

## NEW VOICES

### FREEDOM OF PANORAMA: THE EU EXPERIENCE

Anna Shtefan \*

*Freedom of panorama allows creating and using images of works which are permanently located in public places without the consent of the author. There is no common approach to freedom of panorama, a copyright exception, among the member states of the European Union (EU). Different states have very different forms of freedom of panorama, including the types of works covered and the ways in which images of such works may be used. This causes complexity for users since for the legitimate use of the images of works it is necessary to study the laws of each state separately. In this article, I examine how freedom of panorama is regulated in EU member states, with a particular focus on how the existing approaches relate to the Berne Convention and to the interests of society. I then propose a model regulation of freedom of panorama based on a three-step test which takes into account the interests of both the authors and of wider society.*

**Keywords:** freedom of panorama, EU copyright, copyright exceptions, free use of work

#### TABLE OF CONTENTS

I. INTRODUCTION.....	14
II. LEGAL REGULATION OF FREEDOM OF PANORAMA IN EU MEMBER STATES	
17	
1. Use of Images Allowed for Any Purpose Without Remuneration.....	17
2. Use of Images for Any Purpose With Remuneration.....	18
3. Use of a Panoramic Image for Any Purpose; Use of an Image of a Particular Work for a Non-commercial Purpose Only.....	19
4. Use Images for Non-commercial Purpose Only.....	20
5. No Freedom of Panorama.....	20

---

\* Head of Copyright and Related Rights Department of Intellectual Property Research Institute of National Academy of Law Sciences of Ukraine, PhD in Law.

III. THREE-STEP-TEST AND FREEDOM OF PANORAMA .....	21
IV. BALANCING THE INTERESTS OF THE AUTHORS AND SOCIETY .....	24
V. CONCLUSION .....	26

## I. INTRODUCTION

Freedom of panorama allows individuals to create images of artistic works which are permanently located in public places – by taking photographs, video, drawing, etc. – and to use such images without the consent of the author. The purpose of this rule is to ensure that the diverse interests of society are accommodated. In the words of Barron Oda, it is 'rooted in the notion that if a work is put forth to the public for the public's aesthetic enjoyment, education, or enrichment, then the public should be able to make reasonable reproductions of such work in furtherance of that purpose'.<sup>1</sup> Freedom of panorama concerns works protected by copyright and is thus a copyright exception. Works that have entered the public domain generally do not require permission for their use although the legislation of some states may contain special rules for works that are considered cultural heritage or have other special value.

At the European Union (EU) level, freedom of panorama is enshrined in Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society ('InfoSoc Directive'). Article 5(3)h establishes that EU member states may provide for exceptions or limitations to the exclusive reproduction right of works, such as works of architecture or sculpture, located permanently in public places. This exception is discretionary and leaves the possibility for member states to decide independently on the inclusion of such a provision in national law.

In the majority of EU member states, freedom of panorama is already implemented but each state regulates it differently. Today, there are five different approaches to freedom of panorama across the EU. This diversity

---

<sup>1</sup> Barron Oda, 'Mobile Devices, Public Spaces, and Freedom of Panorama. Reconciling the Copyright Act with Technological Advances and Social Norms Regarding Content Creation and Online Sharing' (2018) 14(2) SciTech Lawyer 1. <<https://www.kiip.re.kr/webzine/1804/resource/file/Library04.pdf?ver=1>> accessed 10 December 2018.

of approaches raises at least three issues. First, there is no single accepted approach to the permissible uses of images created under freedom of panorama. For example, some states allow any use of images obtained within the framework of freedom of panorama, while others provide for non-commercial use only. This creates complexity for users who need to study the legislation of each European state individually to find out how to legally use images of works located in public places.

The second problem is the lack of clear regulation of the types of works that are subject to freedom of panorama. The InfoSoc Directive gives the example of works of architecture or sculpture.<sup>2</sup> However, the laws of different European countries cover different types of works. For instance, reproduction in pictorial form of 'works of art' is permitted in Denmark, although the Danish Act of Copyright does not specify which works actually qualify as such.<sup>3</sup> In Belgium, freedom of panorama covers works of plastic art, graphics or architectural design.<sup>4</sup> In Estonia, the list includes works of architecture, works of visual art, works of applied art or photographic works.<sup>5</sup> These discrepancies further complicate the understanding of the essence of freedom of panorama, since each state has its own individual approach.

Third, there is also no single approach to determining what constitutes a 'public place'. Some states specify a list of public places: 'public roads, streets or squares' (Germany);<sup>6</sup> 'places like a square, street, park, public route or

---

<sup>2</sup> 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. <<https://wipolex.wipo.int/en/text/126977>> accessed 10 December 2018.

<sup>3</sup> Denmark: The Consolidated Act on Copyright No. 1144 of October 23, 2014. <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=363859](http://www.wipo.int/wipolex/en/text.jsp?file_id=363859)> accessed 10 December 2018.

<sup>4</sup> Belgium: Loi du 27 juin 2016 modifiant le Code de droit économique en vue de l'introduction de la liberté de panorama. <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=420197](http://www.wipo.int/wipolex/en/text.jsp?file_id=420197)> accessed 10 December 2018.

<sup>5</sup> Estonia: Copyright Act (consolidated text of February 1, 2017). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=431814](http://www.wipo.int/wipolex/en/text.jsp?file_id=431814)> accessed 10 December 2018.

<sup>6</sup> Germany: Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz, geändert durch Gesetzes vom 01. September 2017).

another public place' (Czech Republic);<sup>7</sup> 'public roads, squares, streets or parks' (Poland).<sup>8</sup> In other countries, the law simply refers to a 'public place' without specifying further what this means (Lithuania,<sup>9</sup> Malta,<sup>10</sup> Portugal,<sup>11</sup> Sweden<sup>12</sup>). As a result, it may be difficult to determine whether a certain place may be considered a 'public place'.

On this basis, many users may find it difficult to understand whether a particular work is covered by freedom of panorama, whether the location of the work is a 'public place', and for what purpose the image of this work can be used. Due to the availability of digital technologies, many persons can take pictures using a camera on a mobile phone, so the process of creating images of works is practically impossible to control or restrict. However, for the legitimate use of images, users need to verify what is specifically permitted by the legislation of the country concerned and which prohibitions it contains. In this context, it is fair to believe that, in the words of Eleonora Rosati, 'the

---

<[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=462249](http://www.wipo.int/wipolex/en/text.jsp?file_id=462249)> accessed 10 December 2018.

<sup>7</sup> Czech Republic: Consolidated Version of Act No. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act, as amended by Act No. 81/2005 Coll., Act No. 61/2006 Coll. and Act No. 216/2006 Coll.). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=137175](http://www.wipo.int/wipolex/en/text.jsp?file_id=137175)> accessed 10 December 2018.

<sup>8</sup> Poland: Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych. <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=408584](http://www.wipo.int/wipolex/en/text.jsp?file_id=408584)> accessed 10 December 2018.

<sup>9</sup> Lithuania: Law No. VIII-1185 of May 18, 1999, on Copyright and Related Rights (Last amended on 22 December 2015 – No XII-2237). <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/5f13b560b2b511e59010bea026bdb259?jfwid=9tq1470gj>> accessed 10 December 2018.

<sup>10</sup> Malta: Copyright Act, 2000 (Chapter 415, as amended up to Act No. VIII of 2011). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=355524](http://www.wipo.int/wipolex/en/text.jsp?file_id=355524)> accessed 10 December 2018.

<sup>11</sup> Portugal: Código do Direito de Autor e dos Direitos Conexos (conforme alterado de acordo com DL n.º 100/2017, de 23/08). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=451731](http://www.wipo.int/wipolex/en/text.jsp?file_id=451731)> accessed 10 December 2018.

<sup>12</sup> Sweden: Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk. <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=450011](http://www.wipo.int/wipolex/en/text.jsp?file_id=450011)> accessed 10 December 2018.

different conditions of national exceptions and limitations thus raise issues of compatibility with EU law, as well as practical difficulties when it comes to determining the lawfulness of certain uses of a copyright work'.<sup>13</sup> A further question arises if freedom of panorama permits the commercial use of the images of works without the consent of the author: how does this correspond to the three-step test of the Berne Convention for the Protection of Literary and Artistic Works? More specifically, can such use bring harm to the normal use of the work?

Resolving these issues is important since freedom of panorama must serve cultural, educational and other interests of society, while at the same time protecting the interests of the author. In this article, I examine the approaches to the legal regulation of freedom of panorama developed in the legislation of the EU member states and analyse which model presented in the legislation is most consistent with the principles of free use of works in accordance with both the Berne Convention and the interests of society.

## II. LEGAL REGULATION OF FREEDOM OF PANORAMA IN EU MEMBER STATES

Freedom of panorama is formulated in the InfoSoc Directive in a general form, leaving a broad margin of discretion for member states to determine the boundaries of their legislation. This has led to the development of several different approaches to the regulation of freedom of panorama. An overview of these approaches is presented below.

### *1. Use of Images Allowed for Any Purpose without Remuneration*

Some European countries permit the use of images of works for commercial purposes without obtaining a permit and without remuneration of the original artist. For example, in Belgium, individuals are allowed 'to reproduce and make available to the public works of plastic art, graphics or architectural design permanently located in public places if such use does not affect the

---

<sup>13</sup> Eleonora Rosati, 'Non-Commercial Quotation and Freedom of Panorama: Useful and Lawful?' (2017) 8(4) *Journal of Intellectual Property, Information Technology and E-Commerce Law* <<https://www.jipitec.eu/issues/jipitec-8-4-2017/4639>> accessed 10 December 2018.

normal exploitation of the work nor does it cause undue prejudice to the legitimate interests of the author'.<sup>14</sup> In Hungary, 'works of fine art, architectural and applied art creation erected with a permanent character outdoors in a public place a view may be made and used without the authorisation of authors and paying remuneration to them'.<sup>15</sup> The law of Sweden provides that 'works of fine art may be reproduced in pictorial form if they are permanently located outdoors or at a public place; buildings may be freely reproduced in pictorial form'.<sup>16</sup> Finally, in some states, such as Croatia<sup>17</sup> and the Czech Republic<sup>18</sup>, the name of the author needs to be indicated unless the work is anonymous or unless such indication is not possible. However, permission to use the work is not required.

## *2. Use of Images for Any Purpose with Remuneration*

The practice of allowing the use of images of works for any purpose as long as the original artist is remunerated is not widespread among EU member states but nonetheless it exists. In Austria, it is permissible 'to reproduce, distribute, present in public by means of optical devices and broadcast works of architecture after their construction or other works of fine art permanently located in a place used as a public thoroughfare. For copying, distribution and provision to the public, the author is entitled to appropriate remuneration. These claims can only be made by collecting societies'.<sup>19</sup> The possibility of remuneration for the use of the image created within the

---

<sup>14</sup> Le Code de droit économique (n 4).

<sup>15</sup> Hungary: Act No. LXXVI of 1999 on Copyright. <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=325838](http://www.wipo.int/wipolex/en/text.jsp?file_id=325838)> accessed 10 December 2018.

<sup>16</sup> Lag (1960:729) (n 12).

<sup>17</sup> Croatia: Copyright and Related Rights Act and Acts on Amendments to the Copyright and Related Rights Act (OG Nos. 167/2003, 79/2007, 80/2011, 141/2013 and 127/2014). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=357287](http://www.wipo.int/wipolex/en/text.jsp?file_id=357287)> accessed 10 December 2018.

<sup>18</sup> Consolidated Version of Act No. 121/2000 (n 7).

<sup>19</sup> Austria: Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz 1936, zuletzt geändert durch das Bundesgesetz BGBl. I Nr. 99/2015). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=395335](http://www.wipo.int/wipolex/en/text.jsp?file_id=395335)> accessed 10 December 2018.

framework of freedom of panorama is also provided for by the Portuguese Code of Copyright and Related Rights.<sup>20</sup> This approach is typical of copyright exceptions, since it does not require permission to use the work. At the same time, the author retains the right to fair remuneration, which ensures respect for the interests of the author, especially when the image of the work is used for commercial purposes.

### *3. Use of a Panoramic Image for Any Purpose; Use of an Image of a Particular Work for a Non-commercial Purposes Only*

In a number of EU member states, freedom of panorama depends on what is contained in the image. If an image does not focus on a specific work in public space, the image can be freely used for any purpose. On the other hand, when the main element in the image is a particular work, the use of this image is restricted. In Estonia, it is permissible 'to reproduce works of architecture, works of visual art, works of applied art or photographic works which are permanently located in places open to the public, without the authorisation of the author and without payment of remuneration, by any means except for mechanical contact copying, and to communicate such reproductions of works to the public except if the work is the main subject of the reproduction and it is intended to be used for direct commercial purposes'.<sup>21</sup> In Finland, freedom of panorama means 'the ability to create an image of a work of art that is permanently placed in a public place or in the immediate vicinity of it. If the artwork is the main subject of the image, the image may not be used for commercial purposes.'<sup>22</sup> This rule is also provided for in the legislation of Lithuania<sup>23</sup> and Romania.<sup>24</sup> This approach seems reasonable. Individuals have ample opportunity to use images of works in the public space, while the

---

<sup>20</sup> Código do Direito de Autor e dos Direitos Conexos (n 11).

<sup>21</sup> Copyright Act (n 5).

<sup>22</sup> Finland: Tekijänoikeuslaki 8.7.1961/404 (sellaisena kuin se on muutettuna asetuksella 18.11.2016/972).

<[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=467066](http://www.wipo.int/wipolex/en/text.jsp?file_id=467066)> accessed 10 December 2018.

<sup>23</sup> Law No. VIII-1185 (n 9).

<sup>24</sup> Romania: Law No. 8 of March 14, 1996 on Copyright and Related Rights (updated 2018). <<https://www.dpvue.com/p/copyright-law-in-romania.html>> accessed 10 December 2018.

author can influence the commercial use of an image in which their work occupies a central place.

#### *4. Use of Images for Non-commercial Purposes Only*

Some EU member states have limited freedom of panorama solely to non-commercial use of images. The use of images for commercial purposes is considered to be beyond the scope of freedom of panorama and requires permission from the author. In Latvia, freedom of panorama covers 'the use of images of works of architecture, photography, visual arts, design, as well as of applied arts, permanently displayed in public places, for personal use and as information in news broadcasts or reports of current events, or include in works for non-commercial purposes.'<sup>25</sup> A similar approach has been taken in Bulgaria,<sup>26</sup> in Denmark,<sup>27</sup> and in France.<sup>28</sup>

#### *5. No Freedom of Panorama*

Two EU member states, Greece and Italy, currently do not have freedom of panorama. The copyright law of Greece permits only the occasional reproduction and communication of images of works located permanently in public places by the mass media.<sup>29</sup> Such use does not need the consent of the author or any payment. However, it cannot be seen as freedom of panorama since the use of works is permitted only in the mass media and has only occasional significance. In Italian copyright law, the list of exceptions contains no provision for freedom of panorama. Article 108(3) of the Code of

---

<sup>25</sup> Latvia: Copyright Law (as amended up to December 31, 2014). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=417220](http://www.wipo.int/wipolex/en/text.jsp?file_id=417220)> accessed 10 December 2018.

<sup>26</sup> Bulgaria: Law on Copyright and Neighboring Rights (as amended up to 2011). <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=280106](http://www.wipo.int/wipolex/en/text.jsp?file_id=280106)> accessed 10 December 2018.

<sup>27</sup> The Consolidated Act on Copyright (n 3).

<sup>28</sup> France: Law No. 2016-1321 of October 7, 2016, for a Digital Republic. <[http://www.wipo.int/wipolex/en/news/2016/article\\_0014.html](http://www.wipo.int/wipolex/en/news/2016/article_0014.html)> accessed 10 December 2018.

<sup>29</sup> Greece: Law No. 2121/1993 on Copyright, Related Rights and Cultural Matters (as amended up to Law No. 4540/2018). <[https://www.wipo.int/wipolex/en/text.jsp?file\\_id=480970](https://www.wipo.int/wipolex/en/text.jsp?file_id=480970)> accessed 10 December 2018.



the Cultural and Landscape Heritage of Italy permits the reproduction of works relating to cultural heritage.<sup>30</sup> No fee is charged for reproduction carried out by an individual for private use or educational purposes if the image is not used for profit. However, this rule has fairly narrow boundaries as it applies to works that have already entered the public domain. As for works that are under copyright protection, there is no legal provision for the use of images of such works.

The above analysis shows that freedom of panorama is regulated very differently in different EU member states. The types of works to which this rule applies, the list of public places, and the purpose of the use of images are all determined individually by each state. These issues need to be clarified since they affect not only the understanding of the essence of freedom of panorama but also its effective application. From this, the following question arises: which of the existing models of freedom of panorama is the most consistent with the principles of free use of works? To answer this question, it is necessary to look at the relevant provisions of the Berne Convention and establish the optimal form of balancing the interests of society against those of the authors of works permanently located in public places.

### III. THREE-STEP-TEST AND FREEDOM OF PANORAMA

In the EU, copyright in its modern form seeks to balance the interests of the author and society. Copyright exceptions serve societal interests by allowing the free use of works whose legal protection has not yet expired. Principles of free use of works are enshrined in Part 2 of Article 9 of the Berne Convention according to which it shall be a matter for domestic legislation in the state parties to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal 'exploitation' of the work and does not unreasonably prejudice the legitimate interests of the author. This provision contains three basic requirements that the free use of works should satisfy:

---

<sup>30</sup> Italy: Codice dei beni culturali e del paesaggio, ai sensi dell'articolo 10 della legge 6 luglio 2002, n. 137 <<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2004-01-22;42>> accessed 10 December 2018.

- 1) The free use of a work should be restricted to certain special cases. The scope and limits of the free use of works are not determined accidentally nor at one's individual discretion, but are envisaged by the law that establishes a clear list of cases when such use is permissible and lawful.
- 2) The free use of a work should not conflict with its normal use. The use of the work by the copyright holder and the free use of the work by third parties must be carried out in different ways. There should be no competition between the author or other copyright holder and third parties regarding use the work.
- 3) The free use of a work should not unreasonable prejudice the legitimate interests of the author. Only extremely important public interests may outweigh the copyright and require such free use of the work when this would harm the interests of the author. However, as a general rule, the free use of a work should not give rise to any obstacles to or other negative effects on the possibility of the exploitation of the work by the author. An author may not be deprived of the possibility of obtaining economic benefit from the use of their work for the reason that the benefit is already received by another person acting within the limits of copyright.

While undeniably important for the development of science, education and culture, as well as serving public interests, freedom of panorama has another side. The possibility of using the images created within freedom of panorama for a commercial purpose does not always correspond to the interests of the author of the work. If a third party uses the image of a work for a commercial purpose, in some cases the author may be deprived of the same opportunity since it has already been done by someone else. In order to illustrate this problem, I present some examples from the judicial practice of Ukraine. Although Ukraine is not an EU member state and Ukrainian law does not yet provide for freedom of panorama, these examples clearly highlight the conflict between the interests of the author and another person who used a picture of a work located in an open space for commercial purposes.

The examples all concern the same work, a sculpture dedicated to the founders of Kyiv which was erected in 1982.<sup>31</sup> In the second half of the 1990s and early 2000s, various individuals independently of each other began to use an image of this sculpture in their business operations. The image appeared in a bank's advertising,<sup>32</sup> on the cover of a book of a non-educational nature,<sup>33</sup> and on the packaging of some foods (several types of cheese<sup>34</sup> and sausages<sup>35</sup>). None of the users asked the permission of the rights holder to use the image of the work. All these cases went to trial and in each case the courts came to the conclusion that the author's rights were not respected. These conclusions are substantiated since in Ukraine (both at that time and now) such use of the work does not fall within the scope of copyright exceptions. But if we look at these examples from the position of freedom of panorama, when it allows the use of the image for any purpose, should the author have the right to influence the commercial use of images of their work or at least be remunerated for its use?

The Working Group on Intellectual Property Rights and Copyright Reform of the European Parliament turned its attention to this problem in 2016. According to a working document:

where architectural works are central to a scene in the television, producers should seek authorization from the artist, who may in that case be entitled to some payment. In other words, there should be a distinction between use

---

<sup>31</sup> The picture of a monument may be seen here: <[https://ua.igotoworld.com/en/poi\\_object/2052\\_the-monument-to-the-founders-of-kyiv.htm](https://ua.igotoworld.com/en/poi_object/2052_the-monument-to-the-founders-of-kyiv.htm)>.

<sup>32</sup> Case 22-5874 *Joint-Stock Bank 'UkrGasbank' v Vasyl' Boroday* (2008) <<http://reyestr.court.gov.ua/Review/4611925>> (in Ukrainian) accessed 10 December 2018.

<sup>33</sup> Case 3/109/08 *Vasyl' Boroday v Limited Liability Company 'FOLIO Publishing House'* (2008) <<http://reyestr.court.gov.ua/Review/5749072>> (in Ukrainian) accessed 10 December 2018.

<sup>34</sup> Case 22-51 *Open Joint Stock Company 'Molochnik' v Vasyl' Boroday* (2009) <<http://reyestr.court.gov.ua/Review/8795295>> (in Ukrainian) accessed 10 December 2018.

<sup>35</sup> Case 3/60/07 *Vasyl' Boroday v Private enterprise 'VK and K'* (2007) <<http://reyestr.court.gov.ua/Review/560241>> (in Ukrainian) accessed 10 December 2018.

of architectural works in the public interest, which should be excluded from any fees and other uses.<sup>36</sup>

Indeed, the interests of society cover such spheres as education, culture, and obtaining and disseminating information. For these purposes, the freedom of panorama must ensure the possibility of using works that are located in public places. When it comes to the commercial interests of a particular person or company, freedom of panorama should more clearly take into account the provisions of the three-step-test.

As stated above, there are 5 different approaches to legal regulation of freedom of panorama across the EU member states. One of them, permitting the use of images for any purpose without remuneration, can harm the interests of authors, since it allows the use of images of works for commercial purposes without any payment to the original creator. In other models of freedom of panorama, the interests of the authors are respected. However, not every model can provide a balance between the interests of the authors and society, despite this being precisely the purpose of copyright exceptions and limitations.

#### IV. BALANCING THE INTERESTS OF THE AUTHORS AND SOCIETY

The Berne Convention three-step test only applies to the interests of the authors. However, in other provisions of the Convention there are also areas of social interests connected with copyright exceptions. The Berne Convention expressly includes the use of works for information purposes in Part 2 of Article 10bis. It follows from Article 10 that works can also be used for the purpose of education and science.

According to Article 5(2) of the InfoSoc Directive, EU member states may provide for exceptions or limitations to the reproduction right in cases of reproductions using any kind of photographic technique or other process having similar effects and reproductions using any medium made by a natural

---

<sup>36</sup> European Parliament, Working Group on Intellectual Property Rights and Copyright Reform, 'Copyright Reform: Working Document' (17/05/2016). <[http://www.europarl.europa.eu/cmsdata/104023/Working%20Document%20on%20Copyright%20\\_JURI%20meeting%2013.06.2016.pdf](http://www.europarl.europa.eu/cmsdata/104023/Working%20Document%20on%20Copyright%20_JURI%20meeting%2013.06.2016.pdf)> accessed 10 December 2018.

person for private use.<sup>37</sup> That is, educational, scientific, informational, and private interests of society serve as the basis for the establishment of copyright exceptions and limitations. However, they cannot be established for the purpose of securing individual commercial interests without taking into account the interests of the authors. The InfoSoc Directive repeatedly mentions the fair remuneration for right holders to compensate them adequately for the use made of their protected works. The authors of works of public art cannot be completely eliminated from the process of using images of their works when this use has a commercial component. Therefore, freedom of panorama is characterised by two important elements: on the one hand, the regime of using images of works should not contradict the three-step-test; on the other hand, the interests of society need to be respected.

If we consider the existing models of freedom of panorama in terms of ensuring a balance between the interests of the authors and society, we can draw the following conclusions:

- 1) Within the model 'use of images allowed for any purpose *without* remuneration', society has ample opportunities for using works that are located in public space, while the interests of the author are not taken into account at all.
- 2) In the model 'use of images for any purpose *with* remuneration', the interests of society are respected; the authors can rely on receiving financial rewards but cannot influence the sphere of the use of images of their works.
- 3) The model 'use of images for non-commercial purposes only' does not give society the possibility of commercial use of panoramic images so the protection of the interest of society is rather limited.
- 4) Within the model 'use of a panoramic image for any purpose, use of the image of a particular work for non-commercial purposes only', society has opportunities for non-commercial using images of works, and the authors reserve the right to authorise the commercial use of images when their work is the main subject of representation.

---

<sup>37</sup> InfoSoc Directive (n 2).

5) In the model 'no freedom of panorama', the interests of society are not adequately protected.

The most apposite would seem to be model 4. In this scenario, the non-commercial use of an image of a work is permitted without authorisation or payment of remuneration. Commercial use of the image, on the other hand, is only carried out on the basis of author's permission and with payment of remuneration. Building upon this approach, I think it possible to offer the following model of freedom of panorama, based on the solutions already in use in Estonia, Finland, Lithuania and Romania:

1) An image of a street, square, square, park or another public place that is not related to a particular work and contains two or more different objects can be freely used for any purpose.

2) An image of a particular work or an image whose main subject is a particular work may be freely used for personal, informational, educational, scientific or other not-for-profit purpose;

3) An image of a particular work or image whose main subject is a particular work may be used for purposes that are directly or indirectly related to the receipt of income from such use only with the consent of the author or other copyright holder and with payment of remuneration.

This approach appears to be the most balanced out of all the discussed models. It takes into account the needs of society, allowing it to freely create images of works for personal purposes and use panoramic images in the commercial sphere. At the same time, this approach does not unreasonably harm the interests of authors and gives them the opportunity to influence the use of the image if the main element of such an image is their particular work. As this approach is based on solutions already existing in several EU member states, this gives ground to believe that it could be adopted across the whole of the EU.

## V. CONCLUSION

At present, when certain aspects of copyright require reviewing and updating, it is necessary to bring the legal rules in line with the needs of society, to take into account the legislative challenges related to the

development of digital technologies and react to problems which are already identified. As described in this article, one of these problems is to achieve a commonly shared understanding of freedom of panorama which, for the time being, is characterized by a diversity of regulatory approaches in the EU member states. Each existing approach has its own benefits, but it does not always fully reflect the needs of the present times: in some cases, the interests of the author are unreasonably limited; in others, the interests of society are not accounted for in full. It seems that the model of freedom of panorama proposed in this article offers due consideration to the interests of all parties, both authors and society. Taking into account the object which is embodied in the image and looking at whether the purpose of the use of this image meets the conditions of the three-step-test, this approach is recommended as possibly the most fitting response to the challenges outlined above.

It is also important to note that the issues discussed in this article do not exhaust all of the existing problems associated with the freedom of panorama. In particular, how will the Directive on Copyright in the Digital Single Market affect freedom of panorama? Is the distribution of images of works on the internet permitted within the framework of freedom of panorama or does this only cover physical usage? And how, above all, do we distinguish between commercial and non-commercial use? While this last issue has been attracting considerable attention over the recent years, ultimately all these uncertainties indicate that further exploration of freedom of panorama remains relevant and necessary.