



Freedom of Panorama in Europe **Current State & Case Studies**

Structure:

I. Introduction

II. Current Freedom of Panorama Laws: An Uneven Landscape

III. Case Studies

IV. Conclusion: A Call for Harmonisation

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I. Introduction

“Freedom of Panorama” refers to the right to photograph public spaces, and then use the images in either a personal or commercial context.¹ “In theory, it attempts to balance various property rights and other proprietary interests with the importance of allowing reasonable freedom for photography in public places.”² Combined with the Berne three-step-test, such rules control the rights of anyone who takes a photograph or film of a public place, from professional documentarians to tourists.³

Currently, there is confusion over the implementation of this principle in European Union Member States. Article 5(3)(h) of the European Union Information Society Directive (Directive 2001/29/EC) established a non-mandatory exception to copyright law for Member States who wished to provide for the Freedom of Panorama:

“Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

...

- (h) use of works, such as works of architecture or sculpture, made to be located permanently in public places”.

Since different countries have chosen to implement different versions of the Freedom of Panorama doctrine,⁴ there is a high likelihood that photographers and filmmakers will unknowingly violate these laws. This possibility is particularly acute when images are made available online.⁵ Harmonising the Freedom of Panorama exception would clarify the law for artists, companies, and consumers, and assist in the creation and success of the Digital Single Market.

II. Current Freedom of Panorama Laws: An Uneven Landscape

Across Europe, Member States have enacted laws with diverse versions of the Freedom of Panorama, some narrower than the version included in the InfoSoc Directive. These differences have created “uncertainty for companies willing to offer services across the EU, which have to deal individually in each member state with relevant rights holders.”⁶ This is especially problematic when content is posted, distributed, or sold online. It may be created in compliance with the law of the State in which the image was taken, but inadvertently transgress the law in a State where it is viewed or sold.⁷

This outcome is possible because of Article 8(1) in the Rome II Directive (Reg. 864/2007/EU), which dictates that *lex loci protectionis* applies in disputes involving intellectual

1 B.C. Newell, “[Freedom of Panorama: A Comparative Look at International Restrictions on Public Photography](#)”, 44 Creighton L.Rev. 405 (2011) at 405-06.

2 *Id.* at 406.

3 *Id.*

4 See the map accompanying [the Wikimedia Commons article](#) on Freedom of Panorama.

5 Newell at 406.

6 J. Lobert, et. al. [Extending Freedom of Panorama in Europe](#) (2015) at ¶ 3.1.

7 *Id.* at ¶ 3.2.



property.⁸ Therefore, an individual or business domiciled in a Member State that provides Freedom of Panorama rights may be sued in a Member State that does not, if the adverse party alleges that harm occurred in the latter, and seeks protection there.⁹

When these laws were drafted, they may have seemed adequate to protect all parties involved. However, “[b]ecause of the exponential growth in consumer image creation in public spaces and mass distribution of the resulting images via the internet, laws that restrict the taking or distribution of photographs in public places have become more burdensome on creativity than when originally enacted.”¹⁰

These restrictions not only target the creative impulses of artists and content creators, but also affect the activities of almost any individual, who may innocently snap a photo abroad, and then upload it to one or more online platforms. The current patchwork of laws means that many EU citizens are consistently at risk of violating the copyright laws of various Member States.¹¹ “This requires a new balance between the interest of rightsholders and the ability of average people to engage in activities that are critical to their social, cultural and economic lives, but were outside the scope of copyright law in the past technological environment.”¹²

A person posting a photo on Facebook may not face a lawsuit, absent some extraordinary circumstance. However, for those who would create images or films and widely distribute their work online, the lack of a harmonised Freedom of Panorama exception leads to significant risk. Predicting the outcome of a copyright claim can be difficult, and litigation can be very expensive. For this reason, some professional photographers and filmmakers “have been coerced into paying license fees as a form of self-insurance against potential lawsuits.”¹³ Licensing transactions are complex and costly.¹⁴ Established artists and companies might be able to afford such preemptive costs, but start-ups or independent artists may avoid distributing their creations across borders if they cannot afford to ensure compliance with the laws of all States. The expense and uncertainty involved are a disincentive to innovation.¹⁵ “Most likely the territorial nature of copyright within the EU has seriously inhibited the growth of the creative economy in the EU, as compared to the US where copyright holders and users have to deal with only a single (federal) copyright law.”¹⁶

Europe’s economy must adapt to a changing technological landscape. E-commerce in the EU has yet to reach its full potential, and often, only the biggest players can succeed.¹⁷ Most online

8 *Id.* at ¶ 3.5.

9 *Id.* at ¶ 3.5. See the discussion in Part III, *infra*, of a lawsuit filed in Germany over a photograph of a building in Austria.

10 Newell at 409.

11 Lobert, et. al. at ¶ 3.8.

12 J. Reda, [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\(INI\)\)](#) (January 15, 2015) at 11.

13 Newell at 409. See the discussion in Part III, *infra*, of a model maker who purchased a license in order to avoid litigation, despite their belief that they did not need one.

14 European Commission, [A Single Market for Intellectual Property Rights](#), Com(2011) 287 final (May 2011) at 6 [hereinafter “EC Single Market”].

15 *Id.*

16 I. Hargreaves and B. Hugenholtz, “[Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework](#)”, Lisbon Council Policy Brief, Issue 13/2013 at 6.

17 EC Single Market at 6.



trade is largely domestic. Within the EU, cross-border online transactions constitute a mere 4% of total traffic.¹⁸ In particular, “[t]he circulation of cultural goods and services remains below its potential.”¹⁹

The future of the EU’s economy lies in the Digital Single Market, “an area where the free movement of goods, persons, services and capital is ensured and where citizens and businesses can seamlessly access and exercise online activities under conditions of fair competition, irrespective of their nationality or place of residence.”²⁰ Creating a Single Market for intellectual property rights would create jobs and stimulate growth²¹, adding an estimated 340 billion EUR to Europe’s GDP.²²

However, the territoriality of EU copyright law, including the current state of Freedom of Panorama laws, is “critically imped[ing]” the establishment of the Digital Single Market.²³ Uneven application of the InfoSoc Directive exceptions causes confusion about applicable laws, and discourages efforts to distribute products and services across borders.²⁴ For this reason, the original draft of the European Parliament resolution on harmonising the copyright exceptions called for all of them to be mandatory, “to allow equal access to cultural diversity across borders within the internal market and to improve legal certainty.”²⁵ Despite much debate and public interest in the issue²⁶, the Freedom of Panorama exception was not addressed in the final version of the own-initiative report.²⁷

Europe’s fractured Freedom of Panorama laws have caused confusion for artists, companies, and consumers, at home and across borders. Below, we present a few case studies that demonstrate this uncertainty, and the resultant lack of access to diverse information, products, and art.

III. Case Studies

Cross-Border Troubles, Part One: The Hundertwasser House

In this case, both countries involved have included the Freedom of Panorama in their copyright laws. However, the exceptions have slightly different details, and these disparities prevented the promotion and sale of a poster depicting an Austrian landmark.

A photographer found a clever angle from which to shoot the famed Hundertwasserhaus in Vienna, Austria. They used an elevated position in a nearby building, in order to take the perfect picture. When framed prints of the photograph were sold, the Hundertwasser Foundation sought to

18 A. Ansip, *Commission Orientation Debate 25 March 2015 - Key Issues: Digital Single Market Strategy*, SEC (2015) 163 final (March 20, 2015) at 1.

19 EC Single Market at 6.

20 Ansip at 1.

21 EC Single Market at 3.

22 Ansip at 1.

23 Hargreaves and Hugenholtz at 6.

24 Reda at ¶ 10.

25 *Id.* at ¶ 11.

26 *See, e.g.*, the [Change.org petition](#) calling for Freedom of Panorama to be introduced throughout the EU, which garnered over 555,000 signatures.

27 [European Parliament resolution of 9 July 2015 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)).



file suit.²⁸

Since the Hundertwasserhaus is located in a public place, Austrian copyright law permitted the taking of such a picture, as well as the subsequent sale of the prints.²⁹ However, the Hundertwasserhaus Foundation filed suit in Germany. Due to the principle of *lex loci protectionis*, German law applied to the dispute. The Court found that while section 59 of the German Copyright Act allowed for Freedom of Panorama, it only did so if the images were taken from a publicly accessible place, and without the use of any additional props, such as ladders.³⁰

The German court held that the Hundertwasserhaus photos had not been taken from such a place, and the plaintiff was able to secure an injunction against the sale of the prints. This decision was upheld on appeal.³¹ Therefore, the prints can be sold in Austria, but not in Germany.

This case is a perfect example of how disharmony among the copyright exceptions affects cross-border trade. The photographer was in compliance with the law in Austria, where the picture was taken. The sale of the prints was also legal under Austrian law. It was only in exporting the product to Germany that laws were broken, and there were grounds for an injunction. Now, a work of art displaying and promoting an important Austrian cultural landmark cannot be sold to consumers in another country.

Cross-Border Troubles, Part Two: The Traveling Photographer

Harf Zimmermann has photographed streetscapes in Berlin, Leipzig, Dresden, and Warsaw. He compiled these pictures into a coffee table book showcasing his works. However, following an exhibition in Paris, Zimmerman learned that he and his publisher were inadvertently infringing copyright laws.³²

A guest at the exhibition recognized the work of a Polish street artist named Jola Kudela. Using their mobile phone, they took a picture of the photo in question, and sent it to Kudela. Kudela entered into negotiations with Zimmermann as to how she should be credited, but the attempts to reach an agreement with him and his publisher failed.³³

In Germany, the book, as well as prints of the photograph featuring Kudela's art, can be sold. In Poland as well. However, France does not have a Freedom of Panorama exception, so Zimmermann's publisher is unable to sell the book there without Kudela's permission. Instead, they have decided to take costly, but necessary, measures to remove the image from the book.³⁴

The disparity between French, German and Polish law cost Zimmermann and his publisher a great deal of time, work, and money, but the book will still be sold. However, if Zimmermann was not an established photographer working with a large publisher, but an independent artist attempting to make a name for himself, the conflict with Kudela might have brought about the end of this enterprise. Removing the image from the books is a difficult and costly job that a small-scale publisher or individual photographer might not be able to accomplish. They would then be

28 David Seller, "[Gebäudefotografie in der EU – Neues vom Hundertwasserhaus](#)" (2005).

29 [Copyright Act, BGBl. No. 111/1936, as last amended \[BGBl. I No. 25/1998\]](#), § 54, ¶ 1(5).

30 [Copyright Act of 9 September 1965 \(Federal Law Gazette Part I, p. 1273\), as last amended by Article 8 of the Act of 1 October 2013 \(Federal Law Gazette Part I, p. 3714\)](#), § 59.

31 Seller, "Gebäudefotografie in der EU".

32 Lennart Lebarencz, "[Freedom's just here](#)", *Süddeutsche Zeitung*, June 28, 2015.

33 *Id.*

34 *Id.*



completely unable to sell the book in France or other countries where the Freedom of Panorama exception clashes with Germany's laws in this regard.

While this case concerned the sale of such images, our next example involves the mere posting of photos of historical landmarks online.

Wiki Loves Monuments: Cultural Heritage Laws & Freedom of Panorama

Laws that are specifically designed to control images of a country's cultural heritage can interfere with efforts to educate and share knowledge. In this example, such a law was only accommodated following lengthy and intensive negotiations, which a harmonised Freedom of Panorama exception would have rendered unnecessary.

The annual [Wiki Loves Monuments](#) ("WLM") photography contest, the world's [largest photography competition](#), is an opportunity for people around the world to share images of their country's most beautiful and important monuments with the global community. However, participation by users in some EU countries may be difficult or impossible.

In 2011, WLM could not be held in Italy.³⁵ The contest was prevented by the "Codice Urbani", an Italian cultural heritage law.³⁶ The law prohibits the publication of photos of cultural heritage items for commercial purposes. In order to publish such images, authorization must be sought from the local office of the Ministry of Arts and Cultural Heritage.³⁷

The organisers of the 2011 WLM contest in Italy reached out to the relevant officials, worked with them, and were eventually assured that they would be provided a list of monuments that could be photographed for the project. However, no such list was forthcoming, and Italy was unable to participate in the 2011 contest.³⁸

In 2012, they attempted again to include Italian sites and objects in Wiki Loves Monuments. Wikimedia Italia worked with the Ministry of Arts and Cultural Heritage to negotiate an agreement that would allow them to participate in the photography contest. In addition, Wikimedia Italia's project manager began contacting individual institutions that had jurisdiction over certain monuments, and requesting permission for them to be included in the contest. This required extensive outreach, potentially involving "8000+ different municipalities, endless cultural institutions, countless churches. ... We [sic] let you imagine the complexity of the landscape that was opening in front of us: it was a nightmare, but at least it could give us some 'free' monuments."³⁹

The individual outreach effort met with some success.⁴⁰ In addition, an agreement was at last reached with the Ministry, which allows for photographs of all monuments that fall under their

35 "[Commons: Wiki Loves Monuments 2012 in Italy/MiBAC](#)", originally posted September 13, 2012 [Hereinafter "WLM 2012 Post"].

36 [Codice dei beni culturale e del paesaggio, ai sensi dell'articolo 10 della legge 6 luglio 2002, n. 137 \(GU n.45 del 24-2-1004-Suppl. Ordinario n. 28\)](#).

37 WLM 2012 Post.

38 *Id.*

39 *Id.*

40 See [this list](#) of institutions, towns, etc., with which Wikimedia Italia has made such an arrangement. In 2014, Wikimedia Italia partnered with 273 municipalities and other institutions, allowing 21,050 photographs of 4,500 monuments to be submitted for the Wiki Loves Monuments competition. [Wikimedia Italia: Wiki Loves Monuments - Story of the Contest](#).



control to be submitted for the contest. The agreement calls for a disclaimer to be attached to the pictures, and it requires no fee to be paid to the owner of the respective monuments if the photographer does not intend to use the images for commercial purposes.⁴¹

Additionally, the Ministry acknowledged that having images of Italian heritage sites on the Wikimedia Projects is useful for promoting knowledge of Italian culture.⁴² This statement is absolutely correct; a 2012 study found that the addition of an image to a Wikipedia page created a “significant boost in traffic”.⁴³ Adding photographs of monuments to the Projects can increase the number of readers who view the associated articles, stimulating further interest and perhaps even tourism.

Note, however, that securing the permission to post these images has required a great deal of work.⁴⁴ A less organized or well-resourced group, or perhaps a single individual creator, might never have attempted to contact the individual rightsholders, or been able to negotiate with the Ministry. A harmonized Freedom of Panorama exception would still allow them to share content online, without having to navigate the complex workings of local government.

While Italy has been on the forefront on working around current regulations, it has not been the only EU country that was stopped from attending this international photography contest. In Greece, a country that shares both lack of Freedom of Panorama and the Cultural Heritage laws with Italy, volunteers did not have the resources to go through the same tedious process. The volunteer photographer community in Bulgaria, after consulting several law firms, decided that holding such a contest in a country with very unclear Freedom of Panorama permissions would be too risky. This was also the main reason for Lithuania and Latvia not to participate in this pan-European project co-sponsored by Europeana and Europa Nostra.

The Ještěd Transmitter: Two or Three Dimensions?

The Ještěd transmitter is a famous landmark in the Czech Republic. Czech law allows for Freedom of Panorama where the reproduction in question is two-dimensional, but not three-dimensional.⁴⁵ The Ještěd transmitter is considered to be a symbol of the city of Liberec. Its image has been incorporated into many of the logos of local companies.⁴⁶

However, efforts to create three-dimensional models of the transmitter have led to litigation and fines. When a railway model maker included the transmitter in one of its works, the family of the architect who designed the transmitter filed a lawsuit. The model maker lost, and paid a fine. In

41 WLM 2012 Post.

42 *Id.*

43 Robinson Meyer, “[MIT Economist: Here’s How Copyright Laws Impoverish Wikipedia](#)”, *The Atlantic*, July 18, 2012.

44 Wikimedia Italia was able to negotiate with government officials. However, a similar issue in Sweden has led to a lawsuit. Currently, Wikimedia Sverige is involved in litigation over a non-profit project dedicated to creating a large online database of the country’s public art. Wikimedia Sverige, “[Concerning lawsuit from BUS against offentligkonst.se](#)”, Press Release, June 13, 2014. A copyright lobbying group insists that the website infringes the artists’ copyrights, because distribution of public art online does not fall within the Swedish Freedom of Panorama exception. (*Id.*) The Supreme Court of Sweden will determine the correct interpretation of the law. “[Supreme Court of Sweden agrees to try Bildkonst Upphvsrätt Sverige versus Wikimedia Sverige](#)”, Wikinews, March 20, 2015.

45 Václav Drchal, “[Model Ještědu stojí podle soudu 120 tisíc](#)”, *Lidovky.cz*, September 13, 2011.

46 Some examples include Ještěd Tour, Regional Hospital of Liberec, Hotel Ještěd, and even the city of Liberec itself.



addition, they paid a license to display the model.⁴⁷

In a very recent case, from late 2014, another model maker featured the transmitter in one of its displays. The exhibit’s sponsor thought that their use of the model should not have required a license.⁴⁸ However, they did not have “the time or resources” for litigation, so they were forced to negotiate a license with the rightsholders in order to continue displaying the model.⁴⁹

The Ještěd Transmitter presents an example of the confusion that can result when the item that is displayed or sold is not obviously covered by the Freedom of Panorama. The city of Liberec is full of two-dimensional images of the Ještěd Transmitter, on hospitals, hotels, and ski areas. It is used on the logos of local companies, many of whom export to other EU countries. However, three-dimensional representations are treated differently in across EU legislations. A harmonised Freedom of Panorama exception, that was clear as to whether three-dimensional items were included in its scope, would have saved the artisans behind this project time and uncertainty — and, money as either the license or the lawsuit was not necessary.

IV. Conclusion: A Call for Harmonisation

The InfoSoc Directive was drafted with the ideals of harmony and legal certainty in mind. Recital Six noted that both goals could be endangered by national legislation. Laws drafted

in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase.⁵⁰

The drafters were correct; these uncertainties have only multiplied, as more and more people create, share, distribute, and sell content online. The laws must change to account for changes in technology. The internet “gives enormous opportunities for artists and consumers. More direct access to a wider audience, and a wider range of content. New ways to share, spread, sell. ... A good copyright system would help us achieve that. Today's does not.”⁵¹

Tomorrow’s can. A harmonised Freedom of Panorama exception would be a key part of that “good copyright system”. The uneven rules that currently exist are a major impediment to the establishment of the Digital Single Market. A clearer frame for this exception would be a boon not only to the EU economy, but also to students, artists, educators, and anyone with an interest in Europe’s rich and diverse cultural heritage. We urge you to follow through on the Recitals’ promise of harmony and certainty, and make the Freedom of Panorama exception mandatory.

47 Drchal, “Model Ještědu...”

48 Matěj Ludvík, “[Království železnic nesmí vystavovat model Ještědu. Dědici práv chtějí peníze](#)”, Lidovky.cz, September 2, 2014.

49 *Id.*

50 Directive 2001/29/EC, Recital 6.

51 Neelie Kroes, “[Our single market is crying out for copyright reform](#)”, Press Release, July 2, 2014.