not be viewed as reproducing a painting.¹⁶ Viewed through the stereoscope, these photographs would create an impression that no painting could achieve.¹⁷ The court found, however, that the painting and the stereoscopic photograph were almost exactly alike. In particular, the matching colours of the stereoscopic card and the painting showed that Robinson had copied the painting, not

the wood engraving published in the *National Magazine*.¹⁸ During the trial, Robinson also faced questions about the sources of such matching details as the candle going out, the plant in the window and the box of papers – further evidence that the photographer had intended to copy the painting.¹⁹ In the end, the decision of 30 January 1860 largely omitted the question of Robertson’s creative share in the composition of the *tableau vivant* for his stereoscopic photograph. Pictorial subjects per se had never been protected by copyright so that a different representation of the dead Chatterton would not have been problematic. This legal principle remains unquestioned to the present day.²⁰

Aesthetically, however, the shared modes of naturalism employed by both the painting and the photograph connected the two works in the relationship of original and copy. The appellate court, the Irish Court of Chancery, confirmed this view in its decision of 7 June 1860. It stated that the stereoscopy, despite its unique production process, remained a reproduction of the original painting employing a

¹⁵ See Cooper 2018, 213-15.

¹⁶ Interestingly, this difference escapes Gilles Deleuze, who spares the stereoscopic image a thought in his *Différence et répétition*. For Deleuze, stereoscopic images embody the opposition of space and flatness (Deleuze 1994, 51 = Deleuze 1968, 72).

¹⁷ It is ironic that Wallis’s painting had already been described as “eminently stereoscopic in its truth” (*The Spectator*, 26 July 1856, 20).

¹⁸ Foot 1860, 23.

¹⁹ *The Morning Chronicle* (London), 1 December 1859, 7. The striking precision in the assimilated details is still noteworthy (cf. Blunck 2011, 272).

²⁰ See for German law Bauer 2020, 130-1; Schack 2017, par. 875; for French law Dournes 2015, 15; for UK copyright law Bentley et al. 2018, 58-60, 219-20. An international survey of copyright law for photographs was presented by Gendreau, Nordemann and Oesch (1999).

real image staging: “[it] does not [...] lose the character of a copy because it has been effected, not in the usual mode, but by an exercise of memory, and by ingenious scientific operations”.²¹ The court also recognised that James Robinson had not made a direct copy of the painting, but that the stereoscopic reproduced a staged *tableau vivant*:

the stereoscopic slides are not photographs taken directly from the picture, in the ordinary mode of copying, but they are photographic pictures of a model, itself copied from, and accurately imitating, in its design and outline, the petitioner’s painting. It is through this medium that the photograph has been made a perfect representation of the painting.²²

If the result was a copy, the means were no longer important. Reproduction rights existed independently of the media used and regardless of the length of the transmission chain. Pursuant to this view, photography was only one of many possible reproduction media, an instrument for achieving an illegitimate purpose, which becomes evident by comparison and assigning the status of originals and copies based on such a comparison.

Intriguingly, the *Death of Chatterton* was re-staged at least twice, as Denis Pellerin and Brian May report. Around two years after Robert Turner was ordered to stop selling his stereoscopic card of Wallis’s painting, the Birmingham photographer Michael Burr published his own stereoscopic card in two variants. It is likely that Burr and Robinson knew each other.²³ This time, the stereoscopic copies of Wallis’s painting did not give rise to any legal action. It is possible that the new regulations of the Fine Arts Copyright Act of 1862, namely the requirement of registration for copyright protection and the inclusion of photographs as potentially protected works, raised doubts about the legal categorisation of originals and copies. In 1869, the High Court in London decided in Graves’ Case

that, although “All photographs are copies of some object, such as a painting or a statue”,²⁴ even photographs reproducing engravings enjoyed protection under the Fine Arts Copyright Act.

This is perhaps not as remarkable as it may seem since the photographs ostensibly reproducing paintings did not actually reproduce them, at least not in an immediate way. This is due to the technical deficiencies of the medium, which was incapable of reproducing the colours of an oil painting in their correct tonal values.²⁵ While a photograph of an engraving served its reproductive purpose, a photograph of a painting showed false colours, as Philippe Burty complained in a review article for the *Gazette des Beaux-Arts* in 1859: yellow and green turned out black, red and blue looked white.²⁶ Nevertheless, one of the initial myths of photography concerned the suitability of the medium to reproduce works of art. The inventions of Niépce, Daguerre and Talbot were all hailed as progressive instruments capable of reproducing works of art in all their appearances.²⁷ Anthony Hamber notes that the “work of art seems to have been consistently chosen throughout the nineteenth century as a particularly suitable subject matter as it was a use that had considerable kudos”.²⁸

In addition to the chemical inconsistencies of rendering colour and tonal values, paintings often hung in places where they could not be photographed, such as in a dark room or high up on a wall. This propelled a strategy of substitution. When William Stirling published an illustrated edition of the *Annals of the Artists of Spain* in 1848, an exclusively small part of the edition (25 copies) included a volume of Talbotype photographs representing masterpieces of Spanish art.²⁹ Hamber emphasises the “significant aspect about the Talbotypes in the *Annals* volume”, namely that only

few of the photographs depict the original work of art. [...] Velazquez’s *Surrender at Breda* [...]

²¹ Foot 1860, 63.

²² Foot 1860, 65.

²³ Pellerin, May 2014, 28-9. The authors point out that the card reproduced in several publications mentioning the lawsuit (for example Jones 1976 and Greenhill 1981) actually do not show Robinson’s reproduction but Burr’s. More recently, Sally Barnard re-staged the *Death of Chatterton* as a photographic self-portrait, *After Chatterton* (2006), a title replacing the author of the original painting with its subject (cf. Blunck 2011, 274-5; with a reproduction of the photograph).

²⁴ Graves’ Case 1869, 723.

²⁵ See Hamber 1996, 81-2.

²⁶ Burty 1859, 211.

²⁷ de Font-Réaulx 2020, 85-6.

²⁸ Hamber 1996, 36.

²⁹ The volume was reconstructed and re-issued in 2016 as a joint project of the Museo del Prado, the Centro de Estudios Europa Hispánica, the National Media Museum (UK) and the University of Glasgow (cf. MacCartney, Matilla 2016).



Figure 3 Nicolaas Henneman, talbotype of William Barclay's watercolour copy of *Lady in a Fur Wrap* (attributed to Alonso Sánchez Coello). 1847. Salted paper print, 6.7 × 5.4 cm. Los Angeles, The J. Paul Getty Museum

is a copy of a lithograph after the original, while plate 31, of *Las Meninas*, again by Velázquez, is after the engraving by Pierre Audouin made in 1799.³⁰

Before entering the collections of William Stirling in 1853, the *Lady in a Fur Wrap* [fig. 3], which, at the time, was considered to be a portrait by El Greco of his daughter, was part of the Galerie Espagnole at the Louvre. The photograph in the *Annals* was of a watercolour copy by William Barclay.³¹ Such an approach was not exceptional, as it allowed photographers to circumvent problems of access and technical complications. The catalogue of the works of Paul Delaroche, one of the first to include photographs, contained both photographs of the paintings taken at the posthumous exhibition at the

École des Arts, and photographs of reproductive engravings.³² Théophile Gautier mused in his review of the catalogue how

la photographie, si exacte en face de la nature, devient fantasque en face des tableaux; elles les éteint ou les illumine à son gré, et presque toujours les transpose très-heureusement par-fois; mais elle ne fait pas toujours la besogne consciencieuse et servile qu'on attend d'elle.³³

Despite these substitutions, a photograph conveyed the aura of originality and immediacy. This illusion was supported by the law courts, as in the case of *Turner vs. Robinson*, and in the legislation. For example, the German Copyright Act of 1876 clarifies in § 5 no. 2: "It is also to be regarded as a prohibited reproduction if the reproduction is not created directly from the original work, but indirectly from a reproduction of the same". It is likely to have been this provision that motivated the firm of Hanfstaengl, Munich-based specialists in photographic art reproductions in the late nineteenth century, to sue the Empire Palace, a London theatre, where *tableaux vivants* after popular paintings were re-enacted under the programme title of *New Series of Living Pictures*.³⁴ Hanfstaengl also brought an action against the publishers of the *Daily Graphic*, which published engraved drawings of the various scenes performed.³⁵ Hanfstaengl's counsel argued before the House of Lords that

copies or reproductions may be unlawful though made not directly from the original, but from another kind of copy or imitation which is not in itself forbidden.³⁶

The House of Lords observed that the drawings in the *Daily Graphic* were not copies of the paintings for which Hanfstaengl claimed copyright, but were made from the performance at the Empire Theatre. They held that, while it was possible that such drawings might also count as copies of the paintings performed as *tableaux vivants*, this was to be decided on a case-by-case basis. In the case in question, too many differences made such

³⁰ Hamber 1996, 75.

³¹ MacCartney, Matilla 2016, no. 10.

³² Cf. de Font-Réaulx 2020, 92.

³³ Gautier 1858, 155.

³⁴ The *tableaux vivants* were presented under different titles. Parts of the scene were based on the backgrounds from the original paintings (cf. *The Westminster Gazette*, 12 March 1895, 5).

³⁵ Hanfstaengl vs. Empire Palace 1894, 1-10.

³⁶ Hanfstaengl vs. H.R. Baines & Co. and E.J. Mansfield 1895, 21.

an assumption impossible.³⁷ The court thus confirmed the method of comparing the start and ending points of the transformative chain of a work of art. In this instance, they were too dissimilar for them to be accepted as original and copy. Whereas the shared photographic mode of representa-

tion between painting and stereoscopic photograph had made such a conclusion comprehensible, the disparate media involved in the Hanfstaengl case, photographs after paintings, *tableaux vivants*, and engraved drawings result in the dissolution of the underlying aesthetic identity.

3 Contemporary Reconstructions of Photographic Subject Matter

Contemporary photographic strategies question this concept of artistic identity, claiming that what we see is not what we get or what we think we are getting. On platforms such as Flickr and Instagram, the hashtag #gurskyesque indicates photographs taken in the style of Andreas Gursky. Wolfgang Ullrich has written on some of the protagonists, such as Felix Lamouroux, who recreated Gursky's famous photograph *Paris, Montparnasse* (1993), which shows the façade of a large apartment building in great detail.³⁸ Gursky's photograph is a digital composite of multiple shots, unified into a consistent perspective and lighting. The technical faults of the amateur photographs, visible seams of the combined pictures, optical distortions and the lower resolution, prove Gursky's mastery and superior equipment.³⁹ The recreation of particular photographs must be distinguished from the creation of photographs in another artist's style. Ullrich mentions communities like *Hockneyesque* and *Seascapes after Sugimoto*,⁴⁰ to which one could also add Wally Koval's successful recent project *Accidentally Wes Anderson*.⁴¹ An artistic style is unprotected and free, as perhaps best explained in the words of US copyright law:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.⁴²

This is an important distinction, both aesthetically and legally.⁴³ A photograph imitating the style of another photographer does not infringe copyright because an artistic style is not protected. A photograph taken from the same scene as another photograph does not infringe copyright because the scene is unprotected. The photographic subject matter remains free even in our over-copyrighted times, as the High Court of England and Wales confirmed in *Creation Records vs. News Group*.⁴⁴ The British band Oasis had arranged a scene for the cover of their album *Be Here Now* which included a white Rolls Royce half-submerged in a swimming pool, an old motorcycle, a gramophone, a large clock missing its clock hands, an inflatable globe and an abacus [fig. 4]. The scene was photographed by Michael Spencer Jones on the premises of Stocks House, an eighteenth-century Georgian mansion in Hertfordshire.⁴⁵ A journalist from *The Sun* photographed the arrangement himself, and the newspaper had offered these photographs for sale. While the newspaper had to stop selling the posters based on breach of confidence, it was held that no copyright existed in the arrangement itself.⁴⁶

A photograph taken from a scene recreated to imitate / copy another photograph remains an open question, both aesthetically and legally. If the resulting photograph is too close to the original, then the transmission chain has formed a full circle, and the two ends will be assigned the functions of original and copy. This is what happened in the case of Turner vs. Robinson and failed in Hanfstaengl's critique of the *tableaux vivants*. If, on the other

³⁷ Hanfstaengl vs. H.R. Baines & Co. and E.J. Mansfield 1895, 24, per Lord Herschell LC.

³⁸ The photograph by Felix Lamouroux is hosted at <https://www.flickr.com/photos/lamouroux/2362408797>.

³⁹ Ullrich 2011, 93-5.

⁴⁰ Ullrich 2011, 95.

⁴¹ Koval 2020. The project maintains an Instagram account at <http://www.instagram.com/accidentallywesanderson/>.

⁴² 17 U.S.C. § 102 (b); online at <https://www.govinfo.gov/app/details/USCODE-2011-title17/USCODE-2011-title17-chap1-sec102&collectionCode=USCODE>. Typical formal elements that define an individual style, however, may be subject to copyright protection (cf. Petri 2018).

⁴³ Crasemann and Weiß (2011, 20) observe that a Deleuzian repetition does not necessarily imply a recreation.

⁴⁴ *Creation Records vs. News Group*, *Entertainment and Media Law Reports*, 1997, 444-56.

⁴⁵ For an account of the photo shooting see Barrie 2019.

⁴⁶ On breach of confidence under UK law see Stokes 2021, 218-19.



Figure 4

Album cover of Oasis, *Be Here Now*. 1997.
Photograph by Michael Spencer Jones.
Private collection

hand, the perceptible differences remain conspicuous enough, a kind of freedom of the photographic process prevails, and the resulting re-creative photograph can assert itself as a new original for the purposes of copyright. The practice has been compared to cover versions of famous pop songs.⁴⁷ A project by a group of YouTubers, Andrew Levitt, Taylor Gray, and Jacob Phillips, who in 2019 travelled to the locations used by Apple in the computer wallpapers for their operating systems named after Californian landmarks, is a case in point.⁴⁸ Deployed by the manufacturer on millions of personal computers worldwide, the recreations by the trio transform the cloned vistas back into original photographs.

While Deleuze's *Différence et répétition* does not contain specific philosophical thoughts on photography,⁴⁹ its basic notion of differentiating repetition is a helpful tool when assessing this kind of recreated photograph. In the words of Joe Hughes's interpretation of Deleuze's book, "The Other is what maintains the connection between the originary and the derived truth".⁵⁰ Recreated works and situations designate such a multiple difference, a reciprocal synthesis of the idea and intensities.⁵¹ They blur the difference between a copy 'of' and a work 'after' an original. The photographic truth both incorporates the dichotomy of original and copy, which is based on identity, and the process of distinct steps of creation and recreation. It

⁴⁷ Ullrich 2011, 97.

⁴⁸ Banks 2019.

⁴⁹ The two mentions of stereoscopic images refer to the opposition of space and flatness, not to the specifics of the photographic process.

⁵⁰ Hughes 2009, 178. Hughes refers to Deleuze's concept of the Other as presented in the concluding chapter of *Différence et répétition*. Here it is applied to the transformative process of reproducing images, which encompasses the potentialities of an original and its actualisation by its copies.

⁵¹ Deleuze 1994, 244 = Deleuze 1968, 315.

can be described as a “process of actualisation”⁵² of a similarity that is not confined to the functions of an exact copy.⁵³

These affinities can be observed against the philosopher’s own photo-scepticism,⁵⁴ which becomes evident in his essay on Francis Bacon.⁵⁵ Vilém Flusser proposed photographic categories of distinct regions of space-time, which open up distinct potential perspectives of different spectators. Flusser emphasises the central role of the photographer, who acts as a composer, translating the subject into a situation *before* taking the picture.⁵⁶ This is consistent with the practical perspective of EU law. The European Court of Justice has confirmed that the preparation phase serves the photographer to make free and creative choices.⁵⁷ Indeed, such preparations constitute the main artistic effort when the resulting photograph depicts a re-constructed model.

Contemporary artists conduct their own experiments along this fine line “entre la crispation sur l’aura et la fascination du simulacre, entre la tradition de l’original et la simulation de la copie”.⁵⁸ Peter Eleey, then curator at the M.o.M.A., remarked that some photographic works of Elaine Sturtevant recall late nineteenth-century forms of *tableau vivant* photography, for example, *Duchamp Relâche* (1967) and *Beuys La rivoluzione siamo noi* (1988).⁵⁹ Both works are based on staged performances. The famous photograph of Beuys walking towards the camera, taken in 1971 by Giancarlo Pancaldi at the Villa Orlandi on the island of Capri, is not a snapshot but a meticulously orchestrated

scene promoting an artist *en marche*. The photograph *Duchamp Relâche* shows Robert Rauschenberg and Sturtevant re-performing a photograph of Marcel Duchamp and Bronia Perlmutter as Lucas Cranach’s *Adam and Eve*.⁶⁰ Man Ray had taken the photograph on 31 December 1924 during rehearsals for the one-off erotic farce *Cinésketch*, written by Francis Picabia.⁶¹ The piece was put on stage after the final performance of the ballet *Relâche* (meaning: ‘Cancelled’) by Erik Satie and Francis Picabia. Technically, Sturtevant’s title is misleading: neither is the work by Duchamp, nor does it show a scene from *Relâche*.⁶² In an interview with Paul Achard for *Paris-Midi*, Picabia explained how Duchamp and “Francine Picabia”, the pseudonym chosen for Bronia Perlmutter, would “revivre cette toile charmante” by Cranach, “le seul peintre que je trouve actuellement supportable”.⁶³ This statement exposes a fundamental idea of the *tableau vivant*, namely its potential to revive (“revivre”) art, to convincingly resurrect it.

Such re-enactments by a *Doppelgänger*⁶⁴ are of the same legal nature as the stereoscopic image that had given rise to copyright litigation one hundred and fifty years prior. Twenty years ago, the provisions for pastiches in European copyright legislation provided an opportunity to legitimise the artistic practice.⁶⁵ In Germany, where the pastiche exception was not implemented until 2021, Beuys’ widow had repeatedly filed legal complaints against Sturtevant over her recreations of Beuys’ *Fat chair*.⁶⁶

Sturtevant, whose conceptual correspondence to Deleuze is frequently remarked upon,⁶⁷ is not

⁵² Deleuze 1994, 245 = Deleuze 1968, 316: “processus d’actualisation”.

⁵³ Deleuze 1994, 266 = Deleuze 1968, 342: “la ressemblance n’a plus besoin d’être exactement celle de la copie au modèle”.

⁵⁴ Zepke (2010, 74) has called Deleuze’s rejection of photography “quixotic”.

⁵⁵ Cf. Deleuze 1981, 59.

⁵⁶ Flusser 1984, 24-5.

⁵⁷ *Eva-Maria Painer vs. Standard Verlags GmbH and others* 2011, par. 91.

⁵⁸ Zahm 1991, 102, on the position of Elaine Sturtevant.

⁵⁹ Eleey 2014, 63. On the latter cf. Frohne 2000.

⁶⁰ The poses taken in the *tableau vivant* are derived from the two Cranach panels in the collection of the Kunsthistorisches Museum, Vienna (inv. nos. 861 and 861a).

⁶¹ Mundy 2008, 198. The film *Entr’acte* was presented during the intermission of the ballet *Relâche* (cf. Baker 2003).

⁶² *Man Ray Ciné-Sketch* would be correct. However, Duchamp produced an etching after Man Ray’s photograph for his series *Morceaux choisis* in December 1967 (Schwarz 2000, no. 645). In November, Duchamp had attended Sturtevant’s *Relâche* performance at the School of Visual Arts, New York (cf. Hainley 2012, 232).

⁶³ Achard 1924, 4.

⁶⁴ Cf. Frohne 2000, 278.

⁶⁵ The Information Society Directive (2001/29/EG) stipulates a copyright exception for pastiches, caricatures and parodies in Article 5(3)(k) (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029>). A similar exception had been introduced in French copyright law as early as 1957.

⁶⁶ Eleey 2014, 64 fn. 124.

⁶⁷ For example Bowring 2008, 89-90; Dressen 2010, 11; Lee 2016, 24-5. Sturtevant was said to have read *Différence et répétition* in French, with the aid of a dictionary, before it was translated into English. Her mostly retrospective Deleuzian statements are critically assessed by Schaar (2010, 900-1).



Figure 5 Adrian Sonderegger, Jojakim Cortis, *Making of "Terror of War"* (by Huynh Cong Út, 1972). 2019. Photograph. Private collection. Photo © Cortis & Sonderegger

alone in the field of recreations of photographs. With a perceptible echo of Marcel Duchamp's *Boîte-en-valise* (1941/66), Hubert Becker has recreated photographs by Thomas Struth, Ansel Adams, Karl Blossfeldt and Robert Mapplethorpe by building a three-dimensional model in his studio that he then photographs. The result is a picture that, at first sight, can be easily confused with the original. The observer then realises subtle differences of the same kind as those seen when James Robinson recreated Wallis' painting in his stereoscopic studio. Once Becker's photograph is finalised, the model is destroyed.⁶⁸ Becker's gallery advertises his method as a hide-and-seek game between mimicry and mimesis.

Swiss photographers Adrian Sonderegger and Jojakim Cortis follow Becker's approach but expose it more openly. While they also reconstruct 'iconic' photographs as a miniaturised, three-dimensional model,⁶⁹ they then photograph these reconstructions from a perspective that includes the surround-

ing set-up. The duo often chooses violent moments from history, repeated as a simulation in their studio. Unlike Becker's works, they primarily do not create photographs that mimic the originals. Instead, Sonderegger and Cortis lay bare the construction works of their chosen photo-documents, a shortcut between two Flusserian space-times of one photograph. In their recent version of *Terror of War* by Huynh Cong Út (known as Nick Ut) [fig. 5], this even involves the convoluted publication and editing history of the photograph. At its first appearance on the front page of the *New York Times* on 9 June 1972, the photograph was cropped by a third on the right. This left out the military photographers and cameramen, whose role as unhelpful voyeurs has been the subject of the debate relating to photographers' moral responsibility. Since its first publication, the image has been used in various different cropped variants for as many political narratives.⁷⁰ By exposing the studio set-up in their photographs and naming them "Making of ...", Son-

⁶⁸ Mensger 2012, 278-9; Miess 2005.

⁶⁹ Interestingly, their project began with the recreation of a Gursky photograph, *Rhein II* (1999) (Caujolle 2011, 11; Cortis, Sonderegger 2018, 86).

⁷⁰ Paul 2005, 234-6.

deregger and Cortis reflect on the photograph's editing history, its framing and constant re-framing. Who is responsible for the incident that was documented in the photograph? Are not the attackers a kind of co-author of the picture, which would not have been taken without the act of violence? The photograph documents a case of 'friendly fire', a South Vietnamese napalm strike that mistakenly hit the village of Trảng Bàng. In subsequent years, the US were often blamed for the attack, and in 1996, a Vietnam veteran falsely claimed that he was the commander in charge who was responsible for the airstrike.⁷¹

The studio's visibility in the photograph serves as a reminder of the constructive task of any actual or potential spectator observing the scene.⁷² It is an idea taken up by Susan Sontag in her book *On Photography*, when she comments on the constant modification of the uses of photography,⁷³ and also reaches back to Benjamin's remark on the film studio, where "the mechanical equipment has penetrated so deeply into reality" that the "equipment-free aspect of reality here has become the height of artifice".⁷⁴ It is a framing that is made visible in the set-up employed by Sonderegger and Cortis. Their self-understanding as forensic detectives re-

searching a historical photograph⁷⁵ combined with the labelling of their reconstructions as "Making of ..." imparts a superficially revealing quality to their photographic constructions. If taken at face value, these would dismantle any documentary claim of the originals. Sonderegger and Cortis present an alternative truth for these icons of photography – a kind of parallel universe in which they become simulacra of history or siblings of Pierre Bayard's "plagiaries by anticipation".⁷⁶

The concept is compatible with Deleuze's critique of the photograph that creates the event ["La photo 'fait' la personne ou le paysage, au sens où l'on dit que le journal fait l'événement (et ne se contente pas de le narrer)"].⁷⁷ In *Making of "Terror of War"*, the glass pane substitutes the original negative. A conceptual remnant of Alberti's window,⁷⁸ it allows for two different modes of photographic perception. Looking *at* the photograph, two images are placed in relation to one another. Looking *through* a photograph, the connection between the represented object and its representation is emphasised. The glass pane is an intersection of these two modes, which lean towards the processual understanding and the object-based focus on the ends of the inter pictorial transmission chain, respectively.

4 Conclusion

This short survey of cases and practices suggests a final hypothesis: copies always combine reproductive and original elements. The reproductive elements maintain the identity of a work of art; they operate as perceptible continuities. This identity preserves the integrity of the 'transmission chain' across different media, which may not be exclusively photographic. The aesthetic identity bridges distinct regions of space-time (Flusser), which allow

for more complex inter pictorial relations than the dichotomy of the original and the copy, whose underlying identity turns out to be mutable (a reciprocal synthesis, Deleuze). In the instances of the 'transmission chain', alterations introduce new originalities in addition to the first originality of the copied work. They are part of the productive process, meaning that 'production' is therefore an intrinsic part of 'reproduction'.

⁷¹ Paul 2005, 239-40. The authors of a more recent publication (Girardin, Pirker 2008, 180-1) gloss over the factual inconsistencies of the legend as "éventuelle imprécision".

⁷² Cf. Caujolle 2018, 11.

⁷³ Sontag 1979, 106.

⁷⁴ Benjamin [1935] 1968, 233.

⁷⁵ Cortis, Sonderegger 2018, 107.

⁷⁶ Cf. Bayard 2009.

⁷⁷ Deleuze 1981, 59.

⁷⁸ Cf. Alberti 2011, 167.

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