To what extent should uses of public architectural works be permitted under European copyright law?

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ABSTRACT

This paper argues that the optional exception to copyright law contained in Article 5(3)(h) of Directive 2001/29/EC should be extended to clearly include commercial uses of copyrighted works, and should be made mandatory across the European Union. Copyright law must be clearly justifiable, requiring a balance between the private interest of right holders and the wider public interest. It is argued that the significant role of architecture in society is such that there is great public interest in the public being able to freely use copyrighted architectural works for commercial and non- commercial purposes, and that copyright law must therefore be reformed to reflect this. It is argued further that the distinction between commercial and non-commercial uses is unworkable following the digital revolution, and that an unharmonised panorama exception is incompatible with the European Union's Digital Single Market Strategy and creates uncertainty amongst European citizens.

1. INTRODUCTION

Architectural works were first legally recognised as deserving protection under copyright law with the revision of the Berne Convention in 1908.[1] In the use of copyright law as a mean of giving creators certain exclusive rights over their literary and artistic works, it was thereafter accepted that architecture should be afforded protection as works created with the purpose of presenting 'a visual spectacle'.[2] Indeed, architectural works involve not merely creativity and aesthetic appreciation but also a deep understanding of the impact of physical space on productivity, health, personal safety, order and overall well-being.[3]

Much like the pharmaceutical and software industries, the very high levels of investment, time, skill and labour required to bring a proposed project to fruition give particular weight to the need for copyright protection. Unlike these industries, however, architecture is notable for its public element.[4] Even private works of architecture have the ability to take on some public significance when forming part of the overall physical landscape of society, as is reflected in the use of planning regulations in the control of private use of land.[5] Also reflecting this public element in the context of the European Union, Directive 2001/29/EC introduced an optional exception to the exclusive right of reproduction and communication to the public under Article 5(3)(h) for reproductions and communications of architectural works.[6] This is commonly known as the 'freedom of panorama'.[7]

This article will argue that freedom of panorama under European law does not go far enough to protect the public interest in using copyrighted works of architecture. Crucially, it will be argued that the 'panorama exception' must be extended to include both commercial and non-commercial uses, and be made mandatory throughout the European Union. This will be argued on two primary bases. First, architecture has a particularly central role in society, both in the context of the everyday lives of European citizens, as well as forming part of the 'discourse' about society itself. Second, it will be argued that enforcing copyright law in the context of public works of architecture runs contrary to developing social norms and practices, particularly in regard to the internet. It will also be argued that, in failing to harmonise this exception to copyright law, thereby allowing a distinction between commercial and non-commercial works to subsist in certain European Member States, the European Union is hampering its own efforts to create an internal market in the digital age.

First, it is necessary to lay down a standard against which copyright law in the European Union can be assessed. Part 2 of this Article will therefore discuss the basis on which copyright law is justified. It will be argued here that

1 Berne convention for the protection of literary and artistic works of September 9, 1886, completed at Paris on May 4, 1896 ('Berne Convention').

2 L. Altman, 'Copyright on Architectural Works' (1992) 33 IDEA: The Journal of Law and Technology 1, 7-8, cited in M. Mathis, 'Function, Non function, and Monumental Works of Architecture: An Interpretative Lens in Copyright Law' (2000) Cardozo Law Review 595, 595.

3 For example see, on the one hand, the redevelopment of Times Square, New York, aiming to make the district safe 'for everyone' (J. Ockman, 'What is Democratic Architecture?' (2011) Dissent 65, 67) and on the other hand, the rise in 'defensive urban architecture' such as 'unsleepable' benches aimed at deterring the homeless population from a particular area (K. de Fine Licht, 'Hostile urban architecture: A critical discussion of the seemingly offensive art of keeping people away' (2017) Nordic Journal of Applied Ethics 27, 29).

4 A. Benjamin, Writing Art and Architecture (2010, Melbourne: Re.Press) 12-13.

5 N. Harris, 'Discipline, Surveillance, Control: A Foucaultian Perspective on the Enforcement of Planning Regulations' (2011) 12 Planning Theory and Practice 57, 64.

6 Directive No 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 ('Infosoc Directive').

copyright law is only justifiable to the extent that an appropriate balance is struck between the interests of right holders and those of the public. Therefore, to the extent that copyright can be found to have failed to strike such a balance, reform is required.

Following this, so as to justify the implementation of a mandatory exception for uses of public architectural works in the European Union, a key question to be answered is how architecture is different from other protected works so as to warrant a difference in treatment. Part 3 of this article will seek to answer this question by reference to the standard laid down in Part 2: is an appropriate balance reached between private and public interests? As such, it will be argued that the public has a particularly strong interest in using copyrighted works of public architecture, due to the central role of architecture in public and private life, as well as the relatively recent development of internet as a key tool in the dissemination of knowledge.

Finally, Part 4 of this article will consider the potential implications of leaving the 'panorama exception' non-harmonised in the European Union. This will include examining such impact within the context of the internet, educational initiatives, and the European internal market. It will be argued here that leaving the law non-harmonised creates a lack of legal certainty, an increasing gap between the law and social norms, and the potential to inhibit cross-border educational initiatives.

2. THE JUSTIFICATION OF COPYRIGHT LAW

In this chapter it will be argued that copyright protection over architectural works is only justified to the extent that it strikes an appropriate balance between the private interest of copyright holders and the public interest. It will be argued that, due to the inherently monopolistic nature of copyright, its integration into the European legal system requires clear justification. Such justification is generally made on the basis that intellectual property rights provide an incentive for creators to create new works, and that this is ultimately in the public interest due to these works eventually passing into the public domain and furthering human technological and creative progress for all. To the extent that public interest cannot be shown, however, or to the extent that public interest can be shown to be greater where there is freedom to use copyrighted works, this justification for copyright law breaks down.

2.1 Justifications for copyright

While we will not enter into a detailed discussion here as to the monopolistic nature of copyright law, it is submitted that works of architecture are 'intellectual works' that are non-exclusive, public goods (meaning that they can be possessed, in abstract, by an unlimited number of persons simultaneously, and can be reproduced for this purpose at very little cost).[8] Our definition of monopoly may be derived from the European Court of Justice in Hoffman-La Roche & Co AG v Commission of the European Communities:

> *"a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers, and ultimately of the consumers."* [9]

In artificially imposing exclusivity to an intellectual work, copyright law attaches an otherwise non-existent (or at least low) cost to the transfer of intellectual works for all persons but the right holder.[10] As such, it is submitted that the exclusive rights provided by copyright law place the right holder in a position of economic strength that affords her the power to behave to an appreciable extent independently of her competitors. Despite this, the copyright system is widely considered to be a justifiable aspect of the European legal system, on two primary bases.

First, copyright is justifiable in that it provides an incentive for creators to create works that will eventually enter the public domain and may benefit society as a whole. The second, related, justification is that copyright acts as a reward for those who invest their time and resources into, hypothetically, furthering human progress. We will now examine these in further detail.

[7] M. Dulong de Rosnay and P. Langlais, 'Public artworks and the freedom of panorama controversy: a case of Wikimedia influence' (2017), 6(1) Internet Policy Review 1, 3.

[8] M. Clancy and G. Moschini, 'Incentives for Innovation: Patents, Prizes, and Research Contracts' (2013) 35 Applied Economic Policy and Perspectives 206, 207.

[9] ECLI:EU:C:1979:36 Hoffmann-La Roche & Co. AG v Commission of the European Communities at 4; see also J. Duffy, who defines monopoly as exclusive or dominant control over a market (J Duffy, 'Intellectual Property as Natural Monopoly' (2005, Unpublished research paper) 6, <https://law.utexas.edu/wp-content/uploads/sites/25/duffy_intellectual_property_natural_monopoly.pdf>).

[10] See generally on this point J. Gans, P. Williams and D. Briggs, 'Intellectual Property Rights: A Grant of Monopoly or an Aid to Competition?' (2004) 37(4) Australian Economic Review 436.

2.1.1. Copyright as an incentive

This argument can be detected in the European Union's objective in adopting the Infosoc Directive – to 'stimulate creativity and innovation' and 'facilitate the development of new technologies now under the purview of European copyright law'.[11] In order for the creation of intellectual works to be worthwhile (and thereby in order to stimulate the production of creative works), the argument goes, creators must be able to capture the value of their work.[12] An investment of time, labour, and potentially other resources is required in order to create intellectual works, and as such potential creators may be less willing to create – or at least to release their creations to the public - without the possibility of this investment being recouped. In the interest of achieving a socially optimal rate of innovation, copyright is used to enable creators to capture the value of their work.[13] By providing creators with the exclusive right to financially exploit this work, they are protected from the possibility of other market actors benefiting from it commercially without having to invest their own resources.

Without such protection, creators will be unable to capture the value of their work, and may be deterred from innovating further in future.[14] This is the clear dynamic benefit of copyright law – future innovators know that, if they were to invest time and labour in creating an intellectual work, they will enjoy a monopoly over that work, and their ability to capture its value is assured.[15] Without such protection, the creator may be deterred from introducing their product to the market, and as such society as a whole may not benefit from this innovation.[16] As such, society as a whole benefits from the copyright system - not only does it incentivise wider investment in research and innovation, but it increases the likelihood that innovations will be introduced to the public, and eventually move into the public domain.

2.1.2 Copyright as a reward

A further justification for copyright – one that is closely related to the idea of incentivising innovation – is that those who create innovations must be rewarded for their efforts. This can be seen in the term of copyright protection – while we are able to exclude others from using our works for 70 years, this is considered sufficient recognition of the investment we have made.[17] This is evidence also of an understanding that such behaviour should not be over-rewarded. For instance, in regard to the term of protection for performers, the European Commission stated that the term acts as "recognition and reward" for performers' creative contributions to society.[18] This is derived from the idea of having the right to the 'fruits of our labour' – [19] that which we create with our own intelligence, effort, and perseverance, ought to be considered our property.[20] In the context of intellectual property, this argument applies to the application of 'intellectual labour' to the 'intellectual commons' (information that is publicly accessible).[21] Creators of intellectual works do not merely identify information that anyone could likewise discover, but use intellect, perceptiveness, and pioneering spirit to bring new creations into existence, otherwise known as the 'finders keepers' rule.[22] While it is beyond the scope of this article to examine the validity of these justifications, it is clear that a balance between private and public benefit must be found to exist for copyright to be clearly justifiable,[23] and this balance must be maintained in relation to architectural works.

2.2 The importance of public interest in justifying copyright

Implicit in the above justifications for copyright is an understanding that these will only hold water to the extent that the public interest is not unduly prejudiced.[24] Indeed, the incentive argument relies on public benefit entirely – innovation is incentivised because it benefits society as a whole - while the reward argument is limited by the period of protection, as well as the criteria according to which work is eligible.[25] As Drassinower notes, despite much debate as to the nature of copyright law, its structure as a balance between right-holders and users is generally undisputed.[26]

[11] European Commission, 'Commission welcomes adoption of the Directive on copyright in the information society by the Council' IP/01/528 (9 April 2001, European Commission: Brussels) <http://europa.eu/rapid/press-release_IP-01-528_en.htm>.

[12] S. Besen and J. Raskind, 'An Introduction to the Law and Economics of Intellectual Property' (1991) 51(1) Journal of Intellectual Perspectives 3, 5.

[13] Ibid.

[14] W. Landes and R. Posner, The Economic Structure of Intellectual Property Law (2003, Cambridge: Harvard University Press) 11.

[15] Ibid., 13.

[16] Ibid.; W. Landes and R. Posner, 'An Economic Analysis of Copyright Law' (1989) 18 Journal of Legal Studies 325, 326.

[17] The Berne Convention protects copyright for a term up to 50 years, whereas European Copyright Law protects copyright for up to 70 years (Berne convention for the protection of literary and artistic works, of September 9, 1886, revised at Stockholm on July 14, 1967 (1967, Geneva: United International Bureaux for the Protection of Intellectual Property) ('Berne Convention') Article 7; Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, Article 1).

[18] M. Barnier, 'Copyright: Extension on the Term of Protection for Performers' (12 September 2011, Brussels: European Commission) <http://ec.europa.eu/archives/commission_2010-2014/barnier/headlines/news/2011/09/20110912_en.html>.

[19] E. Hettingher, 'Justifying Intellectual Property' (1989) 18 Philosophy and Public Affairs 31, 35.

[20] J. Locke, Second Treatise on Government (1821, London: R Butler), Chapter 5.

[21] E. Hettinger (1989) 35.

[22] I.M. Kirzner, 'Entrepreneurship, entitlement and economic justice' (1978) 4(1) Eastern Economic Journal 9, 17.

[23] P. Goldstein, Copyright's Highway: From Gutenberg to the Celestial Jukebox (1994, Stanford: Stanford University Press) s168.

[24] As argued by T. MacCauley in his speech to the House of Commons in 1841, "monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good" (quoted in H.M. Treasury, Gowers Review of Intellectual Property (December 2006, London: Stationery Office) at 4.26).

[25] L. Bentley and B. Sherman, Intellectual Property Law, 4th edition (2014, Oxford: Oxford University Press) 38.

[26] A. Drassinower, 'From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law' (2009) 34(4) The Journal of

One way in which this balance is maintained in copyright law in the European Union is in the list of exceptions and limitations to copyright infringement, to which we will now turn.[27]

Article 5 of the Infosoc Directive lays out a list of over 20 exceptions and limitations to the exclusive right of reproduction under copyright law (Article 5(1), (2) and (3)) as well as to the right to communicate a work to the public (Article 5(3)). It must be noted that, under the Directive, the rights of the author are crucial - the principal objective of the Directive is the establishment of a high level of protection for right holders,[28] and as such Member States must ensure that any application of the Directive's exceptions is in accordance with the 'three-step test'. Under this test, exceptions "shall only be applied in certain special cases which 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".[29]

The Article 5 exceptions, if implemented by a particular Member State, allow the public a degree of free use concerning certain acts of exploitation of copyrighted work.[30] There are four main categories of exception: promotion of freedom of expression,[31] access to knowledge,[32] the requirements of justice and the functioning of the government, and private or personal use.[34] Each category indicates a key interest of the wider public that, in conflicting with otherwise exclusive rights under copyright law, are specifically exempted in the interest of achieving an appropriate and reasonable balance between interests. This may be compared to the more flexible 'fair use' doctrine in the United States, allowing the use of copyrighted work for 'criticism, comment, news reporting, teaching, scholarship, or research'.[35] It is clear that in both cases copyright law must allow reasonable and legitimate use of protected work by the public, provided that both right holders and users have their interests respected.

What is considered a reasonable and legitimate use of protected work by the public differs, however, across the Member States of the EU. Indeed, due to the 'shopping list' of optional exceptions, Member States have been able to adapt copyright law - including their implementation of the panorama exception - so as to most closely approximate their national legal traditions as possible.[36]

In the civil law jurisdictions of France and Italy, for instance, the panorama exception has been only partially implemented. Architecture is protected as a 'work of the mind' by French copyright law under Article L122-2 of the French Intellectual Property Code.[37] Through the Law for a Digital Republic, modifying Article L 122-5 of the Intellectual Property Code, French law recognises a limited right to freedom of panorama.[38] Under this article, architecture and sculptures located permanently on public roads may be reproduced for all non-commercial uses by natural persons.[39] It must be noted, first, that it is not specified what constitutes a commercial use; and second, that this exception does not apply to legal persons.[40]

In Italian law, architecture is protected under the Italian Copyright Law of 22 April 1941,[41] as well as Italian cultural heritage law.[42] There is no specific part of Italian law that allows for freedom of panorama, however Italian law does allow for the use of copyrighted works for personal use, or the use of low-resolution images on the internet for scientific or educational use, or other digital reproductions, provided that such use has no commercial purpose.[43] This is supported by comments made by the Ministry of Cultural Heritage, which has stated that works can be produced for educational purposes that are not for profit.[44]

In explaining why the full panorama exception has not been implemented in these States, the cultural background of each may prove illuminating. French copyright has its basis in natural law and the belief that creative works are the expression of the personality of the author.[45] Accordingly, there is a strong belief that authors have a natural right to have these expressions protected, and this will consequently weigh heavily in any assessment of the appropriate balance between the rights of authors and those of the public.[46]

Corporation Law 991, 992.

27 K. Olson, 'The Future of Fair Use' (2014) 19(4) Communication Law and Policy 417, 418.

28 ECLI:EU:C:2011:631 Football Association Premier League Ltd and Others v QC Leisure and Others at 186.

29 Infosoc Directive, Article 5(5); Discussed further at section 4.3 of this article.

30 I Katsarova, 'The challenges of copyright in the EU' (June 2015, Brussels: European Parliamentary Research Service) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/564380/EPRS_BRI(2015)564380_EN.pdf> 6.

31 Such as the use of copyrighted works by the press (Article 5(3)(c)).

32 Such as the use of copyrighted works for educational purposes (Article 5(3)(a)).

33 Such as the use of copyrighted works in the course of parliamentary proceedings (Article 5(3)(e)).

34 I. Katsarova (2014) 6-7.

35 17 USC §107 (2006).

36 L. Guibault, 'Why Cherry-Picking Never Leads to Harmonisation' (2010) 1 Journal of Intellectual Property, Information Technology and Electronic Communications Law 55, 56.

37 Code de la propriété intellectuelle (Intellectual Property Code) (France), Article L122-2 .

38 Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique, JORF n°0235 du 8 octobre 2016 (France), Article 39.

39 Ibid.

40 M. Dulong de Rosnay and P. Langlais (2017) 7.

41 Legge 22 aprile 1941, No. 633, Protezione del diritto d'autore e di altri diritti connessi al suo esercizio (Law for the Protection of Copyright and Neighbouring Rights) GU No. 166 del 16-07-1941 (Italy).

42 Decreto legislativo 22 gennaio 2004, n. 42, Codice dei beni culturali e del paesaggio (Code of the Cultural and Landscape Heritage) GU No. 45 SO No. 28 del 24-02-2004 (Italy).

43 Law for the Protection of Copyright and Neighboring Rights (supra note 62), Article 71-sexies and 70.

44 Wikimedia, 'Wiki Loves Monuments 2012 in Italy / MiBAC' (updated 2 December 2017, Wikimedia.org) <https://commons.wikimedia.org/wiki/Commons:Wiki_Loves_Monuments_2012_in_Italy/MiBAC>.

45 A. Françon and J. Ginsburg, 'Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work' (1985) 9 Columbia-VLA Journal of Law and the Arts 381, 383.

46 V. Zlatarski, '"Moral" Rights and Other Moral Interests: Public Art Law in France, Russia and the United States' (1999) 23 Columbia-VLA Journal of Law and the Arts 201, 203.

Similarly, Italy has a culture that focuses on the preservation of cultural goods, including strong copyright and moral rights over such goods.[47] However, the 'incentive' argument has featured in justifications for intellectual property law in Italy since the fifteenth century.[48] The public value of bringing works into being and ensuring they are capable of enjoyment by the wider public is recognised in Italian law, as is evident by the introduction of exceptions and the willingness of some local authorities to allow reproductions in certain specified cases.[49] Romano argues that there is an increasing trend towards favouring the interests of the public over the interests of the right holder in broader Italian copyright law, but without amendment or clarification of the freedom of panorama in Italian law, this can only be limited.[50]

On the other end of the spectrum, the public interest in architectural works is nothing new in Germany and the United Kingdom. In Germany, the Bavarian Law on the Protection and Ownership of Products of Literature and Art (1840) excluded works of architecture and public monuments from the central standard of copyright protection.[51] The current version of the law has been in place since 1965, the officially reasoning stating that "the establishment of a work of art in public places expresses that the work is thus devoted to the general public."[52] It is in this sense that the interests of right holders and the public are balanced - creators of intellectual works make the choice to create or place their works within the public domain. Just as they are not entitled to claim ownership over a piece of the street, likewise they cannot claim ownership over a visual space. This may be seen as an extension of physical public space into the more abstract 'public domain' – if it has been placed, by the author, in public, it should be considered a 'common good' in the same manner.

Similarly, in the United Kingdom the panorama exception has been implemented in Section 62 of the Copyright, Designs and Patents Act 1988. This states that copyright in architectural works will not be infringed by graphic representation, photograph, film, or visual broadcast (three dimensional reproductions excluded).[53] There is very little ambiguity about this provision, with little case law arising regarding freedom of panorama in the United Kingdom,[54] however "the risk to which a citizen would be exposed when photographing or sketching in any urban neighbourhood" was considered sufficient justification for similar provisions well in advance of the Infosoc Directive being passed.[55] In this regard it seems that the United Kingdom and Germany has considered the full implementation of the panorama exception to be itself drawing an appropriate balance between the interests of right holders and those of the public.

The argument made in this part is that copyright is a legal fiction implemented to incentivise creation and innovation, and the dissemination of creations throughout society. It is, in effect, a limited monopoly right, giving innovators the exclusive right to exploit their creations and as such it is submitted that it should be maintained in law only to the extent that it can be justified by reference to public benefit. It is on this basis - the necessity of justifiability - that this article proceeds.

This is reflected in the Infosoc Directive's list of optional exceptions - the law recognises that there are indeed cases where the restriction on the public arising from copyright goes too far, and areas of freedom should be carved out of the law to rectify this. However, due to the optional nature of these exceptions, there is a limit to which the public benefit (and therefore the justifiability) of copyright law can be ensured. Civil law jurisdictions such as France and Italy place significant weight on the interests of authors to the extent that, it is submitted, the importance of the public interest is given too little consideration. Even where there is an understanding of the public interest in participating in and experiencing cultural works such as architecture, for instance in Italy (as will be argued in Section 3) the failure to implement a full exception for the use of copyrighted public architectural works may ultimately inhibit public enjoyment of their cultural heritage. This is particularly evident where Member States have dis-

[47] See, for example, disputes over the reproduction of Michelangelo's David, discussed in R. Romano (2018) 3.

[48] R. Romano (2018) 1.

[49] J. Lobert, B. Isaias, K. Bernardi, G. Mazziotti, A. Alemanno and L. Khadar, 'The EU Public Interest Clinic and Wikimedia present: Extending Freedom of Panorama in Europe' (2015) HEC Paris Research Paper No. LAW-2015-1092 <https://www.ssrn.com/abstract=2602683>14.

[50] R. Romano (2018) 3.

[51] Bayerische Gesetz zum Schutz des Eigentums an Erzeugnissen der Literatur und Kunst gegen Nachdruck (Bavarian Law on the Protection of the Ownership of Products of Literature and Art) (1840, Bayern Ständeversammlung Kammer der Abgeordneten: Bavaria) 460; <https://play.google.com/store/books/details?id=vZdBAAAAcAAJ&rdid=book-vZdBAAAAcAAJ&rdot=1> (Germany) (Discussed in M. Dulong de Rosnay and P. Langlais (2017) 4).

[52] Entwurf eines Gesetzes über Urheberrecht und verwandte Schutzrechte (Draft Law on Copyright and Neighboring Rights) BT-Drs 4/270 23 March 1962 (Germany) Section 76.

[53] Copyright, Designs and Patents Act 1988 (c 48) (United Kingdom) Section 62.

[54] B. Newell, 'Freedom of Panorama: A Comparative Look at International Restrictions on Public Photography' (2011) 44 Creighton Law Review 405, 419.

[55] M. Dulong de Rosnay and P. Langlais (2017) 5.

[56] P. Jones, The Sociology of Architecture: Constructing Identities (2011, Liverpool: Liverpool University Press) 29.

[57] A. Bertoni and M. Montagnani (2015) 48.

[58] A. Ravetz, Council Housing and Culture: The History of a Social Experiment (2003, Abingdon: Routledge) 2.

[59] Ibid., 6.

[60] K. Scanlon, M. Fernandez Arrigoitia, and C. Whitehead, 'Social Housing in Europe' (2015) 17 European Policy Analysis 1, 2.

[61] Ibid.

[62] A. Ravetz (2003) 181.

[63] K. Scanlon et al (2015) 4.

[64] P. Watt, 'Respectability, roughness and 'race': Neighborhood place images and the making of working-class social distinctions in London' (2006) 30(4) International Journal of Urban and Regional Research 776, 779.

[65] L. Wacquant, 'Urban Outcasts: Stigma and Division in the Black American Ghetto and the French Urban Periphery' (1993) 17(3) International Journal of Urban and Regional Research 366, 367.

[66] Ibid.

[67] D. Hancox, 'Attack the block: how grime's visuals went pop' (20 April 2017, The Guardian) <https://www.theguardian.com/music/2017/apr/20/attack-the-block-how-grimes-visuals-went-pop>.

[68] F. Kinsella, 'Red Lebanese reveal a different side of Paris' (26 May 2015, i-D) <https://i-d.vice.com/en_uk/article/bjnvdv/red-lebanese-reveal-a-different-side-of-paris>.

tinguished between commercial and non-commercial works, as we will examine in more detail in Section 3.2.

3. ARCHITECTURE AS A SPECIAL PUBLIC CONCERN

The justifiability of copyright protection of works of architecture depends, as we have discussed, on an appropriate balance being struck between the interests of right holders and those of the public at large. It is clear from examining the applicable law in individual European Union Member States that where this balance is struck will differ markedly from state to state, ultimately due to varying perceptions as to the importance of one interest group in relation to the other. The European Union as a whole, we have noted, emphasises the interests of the author as being of crucial importance, and that exceptions to copyright law require restrictive interpretations in light of this. In this chapter it will be argued not that this emphasis is incorrect, or that exceptions to copyright law should be expansively interpreted, but rather that in balancing the rights of authors and the public at large, the significance of the latter has been understated by certain States. In making this argument discussion will begin with the significant public role played by architecture - socially, politically, and culturally – and will then move on to examine certain respects in which limitations to the panorama exception conflict with this public role.

3.1 The role of architecture in society

As Paul Jones notes, "all but the most functionalist of definitions of architecture would position the built environment as a carrier of social meaning ... Architecture is thus a 'discourse', inasmuch as it is a form and a set of practices through which social meanings are communicated and visions of the social world are sustained."[56] Similarly, Bertoni and Montagnani state that 'public art' works, including architecture, can embody cultural, economic, social, and environmental interests.[57] In establishing the meanings that architecture carries, we can look at its social and political significance. If architecture is discourse, what is it that architecture tells us? In answering this question we may look at two types of architecture by way of example: social housing (termed 'council housing' in the United Kingdom) and monumental nationalist architecture.

The introduction of council housing in 1930s Britain was viewed as a 'brave new social experiment', eventually leading to more than a third of the population, at its peak, living in council housing by 1975.[58] It has been argued to be just, if not more, a significant part of working class history as employment and trade unionism.[59] In some European states, such as the Netherlands, France, and Sweden, social housing has been treated not as limited to the working classes but as a mechanism for providing housing to wider society.[60] In other states, such as the UK and Belgium, social housing has been used to raise the living standards of lower income households and increase the efficient functioning of the welfare state.[61] In addition to – and subsumed within – its socio-political function, social housing has historically been and continues to be recognised for its architectural value.[62] The Barbican Estate in London, a Grade II listed building, is a world famous example of Brutalist architecture, while Le Corbusier's Unité d'Habitation is a UNESCO World Heritage Site.

Common across all Member States is the demographics making up social housing tenants – the old, the young, ethnic minorities, and low-income single parent households are the majority.[63] As a result, social housing is seen by many as part and parcel of their demographic groups, and the political and social realities that are attached to these. Indeed, as Paul Watt has noted, place of residence is increasingly treated as a more significant point of social distinction than other traditional signifiers such as occupation, and that feelings of fear and disgust towards the 'other' in society leads to greater spatial distance between these groups.[64] Similar trends can be seen in the formation of 'ghettos' in European states such as Belgium, Germany, Italy, and France.[65] Consequently, these spatial distinctions between different groups in society – particularly demarcated by socio-economic class and ethnicity – can become key aspects of group identity.[66]

British council housing in particular is often seen as an inextricable part of the lives of working class and ethnic minority British youths. For example, the Barbican estate, Meridian Walk, Trellick Tower, and the Alexandra Estate have all appeared in music videos in the last five years.[67] Even when the music artists themselves have not grown up in these estates, visually positioning themselves within them can be used as a way to connect themselves with their target audience. In a similar respect, art collective Red Lebanese are fameds for photographing life in the French banlieues from an inhabitant's perspective, with the architecture itself operating as an often explicit and always felt backdrop to the lives of France's low-income, ethnically diverse populations.[68]

Going back to architecture as a form of 'discourse', in revealing what it is that these social housing projects 'say' to us, it is helpful to turn to the thought processes of the architects that created these works. Le Corbusier, architect of the famous Unité d'Habitation in Marseilles and Berlin, who inspired a multitude of high rise social housing projects throughout Europe and beyond, stated that "we must create a mass-production state of mind."[69] Le Corbusier pursued in his architecture a 'new world order' in which the needs of society - food, sun, and "necessary comforts" – are centred.[70] However, the construction of this world order was only for "elites that must reflect so as to be able to lead".[71] Ernő Goldfinger, architect of Trellick Tower in London, similarly outlined his vision for cities of the future: "centres of civilisation where men and women can live happy lives. The technical means exist, to satisfy human needs. The will to plan must be aroused. There is no obstacle, but ignorance and wickedness."[72]

This interest in designing buildings to pursue social and political aims is still alive and well today, with the 2008 Bauhaus Award for architecture specifically adopting as its theme solutions to housing shortages internationally, particularly in relation to urban poverty.[73] The award title 'Minimum subsistence level housing' was directly borrowed from the International Congress of Modern Architecture (CIAM) 1929 Conference.[74] CIAM, specifically organised around the idea of 'architecture as a social art', aimed to utilise architecture as a means of furthering certain political and social goals.

On the other end of the spectrum, large-scale, state-funded 'iconic' monuments and works of architecture generally are built not merely with an understanding that the work will become part of the lives of the public at large, but will be aimed at making the work 'socially meaningful' to the public.[75] Vale gives the example of Ringstrasse in Vienna, the buildings along which were constructed by a new liberal middle class that, instead of 'palaces, garrisons, and churches' chose to install buildings of constitutional government and higher culture, as an expression that building was now in the communal power of the citizenry.[76] In 20th century Germany, Albert Speer's 'Berlin Plan' was designed to create 'a Berlin Champs Elysées two and a half times the length of the original', culminating in a Great Hall designed to be "essentially a place of worship" for Hitler.[77] Later in Germany's history, the Reichstag with its transparent dome was erected as a building that should 'keep no secrets', to be inserted into a national discourse of transparency and accessibility.[78] If social housing architecture is 'discourse' as to the organisation of society, monumental architecture may be conceived of as 'discourse' regarding the identity of society as a political entity.

It is equally possible, of course, to understand other creative works - such as art and literature – as 'discourse'. Both are capable of being, and indeed are treated as, messages about the world, humanity, society, and individuals, and we nevertheless consider works of art and literature, in general, to be worthy of copyright protection.[79] But architecture is intended by its creators to relate to the public in a different way. As has been discussed, large scale residential architecture can become hugely culturally significant to its inhabitants and those who live in its vicinity. In many of these cases, residents are part of low-income households with less choice in where they live than those of higher income brackets.[80] Those who live in surrounding areas are also unable to escape the 'ugly' visual presence of these structures.[81] Likewise, large-scale monumental architecture is intended to be visually arresting; to force itself into the psyches of passers-by.[82] But we need not limit our analysis as such. All buildings become part of public life, whether these are places that we live or work, or whether they are simply part of our surroundings. They become characteristics of neighbourhoods and cities, act as landmarks by which we can physically locate ourselves, and they are unavoidable. We do not 'consume' architecture as we do art and literature - architecture is often forced on us whether we like it or not. Likewise, as Jacobs notes, buildings are not merely stand-alone 'objects' - their continued survival in the public space requires the support of and continued use by the society at large.[83]

This public element of architecture is recognised by those who commission and create works of architecture or, at the very least, by council urban planning departments who are able to grant or withhold permission for certain projects. For instance, guidance issued by the Local Government Association in the UK states that "planning is about upholding the wider public interest for the benefit of the whole community and not just individual constituents or particular interests".[84] While public interest in a building is particularly heightened in cases where public funding is used, it is clear that the public interest in a building will be of great importance regard-

[69] Le Corbusier, Towards a New Architecture (Translated by J Goodman) (2007, Los Angeles: Getty Research Institute) (First published 1931) 245.

[70] Ibid., 157.

[71] Ibid.

[72] N. Warburton, Ernö Goldfinger: The Life of an Architect (2004, London: Routledge) Chapter 7 <http://nigelwarburton.typepad.com/files/ch7-the-sensation-of-space.pdf>.

[73] U. Knöfel, 'Bauhaus Launches Social Housing Architecture Award' (11 January 2008, Spiegel Online) <http://www.spiegel.de/international/germany/building-for-the-poor-bauhaus-launches-social-housing-architecture-award-a-528098.html>.

[74] Ibid.

[75] P. Jones (2011) 27.

[76] L.. Vale, Architecture, Power, and National Identity (1992, New Haven: Yale University Press) 21.

[77] L Vale (1992) 23.

[78] G. Delanty and P. Jones, 'European Identity and Architecture' (2002) 5(4) European Journal of Social Theory 453, 457.

[79] With the exception, of course, of pro-piracy or anti-copyright groups such as the League of Noble Peers.

[80] See, for example, Greater London Authority, Housing in London 2017 (February 2017, London: Greater London Authority) 54.

[81] A. Kearns et al, 'Notorious Places: Image, Reputation, Stigma. The Role of Newspapers in Area Reputations for Social Housing Estates' (2012) 28(4) Housing Studies 579, 590.

[82] H. Reed, 'Monumental Architecture: Or the Art of Pleasing in Civic Design' 1 Perspecta 50, 56.

[83] J. Jacobs, 'A Geography of Big Things' (2006) 13 Cultural Geographies 1, 22.

less of whether the building is publicly or privately owned.

What, then, of the subject of architecture's discourse - the society itself? As has been noted above, while some European Union Member States do allow the public to reproduce and communicate to the public works of architecture and public art, this exception to copyright infringement is optional. Many states do not, as we have seen, allow such reproduction or communication at all except in certain instances, such as in distinguishing between commercial and non-commercial uses. It could be said that this harks back to Le Corbusier's writings about architecture as a force for social reform – only the few must be given the privilege of working on this reform, of determining the measures that must be taken: "Art is not a popular thing, still less a deluxe whore. Art is a necessary foodstuff for elites that must reflect so as to be able to lead".[85] Preventing the public at large from making reproductions of architectural works such as photographs or artwork, has the capacity to remove the public's ability to create their own 'discourse' about the world in which they live. The image of architectural works can have, and are often intended to have, significant impacts on the culture and everyday lives of those who interact with it. As such, the public interest in being able to interpret and communicate these images is hugely significant. Additionally, as we will now go on to discuss in greater detail, while the public interest in reproducing architectural works may be acknowledged in a distinction between commercial and non-commercial works, for example, this distinction suffers badly from a lack of clarity and definition.

3.2 Commercial and non-commercial uses of architectural works

A significant public concern that may arise from certain restricted formulations of the panorama exception is the uneasy distinction between commercial and non-commercial uses. As we have noted in the previous chapter, one way in which states seek to balance the public and private interest in copyright law applicable to architecture is by allowing 'non-commercial' uses of such copyrighted work. One example of the application of this criterion can be seen in the case *BUS v Wikimedia Sverige*, in which the Swedish Supreme Court held that including photographs of public sculptures on an internet database was not commercially insignificant and therefore conflicted with the normal exploitation of the work.[86] This is despite the fact that the user of the photographs in this case was a non-profit organisation – Wikipedia – with the sole purpose of disseminating knowledge to the public. Furthermore, it held that it was a legitimate interest of the right holder to seek compensation for use of his or her work in this way, despite the database being in the public interest.[87] Indeed, many commentators have noted the blurred distinction between commercial and non-commercial works, particularly in view of the role of internet in today's society.[88] In addition to this, excluding commercial uses from the panorama exception may go too far in privileging the rights of copyright holders, even where commercial purpose is undeniable. Each of these issues will now be addressed in turn.

3.2.1 Educational uses

It must be borne in mind at this point that many educational uses are unaffected by the distinction between commercial and non-commercial uses, for the simple reason that many such uses clearly fall into the latter category.[89] On the other hand we must not understate the potential impact that this may have on existing educational initiatives as well as the potential for future initiatives and collaborations with commercial ventures.

It has been noted that 'massive open online courses' (MOOCs) established in collaboration with commercial platforms may be in jeopardy where these utilise reproductions of architectural works (for instance, courses on architecture or public art).[90] Sweden, for instance, while allowing educational uses, does not extend this exception to the digital sphere.[91] As Lobert and others note, the majority of European universities are engaged in the development of such initiatives, and these are often hosted on third party commercial platforms.[92] This is, in this sense, a similar concern to that raised by the sharing of images on social media. While the use of copyrighted works is, in itself, non-commercial, its taking place online using third party commercial platforms could be sufficient to render this use an infringement.

[84] Local Government Association, A councilor's workbook on planning (August 2017, London: Local Government Association) <https://www.local.gov.uk/sites/default/files/documents/11.63%20-%20Cllr%20Planning%20workbook_02.pdf> 5.

[85] Le Corbusier (2007) 157.

[86] Bildupphovsrätt i Sverige ek för (BUS) vs Wikimedia Sverige (Case no Ö 849-15) (Sweden) at (20).

[87] Ibid. at (21).

[88] For example, J. Lobert, B. Isaias, K. Bernardi, G. Mazziotti, A. Alemanno and L. Khadar, 'The EU Public Interest Clinic and Wikimedia present: Extending Freedom of Panorama in Europe' (2015) HEC Paris Research Paper No. LAW-2015-1092 <https://www.ssrn.com/abstract=2602683>; M Dulong de Rosnay and P Langlais, 'Public artworks and the freedom of panorama controversy: a case of Wikimedia influence' (2017) 6(1) Internet Policy Review 1; M. Schaake, 'The freedom to snap and share' (9 July 2015, MarietjeSchaake.eu) <https://marietjeschaake.eu/en/the-freedom-to-snap-and-share?color=primary>; J. Reda, 'Freedom of panorama under threat' (22 July 2015, JuliaReda.eu) <https://juliareda.eu/2015/06/fop-under-threat/>.

[89] Namely, any educational use that does not utilise a third party platform or otherwise collaborate with a third party.

[90] J Lobert et al (2015) 9.

[91] Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Act on Copyright in Literary and Artistic Works) (Sweden) Sections 23, 24.

[92] J. Lobert et al (2015) 9.

3.2.2 Visual depiction of location in tourism, film, and advertising

While Sweden's implementation of freedom of panorama includes commercial uses that take place offline, such as books, calendars, and postcards, other states such as France, and Italy prohibit such commercial uses.[93] As we can see from the *case Buren et Drevet v. Lyon*, not even postcards are too small a cause for complaint by architects when the law allows it.[94] Additionally, the use of architecture in film and advertising is, of course, prohibited under national laws excluding commercial uses from the panorama exception.

For example, in 2015 a French court ruled that beer company Kronenbourg had to obtain prior authorisation for their use of the *Château de Chambord* in the background of one of their advertisements.[95] This advertisement was one of a series in which Kronenbourg beer appeared alongside the slogan *'le goût à la française'*, with a famous French monument or building appearing in the background, such as the *Arc de Triomphe* and the *Tour Eiffel*. As commentators have noted, the *Château de Chambord* is a state-owned property.[96] Similarly, outside the EU, the Archdiocese of Rio de Janeiro reportedly successfully sued Columbia Pictures for copyright infringement for the appearance of the Christ the Redeemer statue in the film *2012*.[97]

As Jensen notes, the setting of a film is one of its most crucial aspects.[98] Physical filming locations allow audiences to 'escape' to other parts of the world, and allow stories in these locations to be told with perceived authenticity and believability.[99] In countries such as France, film producers are required to pay architectural copyright fees in order to release shots in which protected works are visible.[100] If we consider the fact that monuments such as the Christ the Redeemer statue in Brazil, and the Château de Chambord in France, are prominent aspects of the physical landscape and history of a state, this becomes somewhat problematic for industries such as film, advertising and tourism, particularly those projects with limited funding who may rely on these landmarks to communicate geographical setting and context to audiences.

Restricting the use of architectural works in these contexts may not strike an appropriate balance between the interests of right holders and those of the public. By excluding commercial works from the panorama exception, this could give the right holder the exclusive ability to authorise or prohibit the recognisable depiction of a particular location in film – an extraordinary degree of power over public space and its portrayal in cultural works.

3.2.3 The difficulty of defining 'commercial' uses in the digital economy

The reality of the internet in 2018 is that most online platforms – "a (technological) basis for delivering or aggregating services/content (in digital format)"[101] – are commercial. Revenue may be derived from direct payment, advertising, the sale of end-user data, or acquisition.[102] As was noted in a report for the Committee on Economic and Monetary Affairs, the digital economy is increasingly interwoven with the offline economy, with some companies basing their business model entirely around user generated content such as shared photos.[103] In the context of the internet, therefore, the distinction between commercial and non-commercial may result in a wide range of behaviours falling afoul of copyright law. Particularly in the context of MOOCs, this may inhibit socially useful activities and prevent further innovations in online education.

Even in contexts less obviously beneficial than education, the internet in general plays an important role in enhancing the public's access to news and facilitating the sharing of information generally (as was noted by the European Court of Human Rights in the case *Times Newspapers v United Kingdom*).[104] One key aspect of this is the sharing of images. Approximately 300 million photos are uploaded on Facebook each day, while social media websites Instagram and Snapchat (with 800 and 255 million users respectively as of January 2018) are entirely image-based.[105] One report on internet traffic growth by network equipment manufacturer Cisco has predicted that video will make up 82% of all internet traffic by 2021.[106] Despite the massive scale of image sharing today, sharing taking place in jurisdictions which have not extended the panorama exception to cover 'commercial' uses of copyright protected works may be infringing copyright law, particularly considering the undeniably profit-focused nature of widely used social media platforms.

In light of this, it is submitted that maintaining a commercial/non-commercial distinction in individual Member States, or implementing this distinction in wider European copyright law, would absolutely fail to strike an appropriate balance between the interests of right holders and those of the public.

3.2.4 The encroaching appropriation of public visual space

Indeed, prohibiting even explicitly commercial uses of copyright protected works does not go far enough to protect the interests of the public in a fair and balanced way. In agreement with the justification given for the German panorama exception, that "the establishment of a work of art in public places expresses that the work is thus devoted to the general public",[107] prohibiting commercial uses of

architectural works effectively gives right holders the exclusive right to use the visual public space for commercial purposes.

It is worth pointing out that the use of the visual public space is precisely the object of designing the exterior of a building. Prior to the architect building within the visual public space, a member of the public is, in theory, free to use parts of this space, including for commercial purposes. By allowing architects to remove this freedom simply by designing within this space, lawmakers are necessarily allowing architects not only to build on private land but also to encroach on the public domain.

This could become particularly problematic, first, when the architect has built a place where people live and work, and which has developed cultural significance for sections of the community. The example used above is social housing projects, which have been featured in a number of commercial and non-commercial reproductions, particularly in recent years.[108] Giving architects a monopoly over such areas of visual space does not give sufficient weight to the importance of such visual space to the public. Second, as discussed at part 3.2.2 above, when the relevant work of architecture becomes a landmark that can act as visual shorthand for a geographical location, prohibiting its depiction in commercial works grants an unjustified degree of power to the right holder. In this sense, by excluding commercial uses from the panorama exception, copyright law is privileging the rights of copyright holders to an excessive degree.

3.3 Conclusion

This section has argued that the public benefit in using copyrighted works of architecture should weigh particularly heavily in assessing the justification of copyright law. This argument is made in two primary respects: the role of architecture in society, and the unsuitability of the commercial / non-commercial distinction in allowing socially beneficial uses of copyrighted works. First, it is argued that architecture plays a central role in society, both incidentally, as the setting in which individuals live out their daily lives, and intentionally, as a way of property owners consciously altering public space in the pursuance of various social and political ends. To deny the public the ability to participate fully in this aspect of their lives is not only to objectify the public as an entity that may be talked about only by those who are removed from it. It also denies the reality that architecture exists within public space, and by privatising the visual aspect of this, particularly in urban areas, right holders are taking ownership not only of their creative works, but of previously public areas of visual space.

Second, it is argued that the distinction between commercial and non-commercial works necessarily rules out a number of socially beneficial or otherwise legitimate uses of copyrighted works, such as the uploading of private photos on social media, the use of third-party platforms in online education, or the use of panorama shots in film and advertising. The effective prohibition on the use of public space in all of these cases, it is argued, goes far further than is justified by a balance between private and public interests in copyright law. In conclusion, it is argued that, in an assessment of the appropriate balance between private and public interests, the public interest in the use of architectural works should be given significant weight. This is because architecture plays a far more central role in the lives of the public than other forms of protected work, as well as the fact that prohibiting certain categories of uses under copyright law has the potential to inhibit socially useful or otherwise legitimate activities.

[93] See 1.3 above.

[94] In this case, two artists were unsuccessful in their action against publishers of postcards on which their fountains were visible, as the fountains were not the central feature of the image. Civ. 1ère, 15 March 2005, Place des Terreaux, No 03-14.820 (France) (Discussed in J. Smiers, Arts Under Pressure: Protecting Cultural Diversity in the Age of Globalisation (London: Zed Books) 62.

[95] V. Chaptal and M. du Besset, 'Domanialité publique : Une autorisation était nécessaire pour photographier le château de Chambord' (11 February 2016, SCP Sartorio & Associés) <http://www.sartorio.fr/actualites/flashs-d-info-juridique/641-cabinet-avocats-droit-public-domanialite-publique-une-autorisation-etait-necessaire-pour-photographier-le-chateau-de-chambord.html>.

[96] Calimaq, 'Décret Chambord : le patrimoine livré à l'arbitraire' (3 April 2017, S.I.Lex) <https://scinfolex.com/2017/04/03/decret-chambord-le-patrimoine-livre-a-larbitraire>.

[97] B. Newell (2011) 407.

[98] J. Jensen, 'Hollywood Blackout: Impact of New Architectural Copyright Laws on the Filming Industry' (2016) 2 Texas A&M Journal of Property Law 147, 151.

[99] Ibid., 157.

[100] French Film Commission, 'Film France FAQ' (FilmFrance.net) <http://www.filmfrance.net/v2/gb/home.cfm?choixmenu=FAQ>.

[101] O. Batura, N. van Gorp, P. Larouche, 'Online Platforms and the EU Digital Single Market' (2015, Rotterdam: e-Conomics) <http://ec.europa.eu/information_society/newsroom/image/document/2016-7/nikolai_van_gorp_-_response_e-conomics_to_the_uk_house_of_lords_call_for_evidence_14020.pdf> 2.

[102] Ibid., 4.

[103] O. Batura, N. van Gorp, 'Challenges for Competition Policy in a Digitalised Economy' (July 2015, Brussels: European Parliament) 18.

[104] Times Newspapers Ltd v United Kingdom (No 1 and 2) no 3002/03 & 23676/03, 10 March 2009 (unreported).

[105] D. Tam, 'Facebook processes more than 500 TB of data daily' (22 August 2012, CNET.com) <https://www.cnet.com/news/facebook-processes-more-than-500-tb-of-data-daily/>; Statistica, 'Most popular social networks worldwide as of April 2018, ranked by number of active users (in millions)' (2018, Statistica) <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/>.

[106] Cisco, 'Cisco Visual Networking Index: Forecast and Methodology, 2016–2021' (15 September 2017, Cisco.com) <https://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/complete-white-paper-c11-481360.html>.

[107] Entwurf eines Gesetzes über Urheberrecht und verwandte Schutzrechte (Draft Law on Copyright and Neighbouring Rights) BT-Drs 4/270 23 March 1962 (Germany) Section 76.

[108] For example, music videos.

4. A PROPOSAL FOR HARMONISATION

In this final Section it will be argued that the panorama exception should be made mandatory across the European Union, and extended so that commercial uses of copyrighted public architectural works are permitted under European law. Beginning with an assessment of the impact of a non-harmonised panorama exception, it will be argued that maintaining the status quo fragments the operation of the internal market and fosters uncertainty amongst the public as to what they are and are not allowed to do with copyrighted works of public architecture. It will then be argued that the current law raises serious issues of compatibility with the Digital Single Market as well as principles of competition law. Turning our attention to the other side of the fence, some of the respects in which harmonisation may not be desirable will be addressed, such as in consideration of the need for legislative diversity, and for a high level of protection for authors. The final part of this Section will examine the potential practical realities of an extended panorama exception - how would this be compatible with European law?

4.1 Effects of an non-harmonised panorama exception

A central aim of the European Union is the establishment of the internal market - an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured.[109] In pursuance of this aim, the creation of uniform rules throughout the Union, and thereby the fostering of legal certainty, transparency, and predictability, has been key.[110] The Infosoc Directive is clear in its emphasis on the need for legal certainty in copyright law,[111] and this emphasis continues to be maintained in efforts to modernise copyright law for a digital society - the EU has "a duty to promote a clear legal framework for copyright and related rights that can be understood by all stakeholders, in particular the general public, and that ensures legal certainty".[112] In this respect, members of the public should be able to easily determine their legal rights and freedoms under copyright law throughout the internal market.

Despite this goal, as we have seen, Article 5 of the Directive consists of a long and largely optional list of exceptions to copyright protection. These exceptions allow a significant margin of appreciation amongst Member States, allowing the implementation of the Directive to keep their national laws and traditions intact to as great a degree as possible.[113] This high degree of flexibility has been taken advantage of in relation to freedom of panorama, with the degree of protection afforded to works of architecture varying quite wildly throughout the European Union. As Cammiso notes, the European Union is relatively small, allowing citizens the possibility to travel within two or three countries in a single day, all with different legal standards.[114] Recording one's surroundings on Instagram Live in the morning could be perfectly legal and, one two-hour train ride later, the same act could infringe copyright law.

This relates to what Hugenholtz describes as the "single most important obstacle to the creation of the Internal Market"[115]: the territoriality of copyright law.[116] This refers to the principle that each Member State grants and recognises copyright protection in its own territory by reference to its own laws.[117] As a result of this, ordinary European citizens are faced with completely different legal norms across different Member States in regard to the same facts.[118] Indeed, in the European Commission's report on the public consultation on the panorama exception, it is clear that, whether or not an individual personally experiences problems in uploading potentially copyrighted images of architectural works, there is uncertainty as to whether their actions are legal or illegal.[119] While this issue of legal certainty can only be totally remedied with full harmonisation of copyright law, such as through a single European copyright title or a full list of mandatory exceptions, this is not currently on the horizon.[120] The Commission has stated that an 'incremental' approach is required to slowly take the European Union closer to full harmonisation.[121]

4.1.1 Digital Single Market Strategy

In taking incremental steps towards full harmonisation of exceptions to copyright law, it will now be argued that harmonisation of the panorama exception is particularly necessary in light of the European Union's Digital Single Market Strategy. This strategy is built on three 'pillars':

[109] Consolidated Version of the Treaty on the Functioning of the European Union, Article 26 (2008 OJ C 115/47).

[110] P. Hugenholtz, 'Harmonisation or unification of European Union copyright law' (2012) 38 Monash University Law Review 4, 5.

[111] Recitals 4, 6 and 7.

[112] 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, 2015 O.J. (C 265) Paragraph Q.

[113] S. McCarthy, 'The European Copyright Directive and Combinatorial Explosion' (2013) 19(2) European Journal of Current Legal Issues <http://webjcli.org/article/view/245/317>.

[114] K. Cammiso, 'European Parliament Resolution of 9 July 2015 and its Progeny: Why the Digital Age Demands a Single European Copyright Title' (2018) 17(1) Chicago-Kent Journal of Intellectual Property 37, 43.

[115] P. Hugenholtz (2012) 4.

[116] Lagardère Active Broadcast v Société pour la perception de la rémunération équitable and others ECLI:EU:C:2005:475 at 46; Berne Convention, Article 5.

[117] T. Madiega, 'EU copyright reform: Revisiting the principle of territoriality', Briefing for the European Parliament, PE 568.348 (2015, Brussels: European Parliamentary Research Service) 3.

[118] L. Guibault (2010) 58.

[119] College of Europe, 'Replies to the public consultation on the 'Panorama Exception' (Final Report) (2017, Brussels: European Commission) 8.

[120] C. Geiger et al, 'Reaction of CEIPI to the Resolution on the Implementation of Directive 2001/29/EC on the Harmonisation of Copyright in the Information Society Adopted by the European Parliament on the 9th July 2015' (2015, Strasbourg: Centre for International Intellectual Property Studies). <http://www.ceipi.edu/fileadmin/upload/DUN/CEIPI/Documents/Etudes/CEIPI_statement_on_EU_copyright_reform_final-1.pdf> 2.

access to digital goods and services, creating an environment for the flourishing of digital networks and services, and maximising the growth potential of the digital economy.[122] As Cammiso notes, current copyright legislation in force was "adopted before Facebook and YouTube even existed".[123] As part of the Digital Single Market Strategy, the European Parliament adopted European Parliament Resolution of 9 July 2015,[124] in recognition of the need to adapt European copyright law "in light of the digital revolution and changed consumer behaviour".[125] These two aspects – the digital revolution and changed consumer behaviour – are key to why harmonisation of the panorama exception is necessary.

4.1.1.1 The digital revolution

First, in relation to the digital activities of European citizens, we have seen that the decision not to implement the full panorama exception in certain countries could affect every day online activities such as sharing photos online and participating in online educational initiatives. For example, it was stated in the report on the consultation on the panorama exception that architecture students and professors were concerned that the enforcement of copyright law in Member States without freedom of panorama could hamper their present and future work.[126] These concerns may become more widespread if online educational initiatives, through third-party platforms, continue to be used and developed, as such activities may come to infringe copyright law in even those states with an exception for educational uses. The sharing of images on social media, now considered an essential tool of communication in the digital world,[127] may be similarly problematic. The consultation into freedom of panorama revealed that more than half of respondents often or occasionally faced problems relating to copyright when uploading images of works of architecture online.[128]

It is obvious in these respects that the law in some Member States fails to take into account current educational and digital practices, and in doing so acts in conflict with the Digital Market Strategy. Turning to the first of the three pillars – providing access to digital goods and services – it is clear how the inhibition of cross-border educational services through the panorama exception conflicts with this. As was stated in the Gowers report in the context of the United Kingdom, it is important that copyright law allows educational establishments to take advantage of new technology to educate pupils regardless of their education.[129] Indeed, as this report notes, copyright law that inhibits online educational uses has the potential to disadvantage disabled students or others who are unable to attend classes on campus.[130]

Turning to the second and third of the three pillars – creating an environment for the flourishing of digital networks and services, and maximising the growth potential of the digital economy – the current state of the panorama exception also conflicts with this. If online educational initiatives are at risk of infringing copyright law if they utilise online third party platforms, this introduces the possibility that platforms may be selected to be used for these initiatives not on based ease of use, quality, or the existence of new and desirable platform features, but on their non-commercial nature. This has clear potential to inhibit innovation in digital education, particularly as digital uses almost always carry the potential for revenue raising.[131] One obvious example of how restrictive freedom of panorama has inhibited the flourishing of digital networks and services can be found in BUS v Wikimedia, in which private interests were explicitly privileged over the public interest in an online database facilitating dissemination of knowledge.[132] This problem is worsened by the lack of legal certainty arising from a non-harmonised copyright law. The risk of falling afoul of copyright law and having to potentially pay compensation to right holders may also potentially inhibit online activities relating to copyright protected architectural works, particularly when one considers that a European citizen may be subject to a range of legal norms of varying familiarity when operating online.

[121] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions Towards a Modern, More European Copyright Framework, COM(2015)0626 (Dec 9 2015) 12.

[122] European Commission, 'Shaping the Digital Single Market' (25 March 2015, European Commission: Brussels) <https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market>.

[123] K. Cammiso (2018) 38.

[124] 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.

[125] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM (2015) 192 final (May 6, 2015), Introduction.

[126] College of Europe (2017) 15.

[127] Hugenholtz (2012) 28.

[128] College of Europe (2017) 6; See also Chapter 4.2.1.

[129] L. Guibault (2010) 62.

[130] Ibid.

[131] D. Westkamp, 'The 'Three-Step Test' and Copyright Limitations in Europe: European Copyright Law Between Approximation and National Decision-Making' (2008) Journal of the Copyright Society of the USA 1, 9.

[132] See Chapter 3.4.

4.1.1.2 Changing consumer behaviour

The need for harmonisation is particularly strong when we consider the gap between social norms and legal reality that has developed in Europe, at least partly due to the rise of the digital society.[133] The effectiveness and credibility of copyright law in this respect depends on finding a balance between the interests of right holders in maximising their protection and the interest of the public in having access to products of creativity and knowledge.[134] As is acknowledged by the European Commission, as the internet is becoming the primary means of the dissemination and access of knowledge, people are increasingly expecting to have easy access to literary and artistic works online.[135] In particular, the increased speed of communication through digital technology has also raised expectations among society as to freedom of communication.[136]

As Svensson and Larson argue in relation to file sharing, the attempt to legislate in conflict with social norms is hazardous, carrying with it the potential to foster distrust in the copyright system and ultimately lead to a failure to secure compliance, which could in turn undermine respect for the law.[137] If we consider the increasingly common use of image sharing as a form of communication in the digital society, it is clear how this principle has the capacity to apply to implementations of the panorama exception that the public considers too restrictive. Additionally, a 2015 petition against a mandatory panorama exception narrowed to include only non-commercial works suggests that the public does indeed consider this too restrictive, though there is no indication as to whether the signatories of this petition are representative of the European Union as a whole.[138]

While the European Union has a duty to ensure the effective protection of copyrighted works, including public works of architecture, the purpose of copyright law is not simply to maximise economic benefit to authors.[139] The ultimate goal of the European project is the establishment and maintenance of an internal market. While the territorial nature of copyright law at present prevents this goal from being fully realised, incremental steps – harmonising measures – may be taken. A mandatory panorama exception is one such measure, and one that must be taken if the shorter-term goals of the Digital Single Market Strategy are to be realised. Without a mandatory panorama exception that is extended to include non-commercial uses, it is submitted that copyright law in this area will not be able to fully adapt to the digital revolution and change in consumer behaviours. It is nevertheless the case that certain stakeholders are in opposition to this. This article will now turn to consider certain arguments against the harmonisation of the panorama exception.

4.2 Is harmonisation necessary?

A major criticism against the harmonisation of European law in general, that is key to this debate in particular, is that it erodes legislative diversity within the European Union. The importance of legislative diversity is emphasised in Article 167(4) of the Treaty on the Functioning of the European Union – "The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures."[140] The implementation of the panorama exception in European law can be viewed as one such example of where cultural differences have been taken into account. Member States with a strongly 'public interest' oriented approach to copyright law, or with a history of the panorama exception in general, have implemented the optional exception to its fullest extent.[141] On the other hand, Member States with a tradition of protecting the rights of authors, or with a particularly strong interest in preserving cultural heritage, have limited their implementation of the exception.[142]

The existence of optional exceptions to copyright law in the Infosoc Directive can be taken as clear evidence that legislative diversity continues to be valued by Member States – while the aim is to harmonise copyright law as much as possible, the law has maintained a margin of appreciation within which Member States can adapt the law to suit their own legislative traditions. Additionally, with recent political events such as the financial crisis, the migrant crisis, and Brexit, Rahmatian argues that the EU should be cautious about harmonising European law to a too great extent.[143] Though opinions on the EU are generally favourable, one 2017 report shows that a median of 53% across nine Member States support a national referendum on their country's EU membership.[144] Insisting on one particular law, with no room for national variances, may carry the risk of EU citizens identifying less with the EU legal system.[145] This being said, it is not clear that opinion is particularly divided on freedom of panorama, even among legislators.[146] In the words of Commissioner Günther Oettinger, "25 or 26 EU nations" were in favour of freedom of panorama, with France being the only Member State to strongly object.[147]

[133] P. Hugenholtz, 'Law and Technology: Fair Use in Europe' (2013) 56(5) Communications of the ACM 26, 26.

[134] P. Hugenholtz (2012) 7.

[135] European Commission, 'Commission Communication on Copyright in the Knowledge Economy (Citizens' Summary)' (2009, Brussels: European Commission) <http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/citizens_summary16102009_en.pdf>.

[136] G. Westkamp (2008) 4.

[137] M. Svensson and S Larsson, 'Intellectual Property Law Compliance in Europe: Illegal File Sharing and the Role of Social Norms" 14(7) New Media & Society 1147, 1149.

[138] Change.org, 'Save the Freedom of Photography! #saveFoP' (2015, Change.org) <https://www.change.org/p/european-parliament-save-the-freedom-of-photography-savefop-europarl-en>.

[139] D. Westkamp (2008) 14.

[140] Consolidated Version of the Treaty on the Functioning of the European Union Article 167 (2008) OJ C 115/47 at Paragraph 4.

[141] Such as the United Kingdom and Germany (See Chapter 3.5 and 3.6).

[142] Such as France and Italy (See Chapter 3.2 and 3.3).

[142] A. Rahmantian, 'European Copyright Inside or Outside the European Union: Pluralism of Copyright Law and the "Hererian Paradox"' (2016) 47(8) International Review of Intellectual Property and Competition Law 912, 920.

[144] B. Stokes, R. Wike and D. Manevich, 'Post-Brexit, Europeans More Favourable Towards EU' (2017, Washington: Pew Research Center) <http://assets.pewresearch.org/wp-content/uploads/

Another point to note in any argument for a mandatory panorama exception is that, while European copyright law does require a balance between private and public interests, it is nevertheless clear that the interests of right holders are to be afforded a high standard of protection. The report on the public consultation on the panorama exception revealed that visual artists and collective management organisations see the proposal for a mandatory panorama exception as having the potential to deprive them of substantial revenues.[148] They argue that those who contribute to the embellishment of European cities should be able to be remunerated for the public display of their works.[149] Concerns have also been raised as to what it could mean to shift copyright law away from this high level of protection. One director of a Belgian collective society expressed concern that a mandatory panorama exception could act as the first step on a path to generally weakened copyright protection – "the next step will be to get the right of reproduction of music and then films. You will see: by now pressing the freedom of panorama, they will want more".[150] While digital technology may have changed consumer's expectations regarding the ability to access information, this expectation might, from the perspective of some, have little respect for the copyright system as a whole.

As Westkamp notes, across all fields of EU harmonisation, a high level of protection for intellectual property rights is perceived as the ultimate goal.[151] Recital (9) of the Infosoc Directive, for instance, states that any harmonisation measures must be taken on the basis of a high level of copyright protection, as this is crucial to intellectual creation. While this article argues that an appropriate balance between public and private rights is not reached in certain Member States, it is nevertheless the case that privileging the interests of copyright holders over those of the public is perfectly consistent with the explicit goal of European copyright law being a high level of protection for copyright protected works.

However, as Cammiso notes, the European Parliament Resolution of 9 July 2015 and the Digital Single Market Strategy in general appear to indicate a move away from an authored cantered approach and towards an emphasis on consumer rights.[152] It is also evident from the recitals to the Infosoc Directive that the EU expects the law to have to adapt to changes in society arising from the digital revolution – "Such differences [in exceptions to copyright] could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. [...] The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market."[153] Similarly, the Legal Advisory Board states that rules at the EU level should allow legislative diversity only to the point that they do not hinder the internal market.[154] As has been argued above, while ensuring a high level of copyright protection is important, exceptions to this protection should be introduced where the interests of private actors and the public are no longer appropriately balanced. Not only are the interests of the public particularly pronounced in cases of architectural works, as has been argued, but the current lack of harmonisation in the implementation of the panorama exception is such that the law does indeed directly inhibit the internal market project. While the protection of architectural copyright is a laudable goal, the European Union must take steps to adapt to the changing needs of society.

4.3 Compatibility of harmonisation with the existing copyright system

In arguing for a mandatory exception to copyright applicable to commercial and non-commercial uses of public architectural works, it must be considered how the law will fit into the current European copyright system. The replies to the public consultation on the panorama exception indicate that visual artists and collective management agencies consider that an extended panorama exception of this kind would conflict with the 'three-step test' under international law.[155] This test, derived from the Article 9 of the Berne Convention and now contained in Article 5(5) of the Infosoc Directive, states that exceptions to copyright should be permitted (i) only in certain special cases; (ii) provided they do not conflict with the normal exploitation of the work; and (iii) if they do not unreasonably prejudice the legitimate interests of the author.[156] A similar interpretation of the three-step test was made by the judge in the case BUS v Wikimedia Sverige, in which it was stated that obtaining remuneration for the use of the protected work was a legitimate interest of the right holder.[157] It will now be argued that, provided any mandatory exception does not extend to reproductions made on buildings (as is the law in Germany and in the UK)[158] such an exception would be compatible with the three-step test.

sites/2/2017/06/06160636/Pew-Research-Center-EU-Brexit-Report-UPDATED-June-15-2017.pdf> 4.

145 A. Rahmatian (2016) 920.

146 See also the section 'Changing consumer behaviour' above.

147 C. Spillane, Z. Sheftalovich and N. Vinocur, 'Banned! Taking pictures of the Eiffel Tower at night' (9 July 2015, Politico.eu) <https://www.politico.eu/article/banned-taking-pictures-of-the-eiffel-tower-at-night-copyright-law-eu/>.

148 College of Europe (2017) 5.

149 Ibid.; This is also reflected in Recital 10 of the Infosoc Directive: "if authors and performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work".

150 A. Louviaux, 'Photographier dans un lieu public en Belgique: une loi consacre la « liberté de panorama' (17 July 2016, Tinlot) <http://tinlot.blogs.sudinfo.be/archive/2016/07/17/photographier-dans-un-lieu-public-en-belgique-une-loi-consac-195229.html> quoted in M. Dulong de Rosnay and P. Langlais, 'Public artworks and the freedom of panorama controversy: a case of Wikimedia influence' 6(1) Internet Policy Review 1, 9.

151 D. Westkamp (2008) 15

152 K. Cammiso (2017) 48

153 Infosoc Directive, Recital (31)

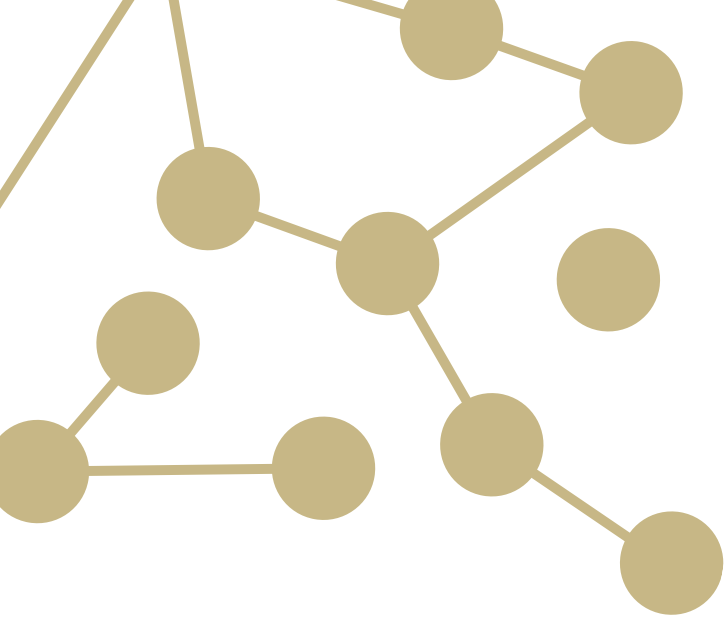
154 L. Guibault (2010) 57

155 College of Europe (2017) 27

156 Berne Convention, Article 9 and Infosoc Directive, Article 5(5)

157 at 11

158 See 3.5 and 3.6



4.3.1 Certain special cases

It is not likely to be contested that the panorama exception would comply with the first of the three steps. This exception would be limited to reproductions of public architectural works, and would not extend to reproductions taking place on buildings.

4.3.2 Not in conflict with normal exploitation of the work

The normal exploitation of a work of architecture relates to the creation and use of the work itself, and the fee attached to this. This work can include client consultation, design, budgeting, managing construction, hiring and contracting, and interior design. It is submitted that what is not included in the normal exploitation of architectural works is the reproduction of images of the completed work by the public. It is acknowledged, however, that freedom of panorama must exclude reproductions on buildings in order to comply with this step.

The three-step test was created in a time before the digital world was even conceived of.[159] As Westkamp notes, the test is intended as a way to prevent exceptions to copyright protection from eroding existing markets, and to prevent future uses that may reduce the commercial value of the copyrighted work.[160] While the three-step test operates to 'reserve' markets for existing operators, this says nothing of the emergence of entirely new markets that are unrelated to the copyrighted work.[161] While in certain states without freedom of panorama, collecting societies and architects may attempt to obtain remuneration for reproductions of their work that take place outside the architecture industry, there is no indication that architectural firms in states with freedom of panorama are unable to obtain a sufficient reward for their creative efforts, or that reproductions of the image of their works lessens their commercial value.

It is submitted that the simple existence of a method of exploitation is not sufficient to render this 'normal' under the three-step test. Reproduction of images of public architecture on the internet, in the context of education, or used in film and photography, does not detract from the commercial value of the original work, and has little relevance to the ordinary operation of the architecture industry. Furthermore, the enforcement of copyright in public architectural works in this way has clear potential to have anticompetitive effects. Newell gives the example of the Sydney Opera House, which is trademarked under Australian law.[162] The Sydney Opera House Trust has previously prevented photographers from taking photos of the Opera House (a major landmark in Sydney Harbour) and selling them as stock photos, suggesting instead that customers purchase a licence to use one of the Trust's own photos.[163] While it is important to ensure that copyrighted works are protected, as Hugenholtz argues, copyright law cannot be used as an instrument to conserve monopoly power and maintain outdated business models.[164]

4.3.3 Unreasonably prejudice the legitimate expectations of the author

It is submitted that it is neither a legitimate expectation that the public will not reproduce a public work, nor is it unreasonable for the law to allow this. As Westkamp argues, the three-step test was intended to allow for shifts in interests and general societal norms.[165] While it is inevitable that any standard based on an 'expectation' is going to be determined, to some extent, by past practice, this standard cannot be used to prevent the law from responding to social change. The key term for our purposes is 'unreasonably': is it reasonable for the legitimate expectations of architectural copyright holders to be bypassed? The conclusion must be strongly affirmative. For the reasons given throughout this article - the public interest in contributing to discourse about society, the potentially chilling effect architectural copyright can have on digital technology and educational initiatives, and the uneasy distinction between commercial and non-commercial works - there are strong reasons for the public interest in reproducing copyrighted works to be privileged above the expectations of the author.

In addition, and connected to the argument made in relation to step (ii) above, it is submitted that the author of a public architectural work cannot legitimately expect to demand further revenue from reproductions of his work that are not related to the sale of the design itself, the construction of the design, or reproductions on buildings. As has been argued, copyright law is concerned with protecting the commercial value of creative works – it should not be used as a mean of obtaining further revenue in new and unrelated markets that have little bearing on the commercial value of the original work.

[159] D Westkamp (2008) 5.
[160] Ibid., 8.
[161] Ibid.
[162] B. Newell (2011) 422.
[163] Ibid.
[164] P. Hugenholtz (2013) 28.
[165] D. Westkamp (2008) 11.
[166] Entwurf eines Gesetzes über Urheberrecht und verwandte Schutzrechte, Section 76 (n 79).

5. CONCLUSION

This article has argued for the introduction of a mandatory exception to European copyright law whereby public architectural works may be used for all purposes, excluding reproductions of works on buildings. This argument began with establishing that copyright must be reformed where it cannot be shown to be clearly justified. With intellectual works being by their nature non-exclusive goods, the artificial imposition of exclusivity by the law on such goods necessarily involves giving the right-holder a monopoly over that good. It is understood that this monopoly ought to be given to the right-holder because it is ultimately in the public interest to do so - it provides creators with an incentive to create, thereby stimulating human progress. Where the public interest in incentivising creation is outweighed by the public interest in free access to the good, however, this justification falls apart. Indeed, this article argues that the public interest in free access to copyrighted works is particularly strong in the case of public architecture.

In looking at the protection of architectural works in the European Union and its individual Member States, it is clear that the optional nature of the current exception for copyrighted public architectural works under Article 5(3)(h) of the Infosoc Directive is such that a range of differing approaches has been taken. As a Union of states with diverse legislative traditions, the perceived weight of the public interest in freely accessing works of architecture varies considerably. Certain states such as France place greater weight on the rights of authors to control the use of their works, and to receive remuneration for such use, and accordingly have limited their implementation of Article 5(3)(h) to only narrow, non-commercial circumstances. On the other hand, lawmakers in states such as Germany have expressed understanding of the public nature of architecture, and that, in a work being permanently placed in public space, it becomes devoted to the general public.[166] It is clear from our examination of copyright law across the Member States that implementation of the panorama exception varies considerably, and, where it has only been partially implemented, this may involve a distinction between commercial and non-commercial uses.

Key to the argument being made in this article is the related argument that the public has a strong interest in using copyrighted public architectural works. This was argued on two primary bases.

First, architecture plays - and is very much intended to play - a central role in public life. Whether simply the environment in which people live or work, or whether it is used to further a particular narrative about a society (such as in the case of nationalist monumental architecture), architecture is used as a means of ordering communities of people. It is submitted that, as such, the public must be free to discuss public architecture as an aspect of their lived environment, whether this discussion takes place through education, art, commentary, or even commercial initiatives. Architects should not, it is argued, be permitted to unilaterally privatise sections of public visual space.

The second basis on which the argument made in this article rests is that the distinction between commercial and non-commercial uses, relevant when the panorama exception is only partially implemented in Member States, is becoming increasingly blurred. Cross-border educational initiatives that make use of third party platforms may be considered commercial, and even 'private' uses of copyrighted works may be considered commercial where these take place on the internet. In this sense, prohibiting 'commercial' uses of copyrighted architectural works is far too restrictive on the ability of the public to make use of their physical environment. Greater weight must be given to the public benefit of being able to freely use architectural works, irrespective of whether these uses are commercial or non-commercial.

In the final Section of this article, it is argued that a non-harmonised panorama exception fragments the operation of the internal market. The territorial nature of copyright law is such that European citizens are faced with completely different legal norms across different Member States in regard to the same facts, and as a result there may be uncertainty among European citizens as to the potential legality of their actions. In light of the concerns that have been highlighted in this article regarding internet-based uses of works, an non-harmonised panorama exception is also an obstacle to the realisation of the Digital Single Market Strategy, which aims to further access to digital goods and services to create an environment for the flourishing of digital goods and services, and to maximise the growth potential of the digital economy. Indeed, a mandatory full panorama exception is a necessary step towards the adaptation of European copyright law to the new realities of the digital revolution, such as changing behaviours among European citizens on the internet.

While concerns may be raised to the need to protect the interests of right holders, it is argued that the heightened public interest in free use of public architectural works justifies the introduction of a full mandatory panorama exception, and this is likely to be broadly supported across the European Union. Moreover, such an exception would be compatible with the three-step test, provided that the exception still restricted the reproduction of architectural works on other buildings. In conclusion, it is submitted that the panorama exception should be made mandatory across the European Union, and extended to include both commercial and non-commercial uses.

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