European Copyright Society

Answer to the EC Consultation on the 'panorama exception'

15 June 2016

I. Introduction

The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law. Its members are renowned scholars and academics from various countries of the European Union, seeking to promote their views of the overall public interest. The Society is not funded, nor has been instructed by any particular stakeholders.

For more information : https://europeancopyrightsociety.org/

As the questionnaire for the consultation did not allow for open answers, the ECS has submitted its answer related to the panorama exception in the last question and has decided to send its opinion as a separate document directly to the Copyright Unit of the European Commission. Only the present document represents the official opinion of the ECS on the 'panorama exception'.

Opinion

1. At the outset, it should be noted that the European Copyright Society (ECS) considers that the issue of Freedom of Panorama (FoP) should not be reviewed in isolation from the broader, necessary reform of the European copyright framework. The ECS regrets the disproportionate level of importance accorded to the review of this single exception, which is already satisfactorily regulated under the Information Society Directive (Art. 5.3 (h)) ("use of works, such as works of architecture or sculpture, made to be located permanently in public places"). This provision should remain as it is. Existing problems, such as the need to allow for cross-border use, apply just as much to other exceptions (e.g. the education and research exception) as to FoP.

2. However, if this exception is to be reviewed, the ECS submits[1] that the only change necessary is the conversion of the existing exception into a mandatory provision. Given the absence of flexibility for reasonable uses in the European Copyright Framework, the ECS strongly supports the maintenance of an explicit FoP exception. It is obvious that people will (continue to) take photographs of protected works that are permanently situated in a public place, in the same way as they do with unprotected works. To address this situation, it is thus necessary to make the FoP exception mandatory, even if those photographs may be exempted in certain Member States under the private copyright exception (Art. 5.2 (b)). The sustainability of copyright relies on public support, and its credibility would seriously be undermined if the acts of millions of, evidently reasonable, people were to be held to be unlawful.

3. As with many other exceptions and limitations, the cross-border dimension of the application of the current FoP provision is highly problematic. Its optional nature means that a use falling under a limitation or exception in one Member State need not necessarily be exempted in other Member States. This situation may lead to differences in the scope of services offered in the different Member States. Such lack of uniformity is problematic for end-users, service providers and other intermediaries. Given the difficulties arising from the lack of harmonization of national limitation and exception systems, the ECS is of the opinion that limitations and exceptions should be made mandatory as a matter of principle. Nevertheless, the ECS maintains that it is undesirable for the process of copyright reform to promote only this particular provision to the level of mandatory character,

4. The current wording (and scope) of the provision should be maintained and any clarification should be left to the CJEU. It is established in the case law of the Court that concepts appearing in a provision of a directive without any reference to national laws, must be regarded as autonomous concepts of EU law and interpreted uniformly throughout the European Union (see, to that effect, judgment in *Padawan*, EU:C:2010:620, para 33 and *Deckmyn* ECLI:EU:C:2014:2132, para 15). That interpretation applies to the current optional exceptions (see, to that effect, judgments in *Padawan*, EU:C:2010:620, para 36, and *ACI Adam and Others*, C-435/12, EU:C:2014:254, para 49). It will be even more obviously appropriate in the case of a mandatory FoP exception.

5. The European Union legislature's aim of achieving a uniform interpretation of the concepts contained in Directive 2001/29 is apparent, in particular, in recital 32 in the preamble thereto, which calls on the Member States to arrive at a coherent application of the exceptions to and limitations on reproduction rights, with a view to ensuring a functioning internal market (cf. *TV Danmark,* ECLI:EU:C:2012:244, para 35). Hence, the conditions under which the FoP should apply in all the Member States should be interpreted in the light of this goal.

[1] The arguments put forward in the following paragraphs, are in line with previous submissions by the European Copyright Society; see, in particular*, Limitations and exceptions as key elements of the legal framework for copyright in the European Union - Opinion on The Judgement of the CJEU in Case C-201/13 Deckmyn*, 1 November 2014

6. Member States are not free to determine, in an unharmonised manner, the limits of exceptions and limitations in European Union copyright law, even where those exceptions are optional (cf. *TV Danmark,* ECLI:EU:C:2012:244, para 36). Sufficient safeguards are provided by the existing framework of the three-step test and the obligation to secure a "fair balance" between the rights and freedoms of creators and users (see Recital 31 in the preamble to Directive 2001/29; *Deckmyn*, ECLI:EU:C:2014:2132, paras 26 ff). As a result, it is the view of the ECS that national laws implementing the FoP may not restrict the application of this exception absolutely to situations in which the use of a work, otherwise falling within Art. 5.3 (h), is incidental and/or is accompanied by attribution and/or is non-commercial.

7. Furthermore, the ECS observes that the FoP exception involves clear issues of freedom of expression. As has been repeatedly stated by the CJEU in cases concerning the application of other exceptions with a strong grounding in freedom of expression, a broader interpretation of such an exception may be justified to secure compatibility with Art. 11 of the EU Charter of Fundamental Rights and Art. 10 of the ECHR (cf. quotation right in the *Painer* case and the parody exception in the *Deckmyn* case).

The answer to this consultation has been prepared by : Marie-Christine Janssens (University of Leuven)

Signatories

Prof. Lionel Bently, Cambridge University, UK
Prof. Estelle Derclaye, University of Nottingham, UK
Prof. Graeme B. Dinwoodie, Director of Oxford Intellectual Property Law Research Centre, University of Oxford, UK
Prof. Séverine Dusollier, Law School, SciencesPo Paris, France
Prof. Christophe Geiger, Director General of Center for International Intellectual Property Studies (CEIPI), University of Strasbourg, France
Prof. Jonathan Griffiths, School of Law, Queen Mary University of London, United Kingdom
Prof. Reto Hilty, Director of Max-Planck-Institut für Innovation und Wettbewerb, Germany
Prof. Bernt Hugenholtz, Amsterdam University, Director of IVIR (Institute for Information Law), The Netherlands
Prof. Marie-Christine Janssens, University of Leuven (KU Leuven), Belgium
Prof. Martin Kretschmer, Director of CREATe, University of Glasgow, UK
Prof. Axel Metzger, Humboldt-Universität Berlin, Germany
Prof. Alexander Peukert, Goethe-Universität Frankfurt am Main, Germany
Prof. Marco Ricolfi, Chair of Intellectual Property, Turin Law School, Italy
Prof. Ole-Andreas Rognstad, University of Oslo, Norway
Prof. Martin Senftleben, VU University Amsterdam, The Netherlands
Prof. Alain Strowel, Saint-Louis University and UCLouvain, Belgium
Prof. Michel Vivant, Law School, SciencesPo Paris, France
Prof. Raquel Xalabarder, Universitat Oberta de Catalunya, Spain