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Cultural Dissemination and Commercial Exploitation of Images of Architectural and Art Works: "Freedom of Panorama" under Scrutiny

Introduction

Notably, art. 5.3(h) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (Directive) provides that Member States may establish exceptions or limitations to authors' rights of reproduction and communication to the public in the case of "use of works, such as works of architecture or sculpture, made to be permanently located in public places." This exception is known as "freedom of panorama," and originates from the German term *panoramafreiheit*, a concept that was created in Germany.[1] All European Union (EU) Member States implemented this exception to their national regulations and it permits photographing or videotaping (acts of reproduction) and then sharing the works on the Internet (act of public communication or making available) of images of buildings, bridges, sculptures, murals and any other art work protected by copyright that is permanently located in public space.

The impact of the freedom of panorama is enormous for consumers (or citizens in general), companies and professionals. This exception affects millions of people since the activities of reproducing and sharing images of works of architecture or art exhibited in public places on the Internet (especially on social networks) are the order of the day and currently constitute a socially accepted form of disseminating culture. The exception also has a significant economic impact as many companies and professionals in the cultural sectors benefit from it, such as publishers, advertising agencies, newspapers, photographers and digital platforms (among others), as do companies engaged in merchandising works of architecture and fine art.

[1] P. Popova, *Report on the freedom of panorama in Europe*, August 2016, https://perma.cc/6V5N-UYRA [accessed: 2023.09.03]; S. González-Varas Ibáñez, L. Rivera Novillo, *Intellectual property protection in Spanish law: architectural work and freedom of panorama*, "Journal of Privacy and Digital Law" 2017, vol. 2, no. 8, pp. 81–107.

Despite the relevance that this exception has in the social and economic sphere, it has received limited attention from specialized legal doctrine and the Court of Justice of the European Union (CJEU) has not examined it. Hence, it merits a more in-depth legal examination, both at EU and national levels. The greatest problem with this exception is its lack of harmonization at the EU level. Even though all Member States have implemented the exception into their national copyright laws, these laws differ from one another. This article has three main objectives regarding this issue. First, to analyze the reasons for the differences among national laws; second, to highlight discrepancies between them and the Directive; and third, to propose changes to achieve legal harmonization. This is necessary to safeguard the legal security of consumers and professionals with regard to the use of images of architecture and artworks and to achieve the proper functioning of the single internal market, in particular the digital single market, which is a cross-border space.

According to the European Commission (EC), which was particularly interested in the freedom of panorama exception in the preparatory phase of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market (Directive 2019/790), which has already implemented in Spain, the reasons that explain the aforementioned lack of harmonization include the optional nature of the exception and its current wording in the Directive.

In view of the above, this article analyses both reasons to determine whether they are so important that harmonisation is still not being achieved as a result (first objective). To address this, various national regulations will be examined, particularly from Spanish legal regulations. The analysis of the issues raised allows us to conclude whether it is necessary for the exception to become mandatory and whether or not a revision of its current regulation in the Directive should be conducted to achieve the highest possible degree of harmonization, thus solving the legal and economic problems that the current disparity among national legislations generates (third objective).

1. The optional nature of the exception

Currently, most of the copyright exceptions provided for in the Directive, in particular the freedom of panorama, are optional in nature, so that whether or not to implement them in national legislation is at the discretion of the Member States. Despite its optional nature, at present all Member States recognize the exemption in their national legislation. Some regulated it prior to the approval of the Directive, as is the case of Spain, which introduced this exception in the Intellectual Property Law (LPI) of 11 November 1987, and currently regulates it in art. 35.2 of Royal Legislative Decree 1/1996, of 12 April 1996.[2] Thus, it regulates, clarifies and harmonizes the legal provisions in force

[2] Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia; https://www.boe.es/buscar/act.php?id=BOE-A-1996-8930 [accessed: 2023.09.03].

on the subject and provides that "works permanently located in parks, streets, squares or other public places may be freely reproduced, distributed and communicated in the form of paintings, drawings, photographs and audio-visual works."[3] The exception was born at the community level in order to protect national legislations that already had it in place for some time.[4] In fact, the exception already in effect was confirmed, although it should be noted that it is understood differently in Member States, and these issues also arise when these works are presented in digital spaces.

Other countries have been slower to recognize the freedom of panorama in their legislation, as in Italy, Belgium and France. The latter two recognized this in 2016 by reforming the *Code de Droit Économique* and the *Code de la Propriétté Intellectuelle*. In Italy, freedom of panorama is recognized not in copyright legislation but in the *Codice dei beni culturali e del paesaggio*.[5] By virtue of this reform, a new paragraph 3bis was added to art. 108 of the *Codice* according to which the reproduction and free disclosure of images of cultural property (including sculptures and works of architecture) is allowed, provided that they are made without profit and for the purpose of study, research, free manifestation of thought or creative expression or promotion of cultural heritage. The optional nature of the exception entails minimal regulation, and this situation has led Member States to implement the exception with a margin of discretion that they actually seem to find deficient. As a result, this has led to legal inequalities, some very significant, among these provisions.

This gradual and uneven implementation of the exception fully affects the use of images permitted by it, as neither consumers nor companies can be sure whether or not their activity is legal (i.e., whether it falls under the exception). This situation of legal uncertainty is exacerbated by the fact that images are available on the Internet and that most uses are cross-border, so what is legal in one country may not be legal in another.

For citizens in general, the situation described above arises from the legal and jurisprudential differences as to which works are covered by the exemption and from the concepts of public place and permanence of works. Thus, users who do not make commercial use of the images cannot know in advance whether the work they photograph or videotape is covered by the exception and, if not, whether it is still protected by copyright. It seems unreasonable that they should be required to investigate this as, among other reasons, this requirement sits poorly with the speed and immediacy of the Internet. As Cedric Manara[6] points out, transaction costs are obviously exaggerated in view of the triviality of the act of photographing works, and

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[3] The translation is mine.

[4] S. Von Lewinski, *Article 5. Exceptions and limitations* [in:] *European Copyright Law. A commentary*, eds. M.M. Walter, S. Von Lewinski, Oxford 2013, pp. 1013–1062.

[5] Legislative Decree No. 42 of 22 January 2004, as amended by Decree Law No. 83 of 31 May 2014, then converted into Law No. 106 of 29 July 2014.

[6] C. Manara, *La nouvelle "exception de panorama". Gros plan sur l'Article L. 122-5 10 du Code français de la propriété intellectuelle*, "Revue Lamy Droit de l'Immatériel" 2016, nº 4049, pp. 40–43, https://ssrn.com/abstract=2828355 [accessed: 2023.09.02].

rights holders have never taken action against citizens who carry out non-commercial uses of photographs or videos without authorization, as they know that this is a losing battle. For commercial or professional uses, legal uncertainty is even greater than that described above, since not all Member States recognize the panorama exception to the same extent, and some do not allow commercial uses of images or, if they do, require the use of the work to be ancillary.

The situation described above is explained by the optional nature of the freedom of panorama exception, which prevents true harmonization.[7] In contrast, opting for the exception being mandatory would put an end to the unlawfulness of uses by millions of consumers in the EU, as they would be automatically covered by the exception, thus preventing the commission of unlawful acts en masse.[8] Were the exception to be compulsory, this would solve problems arising from the territoriality of copyright law, as it would achieve full harmonization, thus avoiding fragmentation of the single internal market and ensuring legal certainty for all involved.[9] It should be noted that objections to the optional nature of the exception ceased to make sense from 2014 to 2016, when states that had not previously regulated it started to do so. It is argued that if the panorama exception were mandatory this would help to resolve legislative inequalities because Member States would be obliged to introduce the exception in their national legislation in accordance with the provisions of the Community regulation, which would neutralize the possibility of different national legislative texts.

In line with this statement, we also believe that the fact that the panorama exception was designed as optional does not justify that the national transposition deviates from the text of the Directive. Recital 32 requires Member States to consistently apply exceptions and limitations provided therein, so the conditions of application of the panorama exception in all Member States should meet this objective of consistency, without the Directive allowing Member States to alter the scope of the exceptions they decide to import into their national legislations,[10] so the regulations should be the same in all Member States or, at least, the disparities should be minimal.

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7 See: S. Bechtold, *Article 5 DDASI* [in:] *Concise European Copyright Law*, eds. T. Dreier, P.B. Hugenholtz, The Netherlands 2006, pp. 367–382; C. Geiger, F. Schönherr, *The Information Society Directive (articles 5 and 6(4))* [in:] *EU Copyright Law. A commentary*, eds. I Stamatoudi, P. Torremans, Cheltenham, UK–Northampton, USA 2014, pp. 395–484.

8 European Copyright Society (ECS), *Answer to the EC Consultation on the "panorama exception,"* 2016, https://europeancopyrightsociety.org/wp-content/uploads/2016/06/ecs-answer-to-ec-consultation-freedom-of-panorama-june16.pdf [accessed: 2023.09.02].

9 L. Montagnani, *The EU Consultation on ancillary rights for publishers and the panorama exception: Modernising Copyright through a "one step forward and two steps back" approach*, Kluwer Copyright Blog, 20.09.2016, http://copyrightblog.kluweriplaw.com/2016/09/20/the-eu-consultation-on-ancillary-rights-for-publishers-and-the-panorama-exception-modernising-copyright-through-a-one-stepforward-and-two-steps-back-approach/ [accessed: 2023.09.02].

10 E. Rosati, *Non-Commercial Quotation and Freedom of Panorama: Useful and Lawful*, "JI-PITEC. Journal of Intellectual Property, Information Technology and Electronic Commerce Law" 2017, nº 8, pp. 311–321, https://www.jipitec.eu/issues/jipitec-8-4-2017/4639/?searchterm=Rosati [accessed: 2023.09.02].

The question of the nature of the exception has also been raised by EU legislative bodies. The European Parliament (EP), in its Motion for a Resolution on the implementation of the Directive of 15 January 2015, postulated in favor of a mandatory and broad panorama exception, a position it eventually abandoned, so that in the final Resolution of 9 July 2015 it limited itself to "urge the Commission to examine the application of minimum standards in exceptions and limitations, to ensure the correct application of the exceptions and limitations provided for in Directive 2001/29/EC and equal access to cultural diversity across borders within the internal market and to increase legal certainty" (paragraph 38). The EC, for its part, went so far as to state that the panorama exception is one of the key exceptions for copyright and found that the optional nature of the exception and the lack of a sufficient definition in the Directive led to uneven implementation and varying scope, causing distortions in the digital single market.[11] In order to take a position on the possible revision of the exception, the EC promoted a public consultation, held from 23 March to 15 June 2016, among rightholders and addressees of the exception.[12] The conclusion is that there are two clearly differentiated groups regarding the mandatory nature of the exception and the inclusion of commercial uses, as it could not be otherwise.[13] On the one hand, the authors most directly affected by the exception (visual artists and architects) and their collective management entities were against a mandatory exception of broad scope since this would have meant giving up their exclusive rights and the income that licenses of use could have earned them. Moreover, the Directive does not provide for any economic compensation for the recognition of the exception. Groups that would benefit by the exception at individual, institutional and professional levels were clearly in favor of a broad mandatory exception that would cover such persons and groups that were already using such images thus permitting them to avoid the legal uncertainty that the current situation placed them in. Finally, despite affirming the relevance of the exception[14] and the favorable position of other European bodies, such as the Economic and Social Committee,[15] the EC decided not to review the regulation of the panorama exception.

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[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (2015). Towards a modern and more European copyright framework. COM(2015) 626 final.

[12] See: Public consultation on the role of publishers in the copyright value chain and on the "panorama exception." The questionnaire and report analyzing the results are available at https:// ec.europa. eu/digital-single-market/en/news/public-consultation-role-publishers-copyright-value-chain-and-panorama-exception) [accessed: 2023.09.02].

[13] Ll. Cabedo Serna, *Freedom of panorama in the European Union copyright revision strategy: A missed opportunity?*, "Pe.i.: Revista de Propiedad Intelectual" 2019, nº 63, pp. 65–106.

[14] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (2016). Promoting a fair, efficient and competitive European copyright-based economy in the digital single market, COM (2016) 592 final.

[15] Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on copyright in the digital single market (2017). Official Journal of the European Union C 125/27.

However, this does not mean that the EC is against the mandatory nature of exceptions, such as those for orphan and visually impaired works (art. 6 of Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works and art. 3 of Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled) and those adopted in Directive 2019/790, which are all mandatory. Therefore, it cannot be ruled out that, in the future, the exceptions provided for in the Directive on an optional basis will also become mandatory, including the panorama exception.

We may conclude, with regard to the optional nature of the exception, that the Member States are not entitled to determine the conditions for the application of the exceptions if this leads to a lack of harmonization, even if the exceptions are optional. Therefore, the national differences should not be attributed to the optional nature of the exception, but to an incorrect transposition of the exception by the states, which have acted with a margin of freedom that they do not really have, as we shall see in detail in the following section. On the other hand, the EC also raised the need for a better or more detailed definition of the exception at the Community level as a means to achieve greater harmonization.

2. Problems arising from the current regulation

The regulation of the freedom of panorama in the Directive responds to a broad or open formula in all aspects and requirements of its application. Article 5.3(h) provides for an exception to the rights of reproduction and communication to the public "when works, such as works of architecture or sculpture, made to be permanently located in public places, are used." This broad formulation was chosen to respect national regulations already existing at the time of the entry into force of the Directive, since, according to its Recital 32, "The list [of art. 5] takes due account of the different legal traditions of the Member States."

Thus, the EC understands that the existing legal inequalities are due precisely to this broad formulation. In my opinion, although the lack of specificity in the Community regulation may have led to the existence of national differences, the reason for them lies in the incorrect transposition of Community legislation, which is manifested, above all, in national regulations that are more restrictive than the Community regulation. The optional nature of the exception allows Member States not to incorporate it into their legal systems, as we already know, but the exceptions provided for in the Directive are either accepted or rejected and, in the first case, they cannot be restricted[16] for reasons already explained. On the other hand, the panorama exception is closely

[16] R. Casas Vallés, *Comentario al artículo 40bis* [in:] *Comentarios a la Ley de Propiedad Intelectual*, ed. R. Bercovitz Rodríguez-Cano, Madrid 2017, pp. 791–836.

linked to freedom of expression,[17] which is enshrined in art. 11 of the EU Charter of Fundamental Rights and art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Precisely, the CJEU points out in the Painer and Deckmyn cases that the exceptions directly justified by freedom of expression (such as quotation and parody) must be subject to broad interpretation to ensure compliance with the above-mentioned international texts. Therefore, when national legislations regulate the exception in a more restrictive manner than the Directive, it can be said that they are acting incorrectly.

Although Member States may not transpose a provision that restricts the scope of application of the exception with respect to any of the requirements set forth in art. 5.3(h) of the Directive, it is possible, for them to establish conditions whose function is to delimit more precisely the scope of application of the exception, provided that they serve the purpose and aim of the exception, as we will see below.

2.1. The object of the exception

First, art. 5.3(h) does not establish a closed list of works, but opts for a merely exemplary enumeration ("works, such as works of architecture or sculpture"),[18] Thus, art. 5.3(h) does not preclude national legislation from extending the exception to other categories of works[19] such as murals or graffiti.[20] On the contrary, one could conclude that such legislation cannot limit, ab initio, the types of works to those expressly listed in the community legislation and, if they did so, they would be restricting the community rule in an unjustified manner. This would be, for example, the case of France, which limits the applicability of the exception to works of sculpture and architecture,[21] but excludes frescoes, paintings and street art.[22]

Second, art. 5.3(h) does not refer to the means of reproduction or public communication, from which it is inferred, given its broad formulation, that the rule includes, in principle, all possible means of dissemination.[23] Spain has chosen to list the means of reproduction ("paintings, drawings, photographs and audiovisual procedures"). However, even if it is a closed enumeration, it cannot be considered

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17 European Copyright Society (ECS), *Answer to the EC Consultation*…; C. Geiger, F. Schönherr, *The Information Society*…, pp. 395–484.

18 C. Manara, *La nouvelle "exception de panorama"*…, pp. 40–43.

19 J. López Richart, *And vandalism became Art: The protection of graffiti by copyright law*, "RIIPAC. Revista sobre Patrimonio Cultural: Regulación, Propiedad Intelectual e Industrial" 2018, nº 10, pp. 53–87, http://www.eumed.net/rev/riipac/10/grafiti.pdf [accessed: 2023.09.02].

20 S. Von Lewinski, *Article 5*…, pp. 1013–1062.

21 C. Manara, *La nouvelle "exception de panorama"*…, pp. 40–43; E. Rosati, *Non-Commercial Quotation*…, pp. 311–321.

22 C. Caron, *Exception de panorama: lorsque la montagne accouche d'une souris*, "La Semaine Juridique" February 2016, pp. 261–262.

23 I. Hernando Collazos, *The panorama exception and the commercial use of secondary manifestations of works of art. Approach from the Spanish Copyright Law*, "RIIPAC. Revista sobre Patrimonio Cultural: Regulación, Propiedad Intelectual e Industrial" 2018, nº 10, pp. 1–52, http://www.eumed.net/rev/riipac/10/obras-arte.pdf [accessed: 2023.09.02].

restrictive due to the breadth of the means listed, which allows includes digital technology.[24] This is why it can be concluded that Spanish legislation is in line with the Community legislation on this point.

3. Permitted uses of images

The freedom of panorama exception does not contain any limitation with respect to commercial uses, nor does it impose or allow Member States to introduce such a limitation.[25] It might be assumed, then, that the exception covers all kinds of uses and all kinds of persons, both natural and legal, albeit with the limit imposed by the three-step rule, to which I will refer later.

However, there are countries that do not allow commercial uses of images of works covered by the exception, such as Bulgaria, Estonia, France, Italy, Latvia, Lithuania, Romania, and Slovenia. In Denmark and Finland, reproduction and public communication of buildings for commercial uses are allowed, but, for works of art, they are not allowed if the work is the main object of the image.[26] In Spain, commercial uses are permitted[27] as follows reasons: the adverb "freely" is used in art. 35.2 Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia (TRLPI) in reference to the exercise of the rights of reproduction, distribution and public communication; no restriction of uses by individuals or for the private purposes of the person performing the reproduction; and no exigency regarding the absence of any lucrative purpose in the article.[28] In addition, the usage can be both private and collective. Moreover, the inclusion of the exclusive right of distribution in art. 35.2, as permitted by art. 5.4 of the Directive ("Where Member States may provide for exceptions or limitations to the right of reproduction under paragraphs 2 and 3, they may also provide for exceptions or limitations to the right of distribution provided for in art. 4, on condition that this is justified by the purpose of the authorized act of reproduction"). Distribution is a right that covers purely commercial acts, and it can therefore be inferred that art. 35.2 includes uses of this nature within its scope of application. It can be concluded that national legislations that have restricted the panorama exception to uses of works of

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24 B. Ribera Blanes, *El derecho de reproducción en la propiedad intelectual*, Madrid 2002; S. López Maza, *Comentario al artículo 35* [in:] *Comentarios a la Ley de Propiedad Intelectual*…, pp. 791–836.

25 E. Rosati, *Non-Commercial Quotation*…, pp. 311–321.

26 P. Popova, *Report*…

27 B. Ribera Blanes, *El derecho de reproducción*…; R. Casas Valles, E. Soria Puig, *Graffiti, urban art and copyright* [in:] *Anuario Iberoamericano de Derecho del Arte*, ed. R. Sánchez Aristi, Navarra 2020, pp. 39–134.

28 S. López Maza, *Comentario al artículo 35*…, pp. 791–836.

an accessory and/or non-commercial nature have not acted correctly,[29] as has been affirmed particularly in France.[30]

On the other hand, limiting the exception to non-commercial uses imposed by certain Member States to protect the owners of the exclusive rights of the works covered by it does not present advantages from a practical point of view because, at present, the doctrine of the CJEU on the concept of profit or commercial activity is not consolidated, so that the ambiguous distinction between non-commercial and commercial uses generates legal uncertainty. Thus, an exception that also covers commercial uses may provide greater legal certainty and allow a reduction in transaction costs.[31]

4. The permanence of works in public places

Article 5.3(h) refers to works "made to be permanently located in public places." The provision therefore requires that the works have been created for this purpose.[32] Is it possible for Member States to dispense with this requirement? In my opinion, yes, because by allowing the exception to include works permanently placed in public places regardless of whether they have been created for that purpose, the scope of the exception is not restricted. In fact, almost all national legislations dispense with it and simply refer to works permanently placed in public places,[33] except Lithuania, Malta and Portugal, which do require it. As far as Spain is concerned, the rule does not require this purpose ("permanently located works"), so it has a broader scope of application than the Community rule, including both works created to be located in public space and those that simply are in it, regardless of the initial purpose.[34]

Another related question concerns who is attributed such intention: only the author or also any other rights holders, such as the owner of the work? It has to be pointed out that, it is most likely to be understood that the author's consent must be obtained when the work is placed in a public place for which it was not intended, insofar as the change of location may affect the moral right of the integrity of the work (art. 14.4 TRLPI).[35] On the other hand, it should also be borne in mind, in the case of the alienation of a plastic work, that the author, even having assigned the right of public exhibition to the acquirer, may oppose the exercise of this right "when the

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29 European Copyright Society (ECS), *Answer to the EC Consultation*…; E. Rosati, *Non-Commercial Quotation*…, pp. 311–321.

30 C. Manara, *La nouvelle "exception de panorama"*…, pp. 40–43; L. Montagnani, *The EU Consultation*…

31 C. Manara, *La nouvelle "exception de panorama"*…, pp. 40–43; E. Rosati, *Non-Commercial Quotation*…, pp. 311–321; J. López Richart, *And vandalism became Art*…, pp. 53–87.

32 S. Bechtold, *Article 5 DDASI*…, pp. 367–382.

33 P. Popova, *Report*…

34 S. López Maza, *Comentario al artículo 35*…, pp. 791–836; I. Hernando Collazos, *The panorama exception*…, pp. 1–52.

35 R. Casas Valles, E. Soria Puig, *Graffiti, urban art and copyright*…, pp. 39–134.

exhibition is carried out in conditions that harm their honor or professional reputation" (art. 56.2 TRLPI).

In short, although the criterion of intentionality cannot be disregarded, as it is required by the Community rule, it must be interpreted in a broad sense for two reasons. Firstly, it is a requirement for the application of the rule that is difficult to comply with, since the addressees of the exception will not be able to know for certain or in all cases, using reasonable diligence, whether or not the work was actually created with the intention of being permanently exhibited in a public place. Secondly, such a requirement would greatly limit the applicability of the exception, to the detriment of the purpose it pursues (facilitating the dissemination of works). Therefore, we understand that, although the element of intentionality must be taken into account, it does not necessarily have to exist at the time of creation of the work, as it can be supervening, nor must it necessarily be the intention of the author, as any rights holder of the work may have decided to place it outside provided that the moral right of the author to the integrity of their work or the right of opposition provided for in art. 56.2 TRLPI is respected.

Having stated the above, there is no consensus on the meaning of "permanence." While it is accepted that permanence is defined in terms of a specific period of time, there are authors who argue that the exception only includes works whose placement in a certain public place is indefinite.[36] On the contrary, other authors consider that the exception also refers to works that are going to be part of the urban space or landscape for a limited space of time, either because of the context in which they are exhibited or because of the perishability of the materials with which they were created.[37] Thus, while the former exclude those works that are part of a temporary or traveling exhibition or have been made with perishable materials (such as ice or sand statues),[38] the latter include them in the exception.[39] An issue that is discussed frequently focuses on works that are conceived as accessory to permanent elements, usually buildings (installations or artistic interventions). Their inclusion is defended on the basis of their accessory nature with respect to the main element they adorn, which is permanent.[40] With regard to this, the judgment of 22 January 2002 (BGH, I ZR 102/99 (KG)-Verhüllter Reichstag) of the German Federal Supreme Court (BGH) on the applicability of the freedom of panorama in the case of a temporary art installation by the artists Christo and Jeanne-Claude in the German *Reichstag* is particularly

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36 J.A. Cuerva de Cañas, L. Castellví Laukamp, *Arquitectura de autor: un análisis de ciertos problemas suscitados en torno a la obra arquitectónica y la propiedad intelectual*, "Pe.i.: Revista de Propiedad Intelectual" 2010, nº 36, pp. 13–86, https://www.pei-revista.com/numerospublicados/numero-36/arquitectura-de-autor-detail [accessed: 2023.09.02]; C. Manara, *La nouvelle "exception de panorama"…*, pp. 40–43; S. Von Lewinski, *Article 5…*, pp. 1013–1062.

37 J. López Richart, *And vandalism became Art…*, pp. 53–87; S. Von Lewinski, *Article 5…*, pp. 1013–1062; I. Hernando Collazos, *The panorama exception…*, pp. 1–52.

38 J.A. Cuerva de Cañas, L. Castellví Laukamp, *Arquitectura de autor…*, pp. 13–86.

39 S. López Maza, *Comentario al artículo 35…*, pp. 791–836; J. López Richart, *And vandalism became Art…*, pp. 53–87.

40 C. Manara, *La nouvelle "exception de panorama"…*, pp. 40–43.

interesting. The two-week art installation, known as *Wrapped Reichstag*, consisted of wrapping the building with a silver fireproof fabric tied with blue propylene cords. The BGH ruled that the criterion to be taken into account should be the original intent as perceived by an impartial observer.[41] Based on this decision, the BGH ruled that the German panorama exception cannot apply to photographs of a temporary art installation, as the temporary nature of the installation clearly demonstrates that there is no intention for it to be permanently exhibited.

In my opinion, the placement of a work is permanent when the intention (whether or not existing at the time of creation of the work) of the author or the rights holder (the owner, for example) is that the work should be in a certain place indefinitely. What is permanent is opposed to what is temporary, ephemeral or sporadic, and it is not possible, from my point of view, to consider as permanent that situation which, by its very nature, cannot be indefinite but clearly limited in time. Thus, an exhibition that is conceived as temporary would not fall within the scope of the application of the exception. However, works made with perishable elements should be included if the intention of their author was that they should be permanently located in a public place since it is not the time of permanence that matters, but the intention that the work should remain exhibited for an indefinite period of time. There is no doubt that street art is included in the exception, since the intention of its author is permanence. A particular case is that of falla monuments (the Fallas of Valencia or the Hogueras of Alicante, for example). They are considered plastic works of a sculptural nature and are characterized by being ephemeral since they are created to be exhibited on public roads for a short time, after which they are burned. For this reason, falla monuments are made with materials that facilitate their destruction by fire. In the opinion of Espín Alba,[42] it is possible to consider these monuments works protected by the exception, separating the permanent character from the ephemeral nature of the work. In this way, the author considers that these works can be interpreted as having a permanent character during the period that elapses between their construction and their destruction by fire.

The exception to this rule is not applicable because, as we have already pointed out, it is necessary to take into account the intention of the author or rights holder, and it is not possible that the intention of the author or rights holder is that the works are permanently exposed on public roads during the period foreseen for their existence. In my opinion, this case would not fall within the scope of application of the exception because, as has already been pointed out, it is necessary to take into account the intention of the author or rights holder and it is not possible that the intention is that the falla monuments are to be exhibited indefinitely since they are created to

[41] T. Nobre, *Freedom of Panorama in Portugal* [in:] *Best case scenarios for copyright. Freedom of panorama, parody, education and quotation*, eds. A. Giannopoulou, T. Nobre, A. Rammo, Warsaw 2016, www.communia-association.org/bcs-copyright [accessed: 2023.09.02].

[42] I. Espín Alba, *Una aportación iusprivatista al estudio del patrimonio cultural inmaterial: la protección de las fallas valencianas por el derecho de autor*, "PIDCC. Revista em propriedade intelectual direito contêmporaneo" 2017, vol. 11, nº 1, pp. 1–28.

be destroyed within a short period of time. What is more, I understand that this is different from works made from perishable materials since, in this case, the duration of the works is unknown and will depend on various factors (materials, climate, place of exhibition). It is true that this position affects, particularly, images disseminated on social networks since it places them in a situation of illegality, but, as already noted, it would be an irregular situation tolerated by the rights holders since it is impossible to prevent citizens from taking photographs and videos of the Fallas or the Hogueras and then posting them on the Internet.

5. The concept of public place

The concept of public place should be given a broad meaning.[43] This means that the question should not be resolved on the basis of ownership, so that, for the purposes of the rule, only publicly owned places are public. What makes a place public is that it is accessible to the general public, regardless of its public or private ownership.[44] Thus, streets, roads, paths, squares and other similar public spaces are public places. However, art. 5.3(h) does not refer only to public roads, but to any place, whether or not it is a place of transit, to which the general public has access. In other words, art. 5.3(h) includes the interiors of public places,[45] which is consistent with the broad interpretation advocated for the exception. It has to be pointed out that, if the legislator had wanted to limit the panorama exception to places located outdoors, they would have used expressions such as "public road" or something similar.[46]

Precisely, on the basis of this argument, it can be concluded that in Spain the panorama exception has been restricted as far as this requirement is concerned. Article 35.2 TRLPI closes the enumeration of locations with a reference to "other public roads,"[47] which means, according to the judgment of the Provincial Court of Madrid No. 195/2014, of 16 June 2014, that the locations listed in art. 35.2 TRLPI are connected to the concept of public road which is "the common concept that semantically suits all of them," understanding by public road "a space of public domain characterized by its suitability for the transit of pedestrians and/or the circulation of vehicles." Hence, Ribera Blanes[48] affirms that the legal provision would be more correctly contemplated

43 S. Bechtold, *Article 5 DDASI*…, pp. 367–382.

44 S. Von Lewinski, *Article 5*…, pp. 1013–1062; D. Muscillo, *The Italian, French, German and English legislation regarding Freedom of Panorama*, June 2019, https://www.academia.edu/34380380/The_Italian_French_German_and_English_Legislation_concerning_Freedom_of_Panorama_pdf [accessed: 2023.09.02]; I. Hernando Collazos, *The panorama exception*…, pp. 1–52.

45 T. Nobre, *Freedom of Panorama in Portugal*…

46 *Ibid.*; S. Bechtold, *Article 5 DDASI*…, pp. 367–382.

47 I. Hernando Collazos, *The panorama exception*…, pp. 1–52; J.A. Cuerva de Cañas, L. Castellví Laukamp, *Arquitectura de autor*…, pp. 13–86.

48 B. Ribera Blanes, *El derecho de reproducción*…

if the terms "or other public roads" of the precept had been replaced by "or other public places."

In the case of privately owned buildings, which are works of architecture, I believe that the exception only allows photographs and videos of façades, but not of interiors since it is not possible to take pictures of building interiors from the exterior. The exception is for the reproduction of the building façades, expressly excluding interiors (art. 59 of the German Copyright Act of 9 September 1965). Some countries, such as Germany, have established that the exception only covers the reproduction of the building façades, expressly excluding interiors (art. 59 of its Copyright Act of 9 September 1965). In Spain, the decision of the Provincial Court of Barcelona (Section 15) no. 147/2006, of 28 March 2006, stated that art. 35.2 does not include in its protection the interior of the building, which is, in this particular case, a religious temple, because it is not a public road.

Therefore, the exception would allow the reproduction of works of art located in museums and similar institutions as they are places open to the public. However, as a general rule, public or private institutions that exhibit works of art do not allow the reproduction of such works if they are located indoors. This prohibition may be justified by the need to protect the condition of the works, since constant exposure to light emanating from devices may damage them, especially in the case of paintings. However, it seems that the underlying reason would be the desire to monopolize the reproduction of the works exhibited since merchandising is one of the income sources of such institutions. From a copyright point of view, it does not seem that the prohibition is justified; on the contrary, the panorama exception, as regulated at the Community level, allows reproduction.

On the other hand, the exception also includes works that are visible from a public place.[49] Therefore, photographs of works in private gardens or of building façades that are not visible from the street but, for example, from a neighbor's house, are subject to the requirement of prior authorization. In this regard, the BGH ruled that a photograph taken from a balcony is not covered by the exception because it was taken in a place that is not accessible to the public.[50] Furthermore, it is understood that photographs obtained using accessories such as ladders or helicopters do not fall under the exception; instead, it is disputed whether the use of telephoto lenses for cameras can be considered as an accessory in this sense.[51] In Spain, the doctrine reaches the same conclusion regarding art. 35.2.[52] The judgment of the Provincial Court of Madrid No. 195/2014 of 16 June 2014, states that art. 35.2 TRLPI requires that the work be located on the public highway or bordering it, so that the limit is not applicable if

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49 S. Von Lewinski, *Article 5*…, pp. 1013–1062; D. Muscillo, *The Italian, French*…; C. Manara, *La nouvelle "exception de panorama"*…, pp. 40–43.

50 BGH, I ZR 192/00, Hundertwasserhaus, https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BGH&Datum=05.06.2003&Aktenzeichen=I%20ZR%20192%2F00 [accessed: 2023.09.02].

51 D. Muscillo, *The Italian, French*…

52 S. López Maza, *Comentario al artículo 35*…, pp. 791–836; J. López Richart, *And vandalism became Art*…, pp. 53–87; B. Ribera Blanes, *El derecho de reproducción*…

it is located in a private place (inside a property) and, to make a reproduction, it is necessary to use means or procedures "more or less convoluted" or to be located in "unpredictable places" (in this case, since the work was located on the edge of a cliff, it was necessary to make a reproduction of it from the air or the sea).

6. Freedom of expression and the three-step test

We will end this section by referring to the legal instruments that must be taken into account when delimiting the concepts that are merely stated in the Community precept. From my point of view, two of them should be present: the purpose of the exception, so that there is no room for an interpretation that impedes the development of the freedom of expression, as I have already pointed out, and the three-step test, so that no concept or presupposition can be interpreted in a way that breaches the limits imposed by it.[53] The three-step test is in art. 5.5 of the Directive and states that "The exceptions and limitations referred to in paragraphs 1, 2, 3 and 4 shall apply only in certain specific cases that do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder." By applying these mechanisms, national judges can conclude whether a particular use, especially a commercial use, should require the authorization of rights holders.

The three-step rule has been taken into account particularly in relation to commercial uses, concluding that only those that respect such a rule are covered by the panorama exception.[54] It is even understood that, regardless of whether the user pursues a commercial purpose, the rule must be applied when the use has an economic impact for the rights holder. In this sense, it is worth citing the judgment of 4 April 2016 of the Swedish Supreme Court that resolved a dispute between the collective management entity of visual artists in Sweden (BUS) and the Swedish division of Wikimedia, a non-profit organization that collected photographs of works of art located in the public space uploaded by its users to create a database that would make them available to the public without restrictions and for any type of purpose (the recipients were the general public, the tourism industry and educational centers).[55] According to the judgment, the rule must be interpreted in light of the three-step rule, which implies a restrictive interpretation of the exception. It considers, accordingly, that the use of photographs in a database freely accessible to the general public has no insignificant commercial significance, so that such value should be reserved to

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53 S. Bechtold, *Article 5 DDASI*…, pp. 367–382; S. Von Lewinski, *Article 5*…, pp. 1013–1062.

54 E. Rosati, *Non-Commercial Quotation*…, pp. 311–321; C. Manara, *La nouvelle "exception de panorama"*…, pp. 40–43.

55 S. González-Varas Ibáñez, L. Rivera Novillo, *Intellectual property*…, pp. 81–107; J. Norderyd, E. Jönsson, *Swedish Supreme Court issues decision regarding the freedom of panorama*, Kluwer Copyright Blog, 9.05.2016, http://copyrightblog.kluweriplaw.com/2016/05/09/swedishsupreme-court-issues-decision-regarding-freedompanorama/ [accessed: 2023.09.02].

the author, regardless of whether the database operator has a commercial purpose. Moreover, it is a use that does not entail any equitable compensation for the author. The court concludes that the right to exploit works of art through the Internet by means of a database belongs to the author, so it is not included in the exception.

The problem, in my view, arises when it comes to knowing how far the application of the three-step test leads us. It is argued that the application of the test means excluding direct commercial exploitation (posters, T-shirts, mugs and merchandising products in general), as well as indirect exploitation (advertising campaigns, for example), what we are stating is that the rule does not allow commercial uses (or should not allow them, as the aforementioned authors point out).[56] Thus, the panorama exception has been configured in an excessively generous manner, and since it does not seem reasonable to allow third parties to profit from the work of others, the fact is that the Community rule does allow commercial uses, as stated above.

This raises the question of the actual relevance of the three-step test for commercial applications. This same rule is also applicable to establish whether the limit only allows two-dimensional or three-dimensional reproductions. The conclusion we must reach is that the latter cannot be admitted since it would be the realization of a replica of the work that would enter into direct competition with the normal exploitation of the work, harming the legitimate interests of the author.[57] In certain countries, such as Germany, Austria, the Czech Republic, Croatia, Slovenia and Lithuania, it is expressly prohibited to make reproductions in three dimensions. It is clear, then, that the use of the image of an architectural or plastic work to create objects for commercial purposes (such as key chains or decorative elements) consisting of a small-scale reproduction of the works in question is not allowed.

The three-step test must also be taken into account in relation to the question of fair compensation for the author, which art. 5.3(h) Directive DDASI does not provide for (this is not an exceptional situation since none of the exceptions provided for in art. 5.3 DDASI does so). Since art. 5.3(h) does not provide for it, national legislators are not obliged to recognize it, although there is no impediment to doing so. On the contrary, Recital 36 DDASI provides that "Member States may provide for fair compensation to rightsholders also when applying the optional provisions relating to exceptions or limitations that do not require such compensation." And the possibility to provide for such compensation may be considered as a consequence of the application of the three-step rule, especially in the case where the use of the work is commercial.[58] Therefore, when certain national legislations (such as those of Slovakia, Greece and Lithuania) expressly exclude the possibility for the author to obtain fair compensation,[59] they are establishing a restriction that is not required by the norm

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56 R. Casas Valles, E. Soria Puig, *Graffiti, urban art and copyright*…, pp. 39–134.

57 *Ibid.*; S. López Maza, *Comentario al artículo 35*…, pp. 791–836; S. Von Lewinski, *Article 5*…, pp. 1013–1062.

58 B. Ribera Blanes, *El derecho de reproducción*…; S. Bechtold, *Article 5 DDASI*…, pp. 367–382; S. Von Lewinski, *Article 5*…, pp. 1013–1062.

59 P. Popova, *Report*…

and can be considered contrary to the three-step test. From my point of view, the recognition of equitable compensation in the case of commercial uses of images would be the fairest for authors and other rights holders, given the broadness with which the exception is drafted as far as such uses are concerned.

Finally, it should be taken into account that, in the case of architectural works, it is not uncommon for their authors to resort to trademark law to protect their exclusivity over the use of the work. In such a case, the free use of photographs by third parties (mainly for commercial purposes) is not be possible since the trademark establishes an *ius prohibendi*.

Conclusions

In view of the above, it does not seem necessary to me for the exception to be made mandatory in order to achieve greater harmonization, although its recognition as mandatory could serve to achieve this. On the other hand, it seems necessary to me that the current wording of the panorama exception be made more precise to resolve the discrepancies that have arisen because of its excessively broad or open wording, essentially as far as the concept of permanence is concerned.[60] Moreover, the panorama exception could be considered an autonomous EU concept in the absence of any referral to national laws, and any autonomous concept must be subject to a uniform interpretation in all Member States, as the CJEU has previously pointed out.[61] This uniform interpretation is difficult to achieve since the application requirements and the scope of the exception are different in each Member State. A more precise regulation of the exception in the Directive would help to achieve a uniform interpretation.

Despite the problems that arise from the lack of harmonization, intervention by the EU legislative bodies should be ruled out, since they had the opportunity to revise the panorama exception when Directive 2019/790 was adopted, but they chose not to do so. A legislative solution could be found at the national level, whereby certain Member States would amend their legislation to regulate the panorama exception in a manner consistent with the Directive, although this does not seem to be the most likely way to achieve a greater degree of harmonization since it is clear, as has been demonstrated with Italy and France, that Member States, on their own initiative, are not willing to legislate to that end. Once the legislative route has been ruled out, all that remains is the judicial route. National judges must apply national legislation in light of the provisions of the Directive, insofar as doubts or ambiguities arise, which should serve to achieve a greater degree of harmonization. Ultimately, the intervention of the CJEU

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60 *Ibid.*; L. Montagnani, *The EU Consultation*…; European Copyright Society (ECS), *Answer to the EC Consultation*…

61 European Copyright Society (ECS), *Answer to the EC Consultation*…; E. Rosati, *Non-Commercial Quotation*…, pp. 311–321.

will be required, through the preliminary ruling mechanism, which will serve to delimit the autonomous concepts of the exception, forcing the courts to apply national law in a harmonized manner.[62] However, as we noted in the introduction, the CJEU has not yet had the opportunity to rule on the matter. The problem outlined in this article will also develop because trends in technological progress are difficult to predict and will also affect the exception presented in this article, particularly with regard to the dissemination of works in the virtual environment. Active monitoring of legislative solutions in this area is a necessity.

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Summary

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Cultural Dissemination and Commercial Exploitation of Images of Architectural and Art Works: "Freedom of Panorama" under Scrutiny

The freedom of panorama is an exception to copyright regulated at the Community level that allows architectural and art works permanently located in public places to be photographed, videotaped and disseminated in any way for any purpose. Its transposition into national legislation, with significant differences, is of great importance both for the dissemination of culture and for the commercial exploitation of images, particularly in the digital environment. These differences are due to the optional nature of the exception and its broad formulation. It is worth analyzing these two issues, contrasting the UE regulation with national legislation, in particular

in Spain, to conclude whether it is possible to reduce existing differences to achieve the greatest possible degree of harmonisation among all of them.

Keywords: architectural works, copyright, Directive 2001/29/EC, exceptions to copyright, freedom of panorama, art work.

Streszczenie

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Rozpowszechnianie i wykorzystanie komercyjne utworów architektonicznych i plastycznych w kulturze i sztuce: „prawo panoramy" jako przedmiot analizy

Prawo panoramy jest wyjątkiem od prawa autorskiego, regulowanym na poziomie wspólnotowym, dającym możliwość rozpowszechniania, w tym fotografowania i filmowania w dowolny sposób i w dowolnym celu utworów architektury i sztuki wystawionych na stałe w ogólnie dostępnych miejscach publicznych. Implementacja tego wyjątku do ustawodawstwa krajowego z istotnymi różnicami pomiędzy poszczególnymi krajami ma ogromne znaczenie zarówno dla rozpowszechniania kultury, jak i komercyjnego wykorzystania dzieł architektury i sztuki, w szczególności w środowisku cyfrowym. Różnice te wynikają z fakultatywnego charakteru wyjątku i jego szerokiego brzmienia. Analiza tych dwóch aspektów prawa panoramy w porównaniu z regulacjami UE i ustawodawstwem krajowym, w szczególności w Hiszpanii, jest konieczna, aby stwierdzić, czy możliwe jest zmniejszenie istniejących różnic w celu osiągnięcia jak największego stopnia harmonizacji.

Słowa kluczowe: utwory architektoniczne, prawo autorskie, dyrektywa 2001/29/WE, wyjątki od prawa autorskiego, prawo panoramy.