HEC NYU

Regulatory Policy Clinic

BACKGROUND DOCUMENT

WIKI PROJECT

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1. INTRODUCTION TO THE PROJECT

Headline: Students will produce a legal memo arguing in favour of the protection of freedom of panorama in EU law and policy and propose attendant legislative reforms.

Client:

Wikimedia is a global movement dedicated to encouraging the growth, development and distribution of free, multilingual, educational content, and to providing the full content of these wiki-based projects to the public free of charge.

Client contact: Dimitar Dimitrov, Policy Advisor, Wikimedia (Free Knowledge Advocacy Group EU), Brussels

Lead scientific advisor and guest lecturer: Giuseppe Mazziotti, Professor of EU copyright law, Trinity College Dublin, Ireland

Background context: Currently, using a picture of the Atomium in Brussels, the Eiffel Tower by night or the European Parliament buildings is illegal - even on a private blog with no intention to profit. The reason is that architecture is artwork and therefore covered by copyright restrictions – as well as many other restrictive regulatory practices – in Belgium, France, Italy and a number of other European countries.

To comply with the law, one has to request the architect's permission for each photo – an anachronism and a considerable inconvenience in the age of Facebook, Wikipedia, Instagram and photo blogging.

Many EU countries provide an exception that ensures that images taken in public places can be used freely. This is referred to as Freedom of Panorama (FoP). Under Article 5(3)(h) of the European Union (EU) Copyright Directive, Member States may recognise on a voluntary basis such an exception to copyright restrictions for "works of architecture or sculpture, made to be located permanently in public places". However, a number of Member States have not applied this exception in their own copyright laws, including France, Belgium, Italy and Greece.

Although practically this may not be a problem for private photo bloggers (as it is virtually impossible for copyright holders to police the use of pictures taken for personal use), this state of affairs creates a significant impediment for online communal photo libraries such as the Wikimedia Commons (ie, an online media file repository making available to the general public freely-licensed and public domain educational media content (images, sound and video clips)).

Wikimedia Commons photos, which are uploaded by the general public, are available for use in both commercial (eg, postcard makers, Facebook, Google) and non-commercial contexts. The current denial of FoP in some EU countries provides for a fragmented and confusing legal framework within the EU and results in legal insecurity for both commercial and non-commercial uses.

Arguably, such restriction may potentially also constitute impediments to the free movement of goods, services and/or freedom of expression.

Wikimedia would like to promote FoP throughout the EU and has enlisted the Clinic to help in this endeavour.

Objectives/deliverables:

The Clinic students will:

1. Conduct research into the current state of FoP under copyright law in the EU based on previous comparative studies commissioned by Wikimedia.

2. Investigate arguments in favour of FoP from free movement and freedom of expression angles.

3. Produce a legal memo on the basis of the research making arguments in favour of EU-wide promotion of FoP. The memo should also contain a draft provision, which could be used in the revised EU Copyright directive. The Provision should set out a mandatory EU-wide exception to copyright restrictions for FoP, enabling the public to take and use images of public architecture for both commercial and non-commercial use. Both the Memo and the Provision should also consider how to prevent Member States from impeding FoP via other restrictive regulatory practices, such as those implemented in Italy and in France.

4. Present findings as set out in the memo to EU policymakers in Brussels.

2. CASE FILE

1. Briefing note from Wikimedia (including)
    a. Wikimedia argumentation strategy
    b. Wikimedia statement of intent
    c. Wikimedia position paper
    d. Wikipedia information and studies on Freedom of Panorama
    e. Speech by outgoing Digital Agenda Commissioner Neelie Kroes,
    f. Article in the EU Observer
    g. Interview with the Atomium
    h. Report on creative commons license and problems with noncommercial use restrictions

3. BACKGROUND SOURCES

Literature

Jane C. Ginsburg, 'Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990' (1991), 14 COLUMBIA J. L. & ARTS 477

Robert A. Gorman, 'Copyright Law' (2006), Federal Judicial Center, freely available at http://www.fjc.gov/public/pdf.nsf/lookup/copyright.pdf/$file/copyright.pdf, p. 48

Bernt Hugenholtz & Martin Senftleben, 'Fair Use in Europe: In Search of Flexibilities' (2011), IViR, Amsterdam, available at http://www.ivir.nl/publicaties/download/912

Giuseppe Mazziotti, 'Copyright in the EU Digital Single Market' (2013), Centre for European Policy Studies (CEPS), Brussels, freely available at http://www.ceps.eu/book/copyright-eu-digital-single-market, p. 71-95

Giuseppe Mazziotti, 'EU Digital Copyright Law and the End-User' (2008), Springer, Berlin, p. 77-109

Bryce Clayton Newell, 'Freedom of Panorama: A Comparative Look at International Restrictions on Public Photography (2011), Creighton Law Review, p. 405-427

Martin Senftleben, 'Copyright, Limitations and the Three Step Test' (2004), Kluwer Law International, The Hague

Dirk Voorhoof & Inger Hoedt-Rasmussen, 'Copyright v Freedom of Expression Judgment' (2013), available at http://echrblog.blogspot.ie/2013/01/copyright-vs-freedom-of-expression.html

Wikimedia, 'Commons: Freedom of Panorama', available at http://commons.wikimedia.org/wiki/Commons:Freedom_of_panorama

Legislation

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, OJ L 167, 22.06.2001, p. 10-19

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, p. 5-12

Case law

Ashby Donald v France, European Court of Human Rights, 36769/08, 10.01.2013, available at http://hudoc.echr.coe.int

Bernstein of Leigh v Skyviews and General Ltd [1978] QB 479 (United Kingdom – freedom to take aerial photographs)

Decision of the German Federal Court in favour of the Stiftung Preussische Schlosser und Garten (Germany - extension of the freedom of panorama exception to private grounds), December 17, 2010, available at
Juris.bundesgerichtshof.de (in German)

Leicester v. Warner Bros., 232 F.3d 1212 (9th Cir. 2000)

Official documents

EU Commission, 'Copyright in the Knowledge Economy' (Green Paper), COM (2008) 466/3, available at
http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf

EU Commission, 'Creative Content in a European Digital Single Market: Challenges for the Future', Brussels, 22.10.2009, available at
http://ec.europa.eu/internal_market/consultations/docs/2009/content_online/reflection_paper%20web_en.pdf

EU Commission, 'Impact Assessment on the Cross-Border Online Access to Orphan Works', Brussels, 24.05.2011, available at

http://ec.europa.eu/internal_market/copyright/docs/orphan-works/impact-assessment_en.pdf

'Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works', Brussels, 20.9.2011, available at
http://europa.eu/rapid/press-release_MEMO-11-619_en.htm

EU Commission (DG Internal Market and Services), 'Report on the responses to the Public Consultation on the Review of the EU Copyright Rules' (2014), available at:
http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf

4. ACTORS

EU Commission: DGs Connect, EAC (Education and Culture)

European Parliament: JURA (Legal affairs), CULT (Culture and Education) and LIBE (Civil Liberties) committees

Council of the European Union (Latvian Presidency)

Member States:

Competent ministries (EU affairs, cultural heritage and activities, etc)
Permanent Representations at the EU

NGOs promoting free/open access to knowledge, preservation of the commons, freedom of expression and communication

5. RESEARCH QUESTIONS

After gaining familiarity with the background material and, in particular, with the provisions and principles on EU copyright exceptions and with national provisions creating restrictions to the use of images incorporating certain works of architecture and sculpture taken in public spaces, you should ask yourself:

- Why would an EU-wide provision ensuring freedom of panorama be a suitable policy option from a public interest perspective?
- Should freedom of panorama be ensured for both commercial and non-commercial uses?
- Are the existing directive on certain uses of orphan works and the memorandum of understanding on out-of-commerce works useful precedents?
- Do other bodies of law raise restrictions to free use of images depicting works of architecture and sculpture, irrespective of copyright? Are there examples of Member States placing restrictions on images for the protection and valorisation of their cultural heritage?
- Which are the arguments against freedom of panorama that are worth scrutinizing?
- Is there any existing and well-developed business that would be stifled because of the adoption of a mandatory EU-wide exception of freedom of panorama?