



EUROPEAN VISUAL ARTISTS

Exceptions for Works Permanently Located in Public Places

Introduction

One of the outstanding objectives of the digital single market is the creation of economic growth and employment. The **visual sector** is one of the leaders in this respect within the European Union with **a turn-over of 127.6 bn € and 1,231 million jobs in 2012**¹. As Commissioner Öttinger says, Europe is leading as concerns cultural content. In order to maintain this position the authors of visual works should not become subject to prejudice caused by unjustified and unremunerated exceptions and **an appropriate return of value which has been created based on authors' works** should be ensured.

Member countries have introduced the exceptions 5.3 (h) on works in public places and 5.3 (j) on incidental inclusion with some differences following their national traditions and **within the flexibility provided by the EU Directive 29/2001**. There are, however, **serious doubts that exceptions including commercial uses are in compliance with the three-step-test**.

Recently, and within the discussions about the digital single market, the argument is heard that consumers would be under threat to be pursued by authors of art works in public places for uploading private photos and videos on personal websites when these images included protected works. It would be difficult for private persons to judge if a work could be used without permission or not because the implementation of article 5.3 (h) (works in public places) and 5.3 (i) (incidental inclusion) was not identical in all member countries. Although **private users can use these works for such purposes without risk to be pursued**, there is nonetheless a call for the European legislator urging for harmonization on the lowest level and depriving the authors of sculptors and architecture in public places entirely of all rights, including moral rights and remuneration rights for secondary uses, by placing such works by law into the public domain. **Such legislation would not be limited to specific cases, interfere strongly with the normal exploitation of works, cause unjustified prejudice to visual authors and be an unequal and unfair treatment of the visual repertoire**, not only for the authors of the works in public places but also for those who are creating **the image material of those works (photographers)**.

¹ Creating Growth, Measuring cultural and creative markets in the EU, December 2014, study by EY, Page 10

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The exceptions in question have been developed about *a century ago when today's mass communication was unimaginable, international advertisement campaigns not known and most works in public places were sculptors referring to historically personalities or events*. The situation has changed strongly, affected uses are today much larger than could be expected and should be taken into account when reflecting on their purposes and extent.

Authors of works in public places would be deprived of an important income source for subsequent commercial uses; sculptors for instance would be fully dependent on the sale of original works to an increasingly tight market.

The broad exceptions in Germany, Austria and others should be subject to evaluation by the European Legislator before deciding on any further step because times have considerably changed since they were developed first about a century ago. Today's digital mass communication and ease of re-use was unthinkable back then and only a few works of national historical and cultural interest were concerned. Today there are far more and new work forms located in public places, such as street arts besides of sculptors and architecture.

1. Personal Use by Private Persons

Even in the few countries where there is no exception for works in public places the *private uses are not pursued when using such works for their personal websites*. In reality there is no conflict which would require the legislator's intervention. The image that creative commons supporters and pirates' party representatives present is a constructed theoretical case. An example of the misleading reporting is the often quoted illumination of the Eiffel Tower in Paris:

Pictures of the Eiffel Tower may be taken by private persons by day or by night and published for instance on personal websites. Since 2005 the exploitation of the tower is run by SETE (Société de l'Exploitation du Tour Eiffel), a private company held in majority by the town of Paris. The company's purpose is to manage all tasks related to the close to 7 million tourists visiting the tower each year - also the requests for shooting pictures for commercial films, advertisement campaigns and other commercial purposes. While copyright protection for the tower is expired, the illuminations - or rather the light shows-, which are changing and modified depending on events and purposes is protected by copyright because they are original creations. The tower has become a symbolic building of national identity carrying at night times messages or symbolic decorations made with

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light. Incomes from commercial uses are applied to cover costs related to providing access to the tower. Again, only commercial uses are concerned, contacts and information on licensing conditions are easy to find on the web site of SETE as well as the highly transparent reporting from the running of SETE and the Eiffel Tower as a much requested historical, cultural and touristic site.

Segrada Familia the famous cathedral by Gaudí in Barcelona is protected by copyright. Private persons may take pictures and publish them on their personal websites. However commercial uses require prior authorization. ***Incomes generated with authorized merchandising products flow into the continued construction of the famous building.***

A mandatory exception for all uses would destroy these important income sources which flow into the preservation and public access to these historical sites.

2. Platform providers

The providers of platforms on which private persons post pictures and videos taken or share image material they made, such as Face book, Flickr, Instagram, are not private users and ***generate financial gains with the running of their services.*** These providers should not be allowed to use protected works without authorization and free of charge. Authors create content which makes cultural industries successful and are drivers for growth and employment. ***A fair share of the profits made by exploiting their works should be returned to the authors in order to continue the creation of visual works and maintain Europe's position as the world leader in cultural content.***

Wikimedia is advocating in Brussels an EU wide mandatory exception for all uses of works in public places. It is a service based on voluntary contributions, by funds or in kind, which has obtained a dominant position in the field of online encyclopedias. The Wikimedia Foundation is a not-for-profit entity but provides services also for commercial entities by offering contents free of charges for all purposes; it is financed by funds from commercial entities, foundations and private persons and has an estimate annual income in 2014/15 of 58,5 mio USD. ²

² With more details: entries on Wikipedia about Wikis



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Wikimedia understands its role as a provider of a pool of materials which can be browsed and used for free by commercial entities as well as by private users. Thus, start-ups may create business models without the need to enter in their cost calculation fees for authors of the works they intend to exploit or in other words: ***set up business models on the accounts of authors***. The only justification given appears to be that such policy was voted for in 2001 by the founders.

When an entity has built its success to becoming a dominant market player on voluntary contributions and is then urging the European Legislator to delete certain authors rights because they are not dedicated voluntarily, this entity is performing a U-turn in its policy.

Authors need rights on their creations to make a living – no less than any member of staff of a start-up has a right to be paid.

3. CMOs Offer Worldwide Licenses

EVA members issue global licenses for their pooled repertoires of 60 000 authors of fine arts. There are ***pending negotiations for instance in France on non-commercial use*** of works in public places to cover countries without such exception. These are based on published tariffs taking into account the purpose of the use.

While on one side negotiations are pending and on the other side a due evaluation of works in public places has not taken place the European Legislator should not take a position for the time being.

4. Share Incomes with Authors

Exception on works in public places have to comply with the three-step-test (article 5.5 Directive 29/2001) “The exceptions and limitations(...) shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably

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prejudice the legitimate interests of the right holder.” **Commercial uses of protected art works should not be subject to an unremunerated exception** of the exclusive rights of authors. It causes **unjustified prejudice to authors** of visual works. They would be treated unequally in comparison to all other authors. Commercial users are dealing professionally with material that may be protected or underlie other restriction to be used (right of portrait, data protection, protection of minors etc). Professional users know or are in a position to know such regulations which are applying to their activity.

There is no justification why for instance an **advertisement campaign** may use works in public places without prior authorization and equitable remuneration for the authors. Commercial uses are not covered by exceptions in the majority of member countries, be it explicitly by legislation or due to the three-step-test (in Spain, Portugal, the Netherlands and Sweden). For the use of works in expensive advertisement campaigns the financial losses for authors would be particularly high and damaging.

The value of images already placed on the English language version of Wikipedia is estimated at 208 mio USD per year³ which gives an idea about the **potential harm** that the uses in question would lead to – although based on tariffs of an international commercial picture agency which are different to those of CMOs.

The unremunerated large exceptions appear to be not compliant with article 5.5 Directive 29/2001, article 9.2 Berne Convention and the respective implementation of the three-step-test into national law.

5. Public Domain is No Solution

The term of **“freedom of panorama images” is misleading** because in reality all works permanently situated in public places are protected, such as any other work. A protected work enters into the public domain when the rights expire. Once in the public domain they are not returned into

³ CREATE, Erickson, copyright and the value of the public domain, February 2015, page 78, value of images in the English version estimate: USD \$208 mio \$ 232 mio per year!

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protection by digitization of image material. The status of the image material is independent of the object on the material. While photography is in general protected this is not the case for scans.

Like any other case of exceptions and limitations only specific uses may be covered and not the work as such. Otherwise the authors would be deprived of other rights for instance their moral rights which has important value, educationally and economically. The correct indication of the authors name for instance is an important tool to ***prevent future creation of orphan works***. Information about the work and its author and other right holder are also essential to ensure that for ***subsequent uses an authorization is acquired***. This information is essential to add cultural value to the use of the works.

Also authors need to have the right to prevent use of their works which are not in line with their personal beliefs and commitments for example ***advertisement*** for doubtful or unhealthy products and services.

The authors also keep all rights to remuneration for secondary uses such as for reprography, public lending and exceptions for schooling and teaching. If works were defined to fall into the public domain the author would lose this source of income which they explicitly have in countries with broad exception such as Germany and Austria.

To recommend dedication of works into public domain opens the door to undermine authors' rights which provide a lifelong relation between the authors and their works.

6. Right on Image Material

Architectural and other protected works in public places need to be transformed into image material before making use of it in print and other media. Pictures have to be taken by photography or audiovisual means. The authors of the image material – whether private individual from the general public or professional photographers or filmmakers - have also rights on this material which incorporates the work in public places or other object. The photographers and picture library industry would be deprived of their rights if such image material would be considered as falling into the public domain due to the status of the works which are incorporated.

If image material were not treated independently from subjects on the material legal insecurity would be the consequence.

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7. License Agreements with Public Authority

Public authorities should be advised to clear rights ahead with architects and authors for buildings they construct and art work in public places. Public institutions acquiring works, constructing buildings and installing art work in public places are offering important opportunities for many visual authors. However, if commercial use of images is not subject to authorisation and subsequent payment these **authors are entirely relying on the sale of original sculptors for which the market is very limited**. The application of authors' rights should not be excluded in principle to the benefit of public authorities because of **their responsibility and obligation to equal treatment** towards all citizens - also the authors. Public authorities should rather play a model role to support authors beyond the purchase of a work. They should be treated like cultural institutions, such as museums and public collections in general.

CMOs work in fruitful partnership with these entities concluding frame contracts covering all intended uses at reduced tariffs taking into account the cultural services granted to society.