



## The EU Public Interest Clinic and Wikimedia present: *Extending Freedom of Panorama in Europe*

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## Abstract

*The following paper advocates for the adoption of freedom of panorama in the European Union. The term “freedom of panorama” (FoP) refers to an unconditional copyright exception vis-à-vis works of architecture and sculpture placed permanently in public places. The current lack of uniformity with respect to copyright exceptions at the EU level has proven problematic to end-users, service providers and other intermediaries. It has also frustrated the ultimate goal of promoting a single internal market throughout Europe, and safeguarding freedom of expression and free movement of services throughout the EU.*

*The current system does not harmonize copyright exceptions throughout the EU. Rather, each Member State is free to adopt copyright exceptions as it sees fit. The result is a heavily fragmented system that leaves businesses and users with the necessity to individually deal with each Member State and rights holder concerned. A mandatory exception for FoP would play a key role in guaranteeing freedom of expression, access to education and the free movement of digital services in the internal single market.*

*FoP is critical for ensuring freedom of expression and access to education. Additionally, the growth of net companies that rely on user generated conduct (UGC), such as through YouTube, Wikipedia and blogs, has led to the constant fear among most EU citizens of violating copyright law. This reiterates the need for a FoP exception that covers both commercial and non-commercial uses. Furthermore, many new cross-border educational initiatives in Europe do not fall within the “non-commercial educational and scientific research purposes” exempted under the current InfoSoc Directive. Some national systems that broadly extend the education exception to uses that fall outside the “non-commercial” definition do not extend the exception to online uses.*

*The EU Copyright Directive should be re-written to include a mandatory FoP provision, as is already the case in the national law of EU Member States such as the United Kingdom and Germany, as well as third countries like Brazil. This solution would also comply with copyright-protective countries’ call – among them Italy, Spain and France – for such an exhaustive list. This solution would provide clear direction to Member States without becoming an overly lengthy and unwieldy document.*

*Several problems remain with this approach. First, there has been reticence on the part of the European Court of Human Rights to protect FoP from a freedom of expression standpoint when the images’ use was commercial. Second, there is the possibility for Member States to use trademark law, cultural heritage law, or other national laws to get around a mandatory FoP exception. The uses of trademark and cultural heritage law do not pose a significant barrier to a mandatory FoP exception at present. However, the reforms ultimately decided upon must take into account the possibility of the use of this law to frustrate the Directive’s objectives.*

*The HEC-NYU EU Public Interest Clinic (the “Clinic”) presents its justifications for a mandatory FoP exception below. We also include an annex and model legislation that addresses many of the deficiencies of current EU law.*

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## 1 Introduction

- <sup>1.1</sup> On October 23, 2012, sculptors Claes Oldenburg and Coosje van Bruggen sent take down notices to the Wikimedia Foundation claiming copyright infringement.<sup>1</sup> These notices demanded that the Foundation remove from its popular Internet encyclopedia, Wikipedia, fifty-nine images of Oldenburg sculptures. The sculptures were on permanent exhibition in public spaces in the United States, Israel, and Japan, and also in many European countries such as the United Kingdom, Germany, Portugal, the Netherlands, and Spain.<sup>2</sup> Oldenburg, through his lawyers, claimed that even though making images of his sculptures available on Wikipedia might be permitted in certain EU jurisdictions such as Germany, the U.K., the Netherlands, and Spain, these pictures constituted infringement elsewhere—in particular, under U.S. copyright law.<sup>3</sup>
- <sup>1.2</sup> On November 9, 2012, Wikimedia complied with Oldenburg’s take down request, removing all fifty-nine of the images.<sup>4</sup> When a German “wikimedian” complained that many of the images did not infringe German copyright law and should be restored to the site, Philippe Beaudette, Director of Community Advocacy at Wikimedia Foundation, quickly responded: “[A]s I’ve explained, it was seriously looked into. Your understanding of the laws under which we operate simply does not agree with the legal counsel’s understanding.”<sup>5</sup> Subsequently, another wikimedian clarified the point: “US [law] applies for claims of infringement in US courts. Other countries’ [laws] will apply in *their* courts.”<sup>6</sup>
- <sup>1.3</sup> The Oldenburg case provides a cautionary tale of the risks of non-harmonized and inadequate copyright protections for Freedom of Panorama or FoP in the modern Internet age where images circulate freely on numerous widely available websites such as Wikipedia. Internet users, all across the globe, find themselves incomprehensibly ensnared in the restrictive copyright laws of one jurisdiction or another. As commonly understood, FoP guarantees individuals the right to use images of works of architecture and sculpture permanently located in public places<sup>7</sup> such as the Atomium in Brussels or the Eiffel Tower by night [See at Annexes 2 to 4 a few images that FoP might cover including the Oldenburg sculptures].<sup>8</sup> Even though the Oldenburg case primarily involved United States copyright law, it is equally applicable to the EU context in which copyright exceptions vary from country to country.
- <sup>1.4</sup> In recent years a growing consensus of politicians, stakeholders, and scholars has proclaimed the need to revise the European Union’s Information Society Directive (the InfoSoc Directive), which was enacted in 2001 and was meant to harmonize EU copyright law. As the EU Commissioner for Digital Economy and Society has stated, “at the moment, there are 28 different sets of national rules and regulations. If an author wants to know all of them, he or she would have to talk to 28 lawyers! While this may be good news for the legal profession, it is not ideal for Europe’s creators.”<sup>9</sup> As was alluded to above, one of the major flaws in the InfoSoc Directive that has received limited attention until recently is the lack of specific and mandatory protections for so-called FoP. There are many important economic, public policy, and educational reasons to guarantee FoP at the EU level. At present, sharing such images without the rights holder’s consent may classify as a copyright infringement in many European jurisdictions and could result in heavy penalties.

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<sup>1</sup> DMCA Oldenburg Takedown Notice, available at [http://wikimediafoundation.org/wiki/DMCA\\_Oldenburg](http://wikimediafoundation.org/wiki/DMCA_Oldenburg).

<sup>2</sup> *Id.*

<sup>3</sup> Jeremy Phillips, *What’s Your View of the Panorama Right?*, THE IPKAT, Nov. 12, 2012, available at <http://ipkitten.blogspot.ca/2012/11/whats-your-view-of-panorama-right.html>.

<sup>4</sup> See WIKIMEDIA COMMONS, *Office Actions/DMCA Notices*, available at [http://commons.wikimedia.org/wiki/Commons:Office\\_actions/DMCA\\_notices#Notification\\_of\\_DMCA\\_takedown\\_demand\\_-\\_Claes\\_Oldenburg](http://commons.wikimedia.org/wiki/Commons:Office_actions/DMCA_notices#Notification_of_DMCA_takedown_demand_-_Claes_Oldenburg). See also Phillips, *supra* note 3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Directive 2001/29/EC, Article 5 § 3(h) on the harmonization of certain aspects of copyright and related rights in the information society [Hereinafter Copyright Directive].

<sup>8</sup> Dimitar Dimitrov, *Atomium & Freedom of Panorama*, Storify, Jul. 2014, available at [https://storify.com/dimi\\_z/atomium-and-freedom-of-panorama](https://storify.com/dimi_z/atomium-and-freedom-of-panorama).

<sup>9</sup> Gunther Oettinger, *Twitter chat on EU copyright: How do YOU want it to be?*, EUROPEAN COMMISSION, 17 Feb. 2015, available at [http://ec.europa.eu/commission/2014-2019/oettinger/blog/twitter-chat-eu-copyright-how-do-you-want-it-be\\_en](http://ec.europa.eu/commission/2014-2019/oettinger/blog/twitter-chat-eu-copyright-how-do-you-want-it-be_en)

- <sup>1.5</sup> As Professor Giuseppe Mazziotti sums up, the issue originates from the failure of EU lawmakers to come to a “consensus about the acts and uses that should have been exempted from copyright’s scope, especially in the digital environment.”<sup>10</sup> Because the InfoSoc Directive only provided a list of exceptions and limitations, which are *not mandatory* for member states, it failed to ensure harmonization of copyright exceptions. Therefore “significant divergences exist from one Member State to another, which creates legal uncertainty for both consumers and creators. In other words, what is legal in one Member State may be illegal in another.”<sup>11</sup> This situation of inadequate harmonization is particularly pronounced in the case of FoP. Harmonization of FoP laws is increasingly important with the development of digital technologies that incorporate user-generated content (UGC) having to do with public architecture and sculpture, as the Directive is unfit for the challenges of the contemporary digital environment.<sup>12</sup>
- <sup>1.6</sup> This memo adds to a growing list of important voices advocating for copyright reform at the EU level. Jean-Claude Juncker has said, for example, that the digital single market would require “to have the courage to break down national silos in copyright legislation” and to “modernise copyright rules in the light of the digital revolution.”<sup>13</sup> Neelie Kroes, the former Vice-President of the European Commission responsible for the Digital Agenda, has repeatedly called copyright reform<sup>14</sup> “the essential centerpiece [of the digital single market]. Otherwise it would not be credible, it would just be words.”<sup>15</sup> Moreover, the draft report on the implementation of the InfoSoc Directive has explicitly called for a broad and mandatory copyright exception for photographs, video footage, and images of sculptural and architectural works that are permanently located in public places.<sup>16</sup> This memo applauds the serious attention paid to copyright reform and, more particularly, to FoP. This memo argues, however, that even the FoP amendment presented by MEP Julia Reda in the draft report<sup>17</sup> does not go far enough and leaves open legal loopholes, such as through trademark, national heritage, and other national laws, that puts FoP at risk.<sup>18</sup> Any FoP exception must address these issues and also must be more explicit in providing an exemption for both commercial and non-commercial uses.<sup>19</sup> This memo concludes with a model FoP provision that, we believe, addresses many of the deficiencies of current EU law.

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<sup>10</sup> Giuseppe Mazziotti, *Copyright in the EU Digital Single Market*, in REGULATORY POLICY, CENTRE FOR EUROPEAN POLICY STUDIES (CEPS) TASK FORCE REPORTS, 73 (2013), available at <http://www.ceps.eu/book/copyright-eu-digital-single-market>.

<sup>11</sup> EUROPEAN CONSUMER ORGANISATION (BEUC), *EU copyright directive: A glance at exceptions & limitations, the need for revision* (Nov. 2012), available at <http://www.beuc.org/publications/2012-00797-01-e.pdf>

<sup>12</sup> Mazziotti, *supra* note 11 at 84-85.

<sup>13</sup> Jean-Claude Juncker, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the next European Commission*, EUROPEAN PARLIAMENT PLENARY SESSION, 15 Jul. 2014, 5, available at [http://ec.europa.eu/priorities/docs/pg\\_en.pdf](http://ec.europa.eu/priorities/docs/pg_en.pdf).

<sup>14</sup> See, e.g. Dimitrov, *supra* note 10.

<sup>15</sup> Neelie Kroes, *Our single market is crying out for copyright reform*, Information Influx International Conference at Institute for Information Law, University of Amsterdam, EUROPEAN COMMISSION PRESS RELEASE DATABASE, 2 Jul. 2014, SPEECH/14/528, available at, [http://europa.eu/rapid/press-release\\_SPEECH-14-528\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-528_en.htm).

<sup>16</sup> Draft Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI)), 11, available at, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-546.580+02+DOC+PDF+V0//EN> [hereinafter Draft Report].

<sup>17</sup> See *id.* In terms of an exception for FoP, the Draft Report puts forward the following language:

Calls on the EU legislator to ensure that the use of photographs, video footage or other images of works which are permanently located in public places are permitted. *Id.* ¶ 16.

The Draft Report also includes recitals emphasizing, “the Charter of Fundamental Rights protects the freedom of expression, of the arts and scientific research, the right to education and the freedom to conduct a business.” *Id.* ¶ C.

<sup>18</sup> *Supra* ... This memo argues that rights holders and Member States may successfully circumvent FoP by employing trademark and cultural heritage law. Consequently, such circumventions should be explicitly addressed in the text of any mandatory exception or in its recitals.

<sup>19</sup> Even though the explanatory note to the Draft Report briefly discusses the need to exempt commercial as well as non-commercial uses, this memo endeavors to make this discussion more concrete in terms of the possible legal effects of failing to explicitly exempt commercial uses. Draft Report at 11. This memo also proposes that the text of any mandatory exception must explicitly exempt commercial uses to avoid legal ambiguities and confusions.

## 2 Overview of issues, arguments and obstacles

**Issue :** How can the European Commission propose an amendment that raises existing FoP exceptions to a level sufficient to provide adequate protection?

- 2.1 Exhaustive mandatory copyright exceptions are already in use in a number of civil and common law jurisdictions, among them, various EU Member States. Introducing a provision detailing clear, concise and exhaustive exceptions would provide Member States with the adequate level of guidance for implementation, while ensuring that both copyright, and its exceptions and limitations are harmonized.
- 2.2 Main arguments:
- 2.2.1 Mandatory exceptions would ensure the harmonization of all aspects of copyright law within the EU, and would ensure the completion of a single internal market.
  - 2.2.2 This solution would not only benefit consumers and service providers; it would also protect the public interest in ensuring freedom of movement – particularly the freedom of movement of goods and services – and in freedom of expression.
- 2.3 Main obstacles:
- 2.3.1 An exhaustive list of mandatory exceptions would render it difficult to keep up to date with technological innovations without requiring constant, periodical amendments.
  - 2.3.2 Reticent Member States could still find ways to circumvent the mandatory exceptions, such as by upholding suits under trademark law or cultural heritage law, for example.
  - 2.3.3 To be effective, a mandatory exception would need to exempt both commercial and non-commercial uses.

## 3 Background context

- 3.1 Under current EU rules, individual Member States can provide in their national legislation limits and exceptions to copyright protections for the “use of works, such as works of architecture or sculpture, made to be located permanently in public places.”<sup>20</sup> However, these exceptions are not mandatory for Member States, which have often formulated exceptions narrower than those permitted in the Directive.<sup>21</sup> This has resulted in different approaches to exceptions to copyright in Member States, and uncertainty for companies willing to offer services across the EU, which have to deal individually in each member state with relevant rights holders [See Annex 1 for a full survey of the position in various Member States].
- 3.2 More precisely, copyright legislation in many member states, for example, Italy, France, the United Kingdom, and Germany varies widely. Due to the territoriality of copyright, making content available on the Internet from one member state may run afoul of copyright law in another.<sup>22</sup> In France or in Italy, there is no FoP. Instead, individuals must acquire permission before using copyrighted works of architecture and sculpture. Moreover, copyright law allows second comers only limited "quotation rights" and "fair use."<sup>23</sup> In addition, photos of cultural heritage assets are subject to preemptive authorization, a fee and other restrictions. Furthermore, it is only possible to publish online pictures of

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20 Directive 2001/29/EC, Article 5 § 3(h) on the harmonization of certain aspects of copyright and related rights in the information society [Hereinafter COPYRIGHT DIRECTIVE].

21 Recital 44 of the Information Society Directive allows that the scope of certain exceptions may be even more limited when it comes to certain new uses of copyright works.

22 There is an extensive and burgeoning EU case law concerning where parties can bring suit for copyright infringement and what laws apply. *See e.g.* Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the “InfoSoc Directive”), *available at* [http://ec.europa.eu/internal\\_market/copyright/docs/studies/131216\\_study\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf) (discussing the implications of conflict of law and choice of court provisions) [Hereinafter Study on the Application of the InfoSoc Directive].

23 General Copyright Act, § 70 & §70bis (It.)

“panorama” without prior consent when they are for a non-profit “teaching or scientific purpose.”<sup>24</sup> Copyright law in some member states allows certain exceptions in the case of derivative photographic works. Under French law, for example, original sculptures, buildings, or 2D artworks placed in public spaces are subject to copyright.<sup>25</sup> However, case law admits an exception if the copyrighted artwork is “accessory compared to the main represented or handled subject.”<sup>26</sup> However, the artwork must not be intentionally included as an element of the setting.<sup>27</sup> Other member states afford more generous protections for FoP. In the United Kingdom, for example, § 62 of the copyright code carves out exceptions for buildings, sculpture, models of buildings, and other “works of artistic craftsmanship” that are permanently in public spaces.<sup>28</sup> Additionally, article 59 of Germany’s *Urheberrechtsgesetz* provides wide protection for FoP. Article 59 states: “It shall be permissible to reproduce, by painting, drawing, photography or cinematography, works which are permanently located on public ways, streets or places and to distribute and publicly communicate such copies.”<sup>29</sup> Under German law, however, second comers do not have the right to reproduce interiors of buildings or make reproductions of works of architecture.<sup>30</sup>

<sup>3.3</sup> In the absence of harmonized exceptions, private international law provisions in the Brussels I Directive (Reg. 2015/2012/EU) and conflict of law provisions in the Rome II Directive (Reg. 864/2007/EU) spell uncertainty for those wishing to exercise FoP protections. They likely impede both businesses reliant on the Internet and ordinary citizens from exercising FoP rights assigned to them at the member state level. In the case of copyright, Brussels I specifies two grounds for jurisdiction. Under article 4 of Brussels I, which covers general jurisdiction, a rights holder can bring action in the place where the defendant is domiciled. According to article 7(2), the rights holder may bring action in the place where the harmful event of infringement occurred. In *Wintersteiger AG v. Products 4U Sondermaschinenbau* (C-523/10), a case involving cross-border trademark infringement, the CJEU held that art. 5(3), which preceded 7(2), established jurisdiction both in the place where the damage occurred and in the place where the event giving rise to damage occurred. The court stated that finding the “center of interests” in relation to the right in question identifies the site of damage. The blog IPKat has argued that this holding may mean that jurisdiction is established anywhere where there is “the mere possibility to access the website in the country where the trade mark is registered.”<sup>31</sup>

<sup>3.4</sup> In the *Pinckney* case (C-170/12), the CJEU returned to the question of the scope of jurisdiction, this time in relation to the distribution of unauthorized copies of copyrighted works. In that case, the court allowed for a very liberal interpretation of 5(3). It held that damage occurs anywhere where one can access and obtain a reproduction of a copyrighted work. In the recent *Pez Hejduk* case (22 Jan. 2015), which concerned photographs published on a publicly available online site, the court reiterated the *Pinckney* holding that damage occurs anywhere where a work is accessible. It added, however, that the place giving rise to the damage can be the physical location where an infringing work is uploaded. The blog Cyberleagle has commented in regard to this decision that it “chills cross-border freedom of expression, encourages geo-blocking of websites and impedes the free flow of information across borders. *Pez Hejduk* is another bad day for the internet.”<sup>32</sup>

<sup>3.5</sup> The CJEU’s recent decisions concerning the scope of jurisdiction under Brussels I means that an individual or business that makes images available in one Member State, even if that state has robust FoP protections, may face legal action in another member state if a court determines that harm has occurred there. Especially if an individual or business uses a site that does not have the ability or the will to engage in geo-blocking, this could mean that citizens are kept from exercising FoP rights assigned to them by Member States. Furthermore, the Rome II regulation, which governs law applicable to non-

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<sup>24</sup> *Id.*

<sup>25</sup> TGI Lyon, 4 avril 2001, Buren & a. c/ Tassin & a.

<sup>26</sup> CA Paris, 27 octobre 1992, Antenne 2 c/ société Spadem; or Court of Cassation, March 15, 2005, Place des Terreaux

<sup>27</sup> CA Versailles, 26 janvier 1998, Sté Movie box c/ Spadem et a. (its presence in the picture must be unavoidable.)

<sup>28</sup> Copyright, Designs, and Patent Act 1988, c. 48 (Eng.) § 62.

<sup>29</sup> *Urheberrechtsgesetz* (Ger.) Article 59.

<sup>30</sup> *Id.*

<sup>31</sup> Jeremy Phillips, *Wintersteiger 3: The Legal Grounds*, THE IPKAT, Jan. 10, 2011, available at <http://ipkitten.blogspot.ae/2011/01/wintersteiger-3-legal-grounds.html>

<sup>32</sup> Graham Smith, *Latest Score in the Jurisdiction Game: Internet 0, EU Court of Justice 2*, Cyberleagle, Jan. 25, 2012, available at <http://cyberleagle.blogspot.ae/2015/01/latest-score-in-jurisdiction-game.html>

contractual obligations, stipulates that a defendant in an infringement action may be subject to the laws of a Member State that does not guarantee FoP even if she is a domiciled and conducts business in a place that provides for such protections. Article 8(1) of Rome II states that in the case of IP disputes, the applicable law is *lex loci protectionis*, or in other words, the member state where protection is sought. Consequently, a German individual or company that infringes copyright in France by making available a picture of the Eiffel Tower at night may find that a French court has jurisdiction to hear the case with the applicable law being French law since France would be the jurisdiction where protection is sought.

- <sup>3.6</sup> In addition, the InfoSoc Directive does not distinguish among exceptions (Article 5(3)) according to “their nature, function and relevance in allowing unauthorised crossborder uses.”<sup>33</sup> Numerous scholars and stakeholders have contended that exceptions linked to the exercise of fundamental rights, i.e. those, which enable and encourage freedom of speech should be mandatory and harmonised at EU level.<sup>34</sup> Such exceptions are, for instance, parody, quotations, reproductions and quotations for news reporting, reproductions for the purpose of criticism and review, educational and research-related exceptions.<sup>35</sup> This reading of the InfoSoc Directive is especially persuasive in light of the entry into force of the Lisbon Treaty on 1 December 2009 incorporating the Charter of fundamental rights into EU Law.<sup>36</sup> Moreover, the Study on the application of the Directive mentioned that the CJEU has considered that transposing the Directive “in an inconsistent and unharmonised manner which may vary from one Member State to another, would be incompatible with the objective of that directive (CJEU, judgment of 21 October 2010, C-467/08, *Padawan*, ECR, 2010, I-10055, paragraph 36; CJEU, judgment of 26 April 2012, C-510/10, *DR and TV2 Danmark*, paragraph 36.).”<sup>37</sup>
- <sup>3.7</sup> Furthermore, in *ACI Adam BV and Others* (C-435/12), the Court found that Recital 32 of the InfoSoc Directive’s preamble made it clear that the list of exceptions in the Directive “has to ensure a balance between the different legal traditions in Member States and the proper functioning of the internal

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<sup>33</sup> Mazziotti, Single Digital Market, *supra* note 11 at 74.

<sup>34</sup> EU COMMISSION (Directorate General on Internal Market and Services), *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules*, 31 (2014), available at [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf) [Hereinafter Consultation Report].

<sup>35</sup> Dirk Voorhoof, *Freedom of expression and the right to information: Implications for copyright*, in *Research Handbook on Human Rights and Intellectual Property* 333, 337 (Christophe Geiger, ed. 2015), available at <https://books.google.fr/books?id=ogCMBgAAQBAJ&pg=PA178&dq=Research+Handbook+on+Human+Rights+and+Intellectual+Property&hl=en&sa=X&ei=IT3qVMiHBovlatbFgrAE&ved=0CCAQ6AEwAA#v=onepage&q=Research%20Handbook%20on%20Human%20Rights%20and%20Intellectual%20Property&f=false>; see also Christophe Geiger, *Challenges for the Enforcement of Copyright In the Online World: Time For a New Approach* 9 (March 7, 2014), available at SSRN: <http://ssrn.com/abstract=2382603> (discussing the risks that enforcing copyright protections may result in violations of freedoms of expression and privacy); see also ECtHR, *Youth Initiative for Human Rights v. Serbia*, n° 48135/06, 25 Jun. 2013, ¶¶ 20 and 24, unreported (referring to its judgment in *Társaság A Szabadságjogokért v. Hungary*, n° 37374/05, 14 Apr. 2009, unreported).

<sup>36</sup> Copyright is guaranteed by Article 27 of the Universal Declaration of Human Rights (UDHR), Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), by the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights. Freedom of expression is guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the 47 Member States of the Council of Europe. Moreover, freedom of expression and information are guaranteed by article 19 of the International Covenant on Civil and Political Rights (ICCPR) (a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966). ECtHR, *Ashby Donald & Others v. France*, 36769/08, 10.01.2013, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115845>. Nonetheless, the discretion afforded to member states should not be overstated. Under EU law, the right of property (Article 17(1) of the EU Charter) and intellectual property (Article 17(2) of the EU Charter) are not absolute. In *Scarlet v. Sabam*, the Court confirmed this view, stating: “[T]here is nothing in the wording of Article 17(2) of the Charter of Fundamental Rights of the European Union or in the Court’s case-law to suggest that that right is inviolable and must for that reason be absolutely protected.” CJEU, Case C-70/10, *Scarlet Extended NV v. Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)* [2011], Judgment of the Court (Third Chamber) of 24 Nov. 2011, ¶ 43, ECR I-11959. See also CJEU, Case C-314-12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH* [2014], Judgment of the Court (Fourth Chamber) of 27 Mar. 2014, ¶ 61, not yet published.

<sup>37</sup> Study on the Application of the InfoSoc Directive, *supra* note 23 at 251.

market.”<sup>38</sup> Therefore, although Member States remain free to choose which Article 5 exceptions to introduce, once the State decides to extend the exception, it must be applied coherently “so that it cannot undermine the objectives which Directive 2001/29 pursues with the aim of ensuring the proper functioning of the internal market.”<sup>39</sup> The Court specifically looked to the introduction of the private copying exception. It stated the Member States were free to provide varying limits to “fair compensation” so long as these variations are compatible with the Directive’s objectives of harmonization and the prevention of distortion of competition of the internal market as a result of the different State approaches.<sup>40</sup>

- <sup>3.8</sup> Any exception for FoP should likely be mandatory because FoP serves increasingly important roles in guaranteeing freedom of expression, access to education, and the freedom of digital services in the internal market. Ian Hargreaves and Bernt Hugenholtz have noted, for example, “the digital single market could have an economic value comparable to the internal market.”<sup>41</sup> As individuals increasingly create and share content in the form of blogs, podcasts, wikis or videos, existing copyright exceptions become increasingly inadequate to cover their role as creators of knowledge.<sup>42</sup> The development of the Internet, the central role that it plays in European’s lives,<sup>43</sup> and the constant risk of violating copyright laws to which all European citizens are exposed, has led to a burgeoning discussion on implementing FoP in all EU Member States both for commercial and non-commercial usage.<sup>44</sup>
- <sup>3.9</sup> Furthermore, the importance of guaranteeing FoP can be seen in the recent explosion across the EU of cross-border educational initiatives such as MOOC’s.<sup>45</sup> Giuseppe Mazziotti writes, “cross-border [educational] initiatives such as open courses made available online for free by educational institutions such as public universities . . . have recently developed at a fast pace and have been offered at an increasingly high level, at both a European and international scale.”<sup>46</sup> A recent study has claimed, for example, that 71.7 percent of a sampling of European universities are developing or have developed MOOCs.<sup>47</sup> The future of these initiatives is at risk without the ability to make available in all Member States images of publicly displayed architecture and sculpture. It is arguable that existing exceptions for education would also cover FoP in the context of cross-border educational initiatives. However, the InfoSoc Directive only exempts “non-commercial educational and scientific research purposes.”<sup>48</sup> As the New York Times has noted, European MOOC’s are often hosted on third-party commercial platforms.<sup>49</sup> Furthermore, Member States have implemented the education exception differently.<sup>50</sup> Austria, France,

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38 CJEU, Case C-435/12, *ACI Adam BV and Others v Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoeding*, [2014], ¶ 33.

39 *Id* at ¶ 49.

40 *See, e.g.*, CJEU, Case C-467/08, *Padawan SL v. Sociedad General de Autores y Editores de España (SGAE)*, [2010], EU:C:2010:620, ¶¶ 35 & 36.

41 Ian Hargreaves and Bernt Hugenholtz, *Copyright Reform for Growth and Jobs: Lisbon Council Policy Brief, available at* <http://www.lisboncouncil.net/publication/publication/95-copyright-reform-for-growth-and-jobs-modernising-the-european-copyright-framework.html>.

42 BEUC, *supra* note 5 at 7.

43 The ECHR has pointed out that “in the light of the Internet accessibility and capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the sharing and dissemination of information generally.” ECtHR, *Times Newspapers Ltd v. United Kingdom* (No. 1 & 2), no. 3002/03 & 23676/03, 10 Mar. 2009, unreported.

44 EUROPEAN PARLIAMENT, Draft Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI)), §16, *available at* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-546.580+02+DOC+PDF+V0//EN> [Hereinafter European Parliament Draft Report].

45 *See* Darco Jansen & Robert Schuwer, *Institutional MOOC Strategies in Europe*, EADTU, Feb. 2015 *available at* [http://www.eadtu.eu/documents/Publications/OEenM/Institutional\\_MOOC\\_strategies\\_in\\_Europe.pdf](http://www.eadtu.eu/documents/Publications/OEenM/Institutional_MOOC_strategies_in_Europe.pdf)

46 Mazziotti, Digital Single Market, *supra* note 11 at 83.

47 Jansen, *supra* note 46.

48 Recital 42 of the COPYRIGHT DIRECTIVE (When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such).

49 Christopher Schuetze, *European Universities Catch the Wave*, N.Y. TIMES, Sept. 22, 2013, *available at* <http://www.nytimes.com/2013/09/23/world/europe/european-universities-catch-the-online-wave.html>.

50 *See* Teresa Nobre, *Mapping Copyright Exceptions and Limitations in Europe*, Jul. 2014, *available at*

Germany, Greece, Iceland, Italy, Lithuania, and Spain, for example, do not exempt online uses.<sup>51</sup> Member States also have different approaches to the type and amount of work that can be appropriated for educational use.<sup>52</sup>

<sup>3.10</sup> In addition, Internet companies like Google, YouTube, and Wikipedia allow individuals to upload and share large numbers of images and videos of European architecture and sculpture.<sup>53</sup> In the modern digital environment, these companies serve increasingly important educational roles—as Beth Simone Noveck notes, “Law students are footnoting the publicly authored, online resource known as Wikipedia in their term papers. Law professors are doing so in their journal articles.”<sup>54</sup> But an exception for non-commercial educational use would not reach a site like YouTube that is explicitly commercial even though it serves important educational functions.<sup>55</sup>

#### 4 Extending Freedom of Panorama Through a Mandatory Copyright Exception

<sup>4.1</sup> Rewriting the EU Copyright Directive to include a mandatory FoP exception would be the best solution to the current fragmented system. As noted above, the exceptions and limitations contained in Article 5 of the Directive encompass a broad range of categories from educational to freedom of panorama exceptions. Allowing individual Member States to pick and choose which exceptions to incorporate, if they choose to incorporate any at all, has created an immensely complex system that prevents consumers, as well as members of industries that act in digital space, from understanding how to respect copyright law throughout the EU.

<sup>4.2</sup> An explicit FoP exception is already the means employed in various countries that incorporate Freedom of Panorama into their copyright law. Those countries include EU Member States such as the United Kingdom and Germany, as well as third countries such as Brazil. Their legislation provides useful models for an EU-wide mandatory exceptions provision. This system would also comply with several copyright-conservative countries’ calls to introduce an exhaustive exceptions list, among them Italy, Spain and France.<sup>56</sup>

<sup>4.3</sup> Drafting a mandatory exception, however, requires overcoming several obstacles. In particular, FoP will still be susceptible to curtailment through other means such as trademark, national heritage, and other national laws enacting at the Member State level. Furthermore, FoP is vulnerable when copyright exceptions do not sufficiently exempt commercial in addition to non-commercial use.

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[http://oerpolicy.eu/wp-content/uploads/2014/07/working\\_paper\\_140714.pdf](http://oerpolicy.eu/wp-content/uploads/2014/07/working_paper_140714.pdf).

<sup>51</sup> *Id.* at 15.

<sup>52</sup> *Id.*

<sup>53</sup> On YouTube, a simple query for “European Architecture” brings up 75,800 results. *See also* Wiki Loves Monuments, *The Wikipedia Photo Contest Around World Heritage*, available at <http://www.wikilovesmonuments.org/>

<sup>54</sup> Beth Simone Noveck, *Wikipedia and the Future of Legal Education*, 57 J. LEGAL EDUC. 3, 3 (2007). *See also* *New Operating System: Wikipedia’s Role in Medical Education Brings Awesome Promise –and a Few Risks*, available at <http://www.bostonglobe.com/opinion/columns/2013/11/18/wikipedia-role-medical-education-brings-awesome-promise-and-few-risks/iasrC5cWfCPhWkF9R0mZ4L/story.html> (claiming that “[w]hether we’d like to admit it or not, Wikipedia has become a central pillar of medical—and honestly most—education.”), Dimitrios Xanthidis, *The Role of Wikipedia in Research and Education*, available at [https://www.academia.edu/7765630/The\\_Role\\_of\\_Wikipedia\\_in\\_Research\\_and\\_Education\\_-\\_Journal\\_of\\_Information\\_Technology\\_Review\\_V4\\_N1\\_PP13-24](https://www.academia.edu/7765630/The_Role_of_Wikipedia_in_Research_and_Education_-_Journal_of_Information_Technology_Review_V4_N1_PP13-24) (claiming that 58 percent of internet users in Greece regard Wikipedia as their first or second choice for online information.)

<sup>55</sup> *See* Sloane C. Burke and Shonna L. Snyder, *YouTube: An Innovative Learning Resource for college Health Education Courses*, 11 International Electronic Journal of Health Education 39 (2008); *see also* Henry Jenkins, *From YouTube to YouNiversity*, 53 CHRONICLE OF HIGHER EDUCATION (2007), Kathleen Fulton, *The Flipped Classroom: Transforming Education at Byron High School: A Minnesota High School with Severe Budget Constraints Enlisted YouTube in Its Successful Effort To Boost Math Competency Scores*, 39 TECH. HORIZONS IN EDU. J. (2012)

<sup>56</sup> Giuseppe Mazziotti, *The Legal Treatment of Copyright Exceptions Under Secondary EU Law*, in EU DIGITAL COPYRIGHT LAW AND THE END-USER 78 (2008) [Hereinafter Mazziotti Secondary EU Law].

- 4.4 Germany, the United Kingdom (UK), and Brazil provide three very clear examples of legislation containing mandatory exceptions for FoP, all of which follow the categories contained in Article 5 of the EU Directive.
- 4.5 Article 59 of the German *Urheberrechtsgesetz*, for example, provides a wide freedom of panorama exception that states it is “permissible to reproduce, by painting, drawing, photography or cinematography, works which are permanently located on public ways, streets or places and to distribute and publicly communicate such copies.”
- 4.6 The UK’s Copyright, Designs and Patents Act of 1988 (CDPA) enumerates a clear list of copyright exceptions contained in §§ 28-76 of the Act. Section 62 includes a very generous freedom of panorama provision that goes beyond what is permissible in the German law, as it<sup>57</sup> also allows the representation of public interiors<sup>58</sup>.
- 4.7 The CDPA is lengthy, detailed and exhaustive, unlike the concise provision in the EU Directive, which must balance giving clear direction to the Member States that will implement the provisions with preventing the instrument from becoming unwieldy.
- 4.8 Brazilian copyright law manages to strike this balance effectively. Articles 46 to 48 of Law No. 9610 of February 19, 1998 on Copyright and Neighboring Rights list exceptions to copyright protection under Brazilian law. It lists several, well-defined uses that do not constitute copyright violation, including use in the press, quotations, educational uses, personal non-commercial uses, parodies, and transformative uses. Importantly, Article 48 contains an explicit freedom of panorama exception, where “works permanently located in public places may be freely represented by painting, drawing, photography and audiovisual processes.”<sup>59</sup> These categories and the reasoning behind the exceptions and limitations closely match what is already contained in the EU Directive.
- 4.9 The Brazilian courts and legal academy understand the list of exceptions and limitations as provisions that must be narrowly construed.<sup>60</sup> Furthermore, the system understands authors as having not only economic, but also moral rights. The latter referring to the understanding that “any derivation or creative use of a work might be detrimental to the author’s personality and reputation ... [t]herefore, many forms of content production which build upon previous works are viewed with distrust, as potential attacks on the author’s integrity or reputation.”<sup>61</sup> The Brazilian system’s views on copyright thus align with those of EU Member States with the most conservative approach to copyright. However, because Brazil’s copyright law specifically and exhaustively lists copyright exceptions, it

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57 Specifically, § 62 of the CDPA provides that

- Representation of certain artistic works on public display
- (1) This section applies to –
    - a. buildings, and
    - b. sculptures, models for buildings and works of artistic craftsmanship, if permanently situated in a public place or in premises open to the public.
  - (2) The copyright in such a work is not infringed by –
    - a. making a graphic work representing it,
    - b. making a photograph or film of it, or
    - c. broadcasting or including in a cable programme service a visual image of it.
  - (3) Nor is the copyright infringed by the issue to the public of copies, or the broadcasting or inclusion in a cable programme service, of anything whose making was, by virtue of this section, not an infringement of the copyright.

58 The only British case to touch on this provision, *Shelley Films Ltd. v. Rex Features Ltd*, [1994] EMLR 134 (Ch.) 143 (Eng.), did not discuss the scope of freedom of panorama under the Act.

59 Lei No. 9.610, de 19 Fevereiro de 1998, Diário Oficial Da União [D.O.U.] de 20.2.1998 (Braz.).

60 Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani, & Pereira de Souza, *Exceptions and Limitations to Copyright in Brazil: A Call for Reform*, in ACCESS TO KNOWLEDGE IN BRAZIL 78 (Lea Shaver, Ed., 2008)

61 *Id.* at 84-85.

has a functional system that provides for freedom of panorama despite the protective and distrustful approach to copyright.

#### *Pitfalls to Drafting a Mandatory Exception for Freedom of Panorama*

- 4.10 Several disadvantages and pitfalls are inherent in the approaches outlined in the previous sections. These pitfalls will be addressed in turn as well as potential solutions:
- 4.11 First, neither the InfoSoc Directive nor national copyright regimes of the Member States provide robust protections for commercial uses of copyrighted materials. The reticence to afford protection to commercial uses can most recently be seen in the ECtHR's decision, *Ashby Donald and others v. France*. That case concerned the conviction of three fashion photographers for copyright infringement following the publication on a website of pictures taken at fashion shows in Paris, without the permission of the fashion houses, the defendants complained of a breach of their freedom of expression and information. The ECtHR considered that the conviction for breach of copyright and the damages interfered with the defendants' right of freedom of expression. However, this interference respected the three conditions of Article 10(2) of the Convention (the interference with the freedom of expression and information was prescribed by law, pursued the legitimate aim of protecting the rights of others and was necessary in a democratic society), and was therefore justified.<sup>62</sup>
- 4.12 In another interesting case, two of the co-founders of *the Pirate Bay* complained that their conviction for complicity to commit crimes in violation of the Swedish Copyright Act had breached their freedom of expression and information. The ECtHR repeated that if there are convincing, pertinent, serious reasons for the restriction of others' freedom of expression and information in enforcing copyright protection, the Court may conclude that this interference is 'necessary in a democratic society' within the meaning of Article 10(2) of the Convention.<sup>63</sup> Scholars have argued that in both cases the commercial nature of the defendants' activities (i.e. the website in *Ashby* and the file-sharing activities in *The Pirate Bay*) explain the ECtHR's decision to allow member states to have a very wide margin of appreciation<sup>64</sup> in applying or enforcing copyright law which interferes with the right to freedom of expression and information.<sup>65</sup>
- 4.13 In addition, the so-called "three-step test" may limit the ability (or desire) of Member States to exempt certain commercial uses. The "three-step test" was first added to the Berne Convention in 1967. In Berne, the "three step test" only pertained to the reproduction right of authors. Subsequently, the "three-step test" was transposed into the TRIPS agreement, the WIPO Treaty, and the InfoSoc Directive, which expanded its scope beyond the reproduction right.<sup>66</sup> The "three-step test" cabins how signatories to the aforementioned treaties can enact copyright exceptions. It also has the potential to limit the discretion of judges to broadly interpret exceptions once instituted. The "three-step test" requires that: 1) copyright exceptions only be implemented in "certain special cases;" 2) not "conflict with a normal exploitation of the work;" and 3) not "unreasonably prejudice the legitimate interests of the rights holder."<sup>67</sup>
- 4.14 Many scholars have argued that the "three-step test" should not inhibit the emergence of new, especially web-based, technologies.<sup>68</sup> But EU officials have often interpreted the "three-step test"

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62 ECtHR, *Ashby Donald & Others v. France*, 36769/08, 10.01.2013, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115845>.

63 ECtHR, *Fredrik Neij & Peter Sunde Kolmisoppi v. Sweden*, 40397/12, 19.02.2013, available at <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-117513>

64 See e.g. *Ashby Donald* at ¶¶ 40-41.

65 Voorhoof, *supra* note 36 at 348.

66 See Jane Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=253867](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253867); see also Berne Three Step Test, available at [http://en.wikipedia.org/wiki/Berne\\_three-step\\_test](http://en.wikipedia.org/wiki/Berne_three-step_test).

67 See Guido Westkamp, *The "Three-Step Test" and Copyright Limitations in Europe: European Copyright Law Between Approximation and National Decision Making*, 56 J. COPYRIGHT SOC'Y U.S.A. 1, 5-13 (2008-2009) (claiming that the "three step test is antiquated in the age of the internet).

68 *Id.*

restrictively.<sup>69</sup> Famously, the EU brought the United States before the WTO's TRIPS dispute resolution panel in 2000 to end the U.S. practice of providing copyright exemptions for the public performance of music via TV and radio. Even though the U.S. argued that radio broadcasts constituted a relatively minor and insignificant secondary market for the exploitation of musical works, the WTO commission sided with the EU. It held that the exception for radio broadcasts was too general and also interfered with the normal exploitation of such works by rights holders.<sup>70</sup> The WTO decision seems particularly relevant to FoP. Photographs of public works of architecture and sculpture most likely constitute a very small secondary market for their exploitation. But empirically such photographs cannot be considered a "special case" given that so many pictures are taken each year. In addition, rights holders at present have the ability to make postcards and license pictures of architecture and sculpture. Thus, it may be hard to claim that FoP does not interfere with "a normal exploitation of the work."

- 4.15 In the end, the "three-step test" does not provide an absolute bar against uses that are commercial in nature. As even the WTO panel stated, "not every use of a work, *which in principle is covered by the scope of exclusive rights and involves commercial gains*, necessarily conflicts with a normal exploitation of that work."<sup>71</sup> Nonetheless, given the reticence of the EU legislator, national regimes, and European representatives to endorse exceptions for commercial use, we suggest that commerciality be explicitly discussed in the text of any FoP provision.
- 4.16 Second, there are still ways in which rights holders have attempted to get around mandatory copyright exceptions, and which may gain a foothold in domestic courts from conservative systems that are reticent to provide for copyright exceptions. One such example is the use of trademark law. In a case concerning the Sydney Opera House in Australia, the building's rights holder claimed a trademark in the exact image of the Opera House to prevent commercial exploitation of its distinctive silhouette.<sup>72</sup> The rights holder won the case.<sup>73</sup> Similarly, in the United States, the Cleveland Rock & Roll Hall of Fame & Museum attempted to sue a photographer selling a poster featuring his photograph of the museum under the auspices of trademark infringement. In that case, however, the Sixth Circuit ruled in favor of the photographer, as it found that the poster was simply a photograph of a well-known and accessible building, and was not "an indicator of source or sponsorship."<sup>74</sup>
- 4.17 Cultural heritage laws also have the potential to restrict FoP.<sup>75</sup> The Italian Code of Cultural and Landscape Heritage is a case in point. In 2004, Italy updated its code to "protect and enhance the cultural heritage" and to "preserve the memory of the national community and its territory and to promote the development of culture."<sup>76</sup> To ensure protection, the code gives power to the Ministry for Cultural Heritage and Activities to license reproductions of "cultural properties," which include public

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69 *Id.*

70 Ginsburg, *supra* note 67.

71 WTO Copyright Panel decision (2000), case WT/DS160, United States - Section 110 (5) of the US Copyright Act (emphasis added).

72 Bryce Clayton Newell, *Freedom of Panorama: A Comparative Look at International Restrictions on Public Photography*, 44 CREIGHTON L. REV. 405, 422-24 (Nov. 2010).

73 Bernard Lane, *Iconic Image of Opera House No Longer Public*, THE AUSTRALIAN, Jan. 25, 2014, available at <http://www.theaustralian.com.au/arts/iconic-image-of-opera-house-no-longer-public/story-e6frg8n6-1226810021279>.

74 *Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods.*, 134 F.3d 749, 751 (6th Cir. 1998).

75 At present, EU Member States with cultural heritage laws that might limit FoP are limited to Greece and Italy. As of yet, the issue has garnered little scholarly attention outside of a few articles and blog posts. See e.g. COMMUNIA, *Cultural Heritage Rights in the Age of Digital Copyright*, Dec. 10, 2010, available at <http://www.communia-project.eu/wg03-istanbul>. See also WIKIPEDIA, *Freedom of Panorama*, available at [http://en.wikipedia.org/wiki/Freedom\\_of\\_panorama](http://en.wikipedia.org/wiki/Freedom_of_panorama); Luca Spinelli, *Wikipedia Cede Al Diritto D'Autore Italiota*, PUNTO INFORMATICO, Jul. 2, 2007, available at <http://punto-informatico.it/2030219/PI/News/wikipedia-cede-al-diritto-autore-italiota.aspx>; Alberto Bellan, *Exclusive Rights in Classical Art Works: The "Armed David" Case*, THE IPKAT BLOG, Mar. 11, 2014, available at <http://ipkitten.blogspot.ch/2014/03/exclusive-rights-in-classical-art-works.html>.

76 Article 1, Code of the Cultural and Landscape Heritage, Legis. Decree No. 42 of 22 Jan. 2004 (It.), available at [http://www.unesco.org/culture/natlaws/media/pdf/italy/it\\_cult\\_landscapeheritge2004\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/italy/it_cult_landscapeheritge2004_engtof.pdf)

architecture and sculpture.<sup>77</sup> To determine the fee, the competent authority “to whose care the property is committed” must take into account the purposes for the reproduction and the manner in which it is made.<sup>78</sup> Such licensing regimes necessarily impose a burden on those wishing to exercise FoP rights. Even though the Italian Code explicitly excludes from fee “requests by private individuals for personal use, for purposes of study, or by public bodies for purposes of enhancement,”<sup>79</sup> it poses problems for firms that use pictures of architecture and sculpture for commercial or quasi-commercial purposes, especially when those uses are politically unpopular.<sup>80</sup> In 2011, for example, photographers were not allowed to submit images of certain important Italian monuments to Wikipedia’s Wiki Loves Monuments competition due to the difficulties in obtaining licenses.<sup>81</sup> The issue was not resolved until 2012 when Wikipedia hired a lawyer to negotiate licensing with the Italian government.<sup>82</sup>

4.18 In 2014, the Italian ministry of culture threatened legal action against ArmaLite, an Illinois-based arms manufacturer, which had used an image of Michelangelo’s David to promote a line of firearms.<sup>83</sup> Minister of Culture, Dario Franceschini tweeted: “The image of David, armed, offends and infringes the law. We will take action against the American company so that it immediately withdraws its campaign.”<sup>84</sup> ArmLite was served with notice.<sup>85</sup> In addition, the Florence City Council proposed requiring ArmLite to pay “an astronomical sum: a billion dollars, which could be used to restore Pompeii, or finance all the maintenance work needed on Italian museums.”<sup>86</sup> Even though it appears that legal action was ultimately not taken - and admittedly this case may garner little sympathy from many - the example shows the risk that such laws pose to FoP and to freedom of expression more generally. There can and have certainly been more harmless uses of publicly available sculpture by commercial enterprise [See Annex 4 for a Calvin Klein advert].

4.19 As constituted, it is unclear exactly to what extent current laws such as the Italian Code burden FoP. As the famous IP blog IPKat suggests, for example, the Italian Code only covers reproductions of cultural property and does not extend to other rights such as the distribution or making available right. Furthermore, the Italian Supreme Court has held that “reproduction” with respect to the Code is the same as the reproduction right in copyright.<sup>87</sup> Nonetheless, laws like the Italian Code are worrisome precisely because they operate independently from copyright law. There is little reason why Member States may not in the future restrict the ability of net companies to distribute or make available images and videos of so-called “national property”. Furthermore, if Member States were to restrict such rights copyright exceptions would not apply. In other words, a Member State that restricted FoP on cultural heritage grounds would be able to circumvent a mandatory FoP exception to copyright law even if it covered all uses.

4.20 Even though current cultural heritage legislation may not at present pose a substantial burden on FoP, any future copyright reform should take into account the possibility that cultural heritage laws may be used to circumvent FoP.

4.21 Third, other types of national laws may interfere with the ability of individuals to exercise FoP. France, for example, has on its books a series of laws governing civil and administrative goods that

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77 *Id.* at art. 106-108

78 *Id.* at art. 108(1) (“Concession fees and payments connected the reproduction of cultural properties are established by the authority to whose care the property is committed, also taking into account: “(a) the nature of activities to which concession of use refers; b) the means and modalities for producing the reproduction; c) the use the spaces and property will be put to and for what period of time; d) the use and purpose for which the reproductions are made, as well as the economic benefits which will accrue to the applicant.”)

79 *Id.* at art. 108(3)

80 See COMMUNIA, *supra* note 76.

81 Creative Commons Global Summit 2013 Report, *available at* [http://www.creativecommons.it/ccitfiles/cc\\_global\\_summit\\_2013\\_report.pdf](http://www.creativecommons.it/ccitfiles/cc_global_summit_2013_report.pdf).

82 *Id.*

83 BBC NEWS, *Italy Up in Arms Over Michaelangelo’s David Rifle Advert*, Mar. 8, 2014, *available at* <http://www.bbc.com/news/world-europe-26501460>.

84 *Id.*

85 *Id.*

86 Bellan, *supra* note 76.

87 *Id.*

could have a profound impact on the availability of FoP.

- 4.22 In French Private law, for example, the *Cour de Cassation* (French Supreme Court) ruled that “the owner of a *property* does not have the exclusive right over its image [but] he can nevertheless oppose third party use of such an image [if] it causes him an abnormal disturbance.”<sup>88</sup> As James Gordley points out, “abnormal disturbance” in French case law refers to “negative inferences” which can range from “the height of neighbouring buildings, to the ‘unaesthetic character’ of a wall, and to the presence of a brothel.”<sup>89</sup> In the realm of FoP, the possible definition of “abnormal disturbance” is still relatively unknown.
- 4.23 In French Public law, the administrative courts have followed the private courts’ solution discussed *supra*. In 2006, the Bordeaux Administrative Court of Appeal<sup>90</sup> rejected an owner’s claims against the use of images of his building, which was located close to a river where tourist boats were legally allowed to navigate. The court stated that “if the passengers of the boat had, during the trip, a direct view of the castle [...] and its domain, the owner of this *property* did not have an exclusive right over its image and could only oppose its use if it caused him an abnormal disturbance.”<sup>91</sup>
- 4.24 Finally, in 2012, the Conseil d’Etat (French Administrative Supreme Court) stated that the same rules applied to taking pictures of collections in a museum as to using moveable property owned by the public but maintained by the state. This judgment was criticized as it indirectly restricted use of images of public property in contradiction to the *Cour de Cassation*’s position.<sup>92</sup> Therefore, public authorities and persons can refuse to let third parties take pictures of their *property* for commercial purposes.
- 4.25 Despite the fact that laws like the French laws governing civil and administrative property pose a threat to FoP, at present, this memorandum can provide little insight on how to address the issue. In order to provide concrete suggestions, there would need to be a more thorough survey of all Member State laws to determine which affect FoP.

## 5 Proposal for Drafting an EU Freedom of Panorama Exception

Model Clause (with recitals):

- A. Noting that freedom of panorama is vital to ensure the freedoms of expression and the proper functioning of the internal market;
- B. Noting that copyright exceptions should not be circumvented by other means, including, but not limited to, trademark protections and national heritage protections;

- 5.1 Calls on the EU legislator to require that the right, including but not limited to, the right to use, alter, reproduce, distribute, communicate, and make available photographs, video footage or other images of works which are permanently located in public places is guaranteed for commercial and non-commercial uses.

## 6 Conclusion

- 6.1 The unfit state of current legislation regarding “works, such as works of architecture or sculpture, made to be located permanently in public places” has made it necessary to implement a reform of copyright rules at EU level. Freedom of Panorama is the most adequate solution to the difficulties we

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88 Cour de cassation, Assemblée plénière, 7 mai 2004, pourvoi n° 02-10.450. Available at : <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007048576&fastReqId=66995551&fastPos=1>

89 James Gordley, THE DEVELOPMENT OF LIABILITY BETWEEN NEIGHBOURS 2 (2014).

90 CAA Bordeaux, 21 févr. 2006, Claude X, n° 02BX02383 : JurisData n° 2006-296049.

91 Jeremy Antippas, Fasc. 2850 : Les droits de la personnalité opposés aux personnes non privées, Lexis Nexis, 2013.

92 Jean-Michel BRUGUIÈRE, Au secours, l’image des biens revient !, Communication Commerce électronique n° 2, Février 2013, étude 2 (Lexis Nexis).

have exposed and should be implemented through a mandatory exception that exempts commercial and non-commercial uses.

## 7 Legislation Referred to

“Berne”	Berne Convention
“Brazilian Copyright Law”	Lei No. 9.610, de 19 Fevereiro de 1998, Diario Oficial Da Uniao [D.O.U.] de 20.2.1998 (Braz.)
“Brussels I”	Brussels I Directive (Reg. 2015/2012/EU)
"CDPA"	Copyright, Designs, and Patent Act 1988, c. 48 (Eng.)
“ECHR”	European Convention for Human Rights
“EU Charter”	Charter of Fundamental Rights of the European Union
“German Copyright Law”	<i>Urheberrechtsgesetz</i> (Ger.)
“ICCPR”	International Covenant on Civil and Political Rights
“ICESCR”	International Covenant on Economic, Social and Cultural Rights
"InfoSoc Directive"	Directive 2001/29/EC, on the harmonization of certain aspects of copyright and related rights in the information society
“Italian Cultural Heritage Law”	Code of the Cultural and Landscape Heritage, Legis. Decree No. 42 of 22 Jan. 2004 (It.)
“Rome II”	Rome II Regulation (EC) (Reg. 864/2007)
“TRIPs Convention ”	Trade Related aspects of Intellectual Property rights Convention
“UDHR”	Universal Declaration of Human Rights
“WIPO Convention”	World Intellectual Property Organization Convention

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## **10 Defined terms**

“CJEU”	Court of Justice of the European Union
“ECtHR”	European Court of Human Rights
“Freedom of Panorama” “FoP”	An unconditional copyright exception vis-à-vis works of architecture and sculpture placed permanently in public place
“InfoSoc Directive”	Directive 2001/29/EC, Article 5 § 3(h) on the harmonization of certain aspects of copyright and related rights in the information society
“WTO”	World Trade Organization

# Annex 1

## Freedom of panorama laws (Examples of divergences in the EU Member States)

Country	Commercial use	Buildings	3D artwork	2D artwork	Text	Public interiors
<b>Austria</b>	Yes	Yes	Yes	Yes	No	Yes
<b>Belgium</b>	No	No	No	No	No	No
<b>Bulgaria</b>	No	No	No	No	No	No
<b>Czech Republic</b>	Yes	Yes	Yes	Yes	Yes	? <sup>93</sup>
<b>Denmark</b>	Yes	Yes	No	No	No	Yes
<b>Finland</b>	Yes	Yes	No	No	No	Yes
<b>France</b>	No	No	No	No	No	No
<b>Germany</b>	Yes	Yes	Yes	Yes	Yes	?
<b>Hungary</b>	Yes	Yes	Yes	Yes	No	No
<b>Italy</b>	No	No	No	No	No	No
<b>Poland</b>	Yes	Yes	Yes	Yes	Yes	?
<b>Portugal</b>	Yes	Yes	Yes	Yes	Yes	?
<b>Spain</b>	Yes	Yes	Yes	Yes	Yes	?
<b>Sweden</b>	Yes	Yes	Yes	Yes	No	Yes <sup>94</sup>
<b>United Kingdom</b>	Yes	Yes	Yes	Some <sup>95</sup>	No	Yes

Source: Wikimedia, 'Commons: Freedom of Panorama'<sup>96</sup>

93 Limited to *veřejná prostranství* (public spaces), the listed examples and some interpretations not include interiors but they are not excluded explicitly.

94 Does not include artworks.

95 "Works of artistic craftsmanship" are OK, "graphic works" are not.

96 Available at [http://commons.wikimedia.org/wiki/Commons:Freedom\\_of\\_panorama](http://commons.wikimedia.org/wiki/Commons:Freedom_of_panorama).

## Annex 2

French copyright law requires licensing of images of the Eiffel Tower at night:



(taken from Wikipedia site)

French law exempts use when “accessory compared to the main represented or handled subject”. In applying this theory, the *Syndicat National des Editeurs de Vues* (a French Association of publishers) seeks the intention of the photographers and applies copyright, or not, according to the surface covered (in cm<sup>2</sup>) by the copyrighted work, on a postcard).<sup>97</sup> But would this be considered “accessory” use?



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<sup>97</sup> TGI Draguignan, 16 mai 1972, Gaz. Pal., 1972.II.568.

Is this “accessory” use?



## Annex 3

In 2012, Wikimedia received a takedown notice from artists, Claes Oldenburg and Coosje van Bruggen, to remove from Wikimedia Commons pictures of architecture and sculpture on display throughout the United States and Europe (takedown notice can be found at [http://wikimediafoundation.org/wiki/DMCA\\_Oldenburg](http://wikimediafoundation.org/wiki/DMCA_Oldenburg)). Wikimedia complied with the takedown notice. Works cited in the takedown notice included sculpture on public display:



Plantoir 2/3, 2001, Porto Portugal



Bottle of Notes, 1993, Middlesbrough, England

## Annex 4

In 2014, American company ArmaLite came under attack by Italian authorities for incorporating an image of Michelangelo's "David" holding a firearm in an advertisement. The David was created between 1501 and 1504, and thus is not protected by copyright. Nonetheless, the unpopularity of the image caused Italian authorities to pursue ArmaLite using laws aimed at protecting National Heritage by requiring a licensing fee to use reproductions of national property.



Another image of the David that would require licensing:

