FREEDOM OF PANORAMA IN THE EU:

MAIN FEATURES AND HIDDEN SIDES

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The rule of freedom of panorama only applies to works permanently placed in public places. The concepts of a public place and the permanent location of work in such a place are usually not clearly defined in the legislation of the EU Member States which gives rise to disputes about the framework of permissible behaviour of the users. In addition, there are several issues that the legislation is silent about, while the courts have to determine whether the creation of the image of the work falls under the characteristics of freedom of panorama. Do the persons who create the image also have to be in a public place; do they have the right to use any additional equipment that allows seeing the work other than standing on the ground; do they have the right to make any changes to the image of the work? This article explores the meaning of public space and the relationship between the permanent and temporary location of work in a public place. This article also considers the hidden sides of freedom of panorama and suggests ways to improve its legal regulation in order to make its exercise less controversial and more efficient.

Keywords: freedom of panorama, EU copyright, copyright exceptions, public place, permanent location.

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I INTRODUCTION

Freedom of panorama is a rule that allows the free creation and use of images of works permanently located in public spaces without the author's consent. Within the Law of the European Union, freedom of panorama is laid out in Article 3 of the InfoSoc Directive.[1] According to Art. 5(3)(h) Member States may provide exceptions or limitations to the exclusive reproduction right of works.[2] These can be works of architecture or sculptures permanently located in public places.[3] This rule is formulated in a general form, leaving a broad margin of discretion for the Member States to determine the

[1] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society ("InfoSoc Directive").

[2] Article 5(3)(h) InfoSoc Directive.

[3] Ibid.

boundaries of their legislation.[4] As a result, there has been great disagreement among the EU Member States in defining the list of works covered by freedom of panorama, as well as outlining the permitted usage of artwork photographs. Regardless of these differences, freedom of panorama always applies to artworks permanently located in public places.

However, the concept of a public place is not always clear. In many EU Member States,[5] the law simply refers to a 'public place' without specifying further what this means. Without legal guidance, it can be difficult for users to determine whether a specific place is public. It is also not always obvious if the artwork in a public place could be considered as being permanent. For example, if a sculpture is made of unstable material, could it be considered a permanent installation if it only lasted a week due to gale-force winds? In many countries, statues dedicated to figures of totalitarian regimes that were previously on public display for many decades have been now demolished. Does the demolition of such monuments mean that their placement in public space was temporary? These are two separate examples, but they both show that it may be difficult to qualify the main features of freedom of panorama.

In addition, there are several hidden aspects to the freedom of panorama rule not mentioned in written law. They are primarily found in the case law of

[4] See: Anna Shtefan, 'Freedom of Panorama: The EU Experience' (2019) 11 European Journal of Legal Studies 13, 17.

[5] See: Austria: Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz 1936, zuletzt geändert durch das Bundesgesetz BGBI. I Nr. 244/2021), Art. 54(1)(5); Belgium: Code de droit économique (mis à jour le 21 avril 2022), Art. XI.190(2/1); Finland: Tekijänoikeuslaki 8.7.1961/404 (sellaisena kuin se on muutettuna asetuksella 18.11.2016/972), Art. 25a; Ireland: Copyright and Related Rights Act, 2000 (Amended in 2023), S 93; Lithuania: Law on Copyright and Related Rights (n 22); Malta: Copyright Act, 2000 (Chapter 415, as amended up to Act No. VIII of 2011), Art. 9(1)(p); Portugal: Código do Direito de Autor e dos Direitos Conexos (aprovado pelo Decreto-Lei n.º 63/85 de 14 de março de 1985, e alterado até ao Decreto-Lei n.º 9/2021 de 29 de janeiro de 2021), Art. 75(2)(q).

Germany, France, and Spain but may also affect the interpretation of freedom of panorama in other Member States. Firstly, does it matter where the user is located when taking a photograph or creating a painting of the work? Does this place also have to be public, or can the user be on their balcony or in another private place? Secondly, can the person creating the image use additional tools, such as a ladder or a drone, to capture images from angles that would otherwise be impossible? Thirdly, does the user have the right to edit their image of the work? For example, could they make a different background around the work or add or remove some elements next to the image of the work? On the one hand, these aspects relate to the creative expression of users over their image of an artwork permanently located in a public place. On the other hand, this creative expression is based on the use of another author's work within the framework of copyright exceptions and limitations. These exceptions and limitations may limit the choice of methods and means of creating the image of the work.

When such questions arise in practice, it is difficult for both users and courts to find answers. The legal rules on freedom of panorama in most EU Member States do not provide any guidance on how the user can or should act. In Germany, the *Bundesgerichtshof* has concluded that a photograph of a building facing a public road does not meet the conditions of freedom of panorama if it was taken while the photographer was not in a public place.[6] The German Federal Court has also concluded that the use of aids, such as a ladder, is not permitted under freedom of panorama.[7] However, the grounds for such conclusions are unclear, as such restrictions are not contained in the

[6] BGH, I ZR 192/00, GRUR 2003, 1035, 1037 – Hundertwasser-Haus, mwN. <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=27285&pos=0&anz=1> accessed 5 December 2023.

[7] BGH, I ZR 247/15, GRUR 2017 – AIDA Kussmund. <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=78753&pos=0&anz=1> accessed 5 December 2023.

legislation. Most of the issues raised above are rarely addressed in doctrine and the rule of freedom of panorama therefore remains difficult to apply.

In this article, I provide an exhaustive description of the concept of a 'public place' and argue that if access to a place is limited to certain working hours or requires the purchase of an entrance ticket, such a place still falls within the 'public place' category. This enables us to distinguish which locations are covered by the freedom of panorama rule.

I shall also define 'permanently located', and I will conclude that an artwork is 'permanently located' if it is intended to remain in the public space for an indefinite period of time or a period that constitutes a significant part of the work's existence. Upon investigating the issue of the location of the image creator, I justify that this should not be relevant so long as the image reflects the part of the work that can be legally visible to the public. This also applies to using additional tools to create an image, such as a ladder or a tripod. When discussing the possibility of making changes to the image of the work, I suggest that the work must be depicted realistically and cannot be altered in any way. Some minor changes to the environment around the work may be permissible so long as they do not alter the general perception of the work. Regarding accompanying an image of the work with text, I argue that the image may contain: the name or pseudonym of the author, the title of the work, the year of its creation, the name of the street, city, and country where the work is located. However, other inscriptions on the image contradict the free use of works principle. In this article, I suggest improvements to the freedom of panorama rule to take into account the interests of users without harming the interests of authors.

II. The Main Features Of Freedom Of Panorama In The EU

Freedom of panorama forms part of copyright exceptions and limitations. These define the content of permitted behaviour and users of artworks in a permanent location and in a public space. This, accordingly, requires

clarification of what place is considered public (1) and what it means to be permanently located in such a place (2).

1. Public places in terms of the rule of freedom of panorama

There are many definitions of the concept of a public place focusing on different aspects – social, political, psychological, and other. In general, public places are places that 'exist outside the home and workplace that are generally accessible by members of the public'.[8] These are places where 'social interactions, sense of belonging, collective memories, and shared identities occur'.[9] The term 'public' has been interpreted by the CJEU as referring to an indefinite number of persons in general.[10] In a broad sense, a public place is a location where a potentially unlimited number of people, unconnected by affiliation with a family circle, workgroup, or any other group with a common interest, may have access. Public places contain a random and undefined number of people visiting at the same or at different times. In general, public places are not only streets and other open-air places, but can also be train stations, airports, theatres, restaurants, and stores. In other words, it is any place that the public can lawfully visit.

The recognition of a place as public should not be influenced by whether access requires prior registration, entrance fees, or other actions to be taken into account. Based on the definition of the term "public" given by the CJEU, a place must be public in nature. In other words, it should allow for

[8] Jacinta Francis, Billie Giles-Corti, Lisa Wood, and Matthew Knuiman, 'Creating sense of community: The role of public space' (2012) 32 Journal of Environmental Psychology 401, 402.

[9] Luca M. Visconti et al., 'Street Art, Sweet Art? Reclaiming the "Public" in Public Place' (2010) 37 Journal of Consumer Research 511, 513.

[10] Case C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* ECLI:EU:C:2016:379, paras 41-43.

the presence of many different people, regardless of whether or not there are entry fees and whether it is only open to visitors during certain hours.

When access to a public place is limited by working hours or the requirement to purchase a ticket for entry, this affects the application of the freedom of panorama rule. Unauthorized entry into such a place makes it illegal to remain and conduct any activity there. If a person creates an image of a work while unlawfully in a public place, the freedom of panorama cannot be applied to such an image. The laws of the Member States do not mention this aspect, but copyright exceptions and limitations do generally define that user behavior combined with illegal activities will not be permissible. As such, freedom of panorama can only apply to cases of lawful presence in a public place.

Limited access to a public place raises the question of how constant or regular the access to such a place must be to fall under the rule of freedom of panorama. Undoubtedly, when a park or public facility has a certain operating schedule, such a place is open to the public during its opening hours. When a place is private and public access is limited, works located in such places should not be subject to freedom of panorama. It is possible to imagine a case where a collector periodically opens their private collection on their private property to the public. Although the public may be temporarily present at this site, the site itself and the artworks there are private and not accessible to the public most of the time.

When it comes to freedom of panorama, the notion of public space becomes especially important since it determines whether a work can be freely used. Some EU Member States have proposed a list of outdoor public places, which includes streets, plazas, parks, and public roads.[11] Such lists are often non-

[11] Bulgaria: Закон за авторското право и сродните му права (ДВ, бр. 56/1993, с измененията по състоянию на 13.12.2019 г.), Art. 24(7); Croatia: Copyright and Related Rights Act (OG No. 111/2021), Art. 204(1); Czech Republic: Zákon č. 121/2000 Sb. ze dne 7. dubna 2000 o právu autorském, o právech souvisejících s

exhaustive. In Spain, for example, freedom of panorama applies to works permanently located in parks, streets, squares or other public places.[12] In this regard, the Provincial Court of Madrid noted that this list is approximate and expresses a general concept that semantically corresponds to all places that are essentially public roads.[13] In the laws of France[14] and Hungary,[15] it is directly stated that freedom of panorama covers only streets, i.e. public places in open space. In contrast, in Ireland it is allowed to freely use works that are permanently placed not only on the streets, but also in premises open to the public.[16]

Although these approaches differ somewhat, they at least allow for a more or less precise definition of what can be considered a public place. In many other Member States, the public place is indicated as such without explaining its content, which makes it difficult to understand the limits of freedom of panorama. According to the law of Finland, freedom of panorama applies to

právem autorským a o změně některých zákonů (autorský zákon) (ve znění zákona č. 429/2022 Sb.), Art. 33(1); Germany: Act on Copyright and Related Rights (Copyright Act, as amended up to Act of June 23, 2021), Art. 59(1); Poland: Ustawaz dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych (zmieniona ustawa z dnia 13 lutego 2020 r), Art. 33(1); Slovenia: Copyright and Related Rights Act (Official Gazette of the Republic of Slovenia, No. 21/95 of April 14, 1995, as amended up to October 26, 2022), Art. 55(1).

[12] Spain: Texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes (aprobado por el Real Decreto Legislativo Nº 1/1996 de 12 de abril de 1996, y modificado por el Real Decreto-ley Nº 6/2022, de 29 de marzo de 2022), Art. 35(2

[13] SAP M 11756/2014 – ECLI:ES:APM:2014:11756, 16/06/2014. <https://www.poderjudicial.es/search/AN/openDocument/d94bc0be785a7364/20141007> accessed 5 December 2023.

[14] France: Code de la propriété intellectuelle, Art. L122- 5(10).

[15] Hungary: 1999. évi LXXVI. törvény a szerzői jogról (Hatályos: 2020.06.18.-tól), Art. 68(1).

[16] Ireland: Copyright and Related Rights Act (n 5).

works permanently located in or in close proximity to a public place.[17] This could potentially include works in private yards near public roads. Portuguese law does not provide examples of public places;[18] this served as a basis for the conclusion that freedom of panorama in Portugal 'clearly includes public interiors'.[19] However, such an interpretation cannot be general and universal for all states that do not explain the essence and types of public places. For example, the law of Lithuania does not have an interpretation of a public place and at the same time explicitly states that freedom of panorama does not apply to exhibitions and museums.[20]

Each state has discretion in deciding this issue, especially since the InfoSoc Directive also does not define public places. In addition, in case of a legal conflict, a court may apply the three-step test of the Berne Convention to determine whether the actual use of the work is consistent with the nature of the exceptions and limitations.[21] However, the law needs to specify exactly where the work should be located so that the convention can be freely used. This problem is highlighted by Julien Cabay who states, 'the

[17] Finland: Tekijänoikeuslaki (n 5).

[18] Portugal: Código do Direito de Autor e dos Direitos Conexos (n 5).

[19] Teresa Nobre, 'Best Case Scenarios for Copyright: Freedom of Panorama, Parody, Education, and Quotation' (2016). <https://www.academia.edu/33280311/Best_Case_Scenarios_for_Copyright_Freedom_of_Panorama_Parody_Education_and_Quotation> accessed 5 December 2023.

[20] Lithuania: Law on Copyright and Related Rights (n 5).

[21] Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, as amended on September 28, 1979, Art. 9(2): 'It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'

broad scope of the exception may be limited in its interpretation, especially by application of the three-step test'.[22]

Freedom of panorama is an exception to the general rule that the author or other copyright holder can permit others to use publicly displayed works. According to the Universal Declaration of Human Rights, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[23] It follows that the introduction of cases of free use of works is implemented in such a way as to restrict the rights of authors only insofar as there is a real need for this due to the legislative guarantees of other rights, freedoms and interests. Therefore, the author or other rightsholder should have a clear overview of how their copyright is limited, and users, for their part, must clearly understand the limits of permissible behaviour.

In my view, the definition of a public place as a publicly accessible place in an open space is appropriate. It allows not to list examples of such places (streets, parks, roads, etc.) and creates a fairly clear idea of them. It also improves the understanding of works covered by freedom of panorama when the law does not contain an exhaustive list of such works. In sum, pointing only to outdoor public places is more consistent with the essence of freedom of panorama, since a panorama is a general view of a particular area, not an interior. In addition, interior design is subject to change, and the user does not always know whether a particular work will be placed in the interior permanently or temporarily. Obviously, there is no reason to

[22] Julien Cabay, 'La Liberté de Panorama: Entre Brouillard et Poudre Aux Yeux' (2016) 5(6) Auteurs & Media 383, 387-388 (« la portée large de l'exception peut se trouver limitée dans le cadre de son interprétation, spécialement par application du test des trois étapes »).

[23] Article 29(2) Universal Declaration of Human Rights, proclaimed on 10 December 1948.

expect that all Member States will adopt this approach. However, it would be appropriate to at least clarify which places belong to the public and whether freedom of panorama covers the interiors of public buildings. If the wording of the public place is abstract, it complicates the application of freedom of panorama and makes the meaning of this rule uncertain.

2. Permanent location of works in public places

The freedom of panorama regime applies only to works that are permanently displayed in public places. Conversely, the temporary presence of a work in a public place withdraws such a work from the scope of freedom of panorama. The fourth plinth on Trafalgar Square in central London exemplifies this relationship. About 200 years ago, statues and sculptures were placed on the other three pedestals and have remained there ever since. The fourth plinth was intended for an equestrian statue of William IV, which was not completed due to lack of funds. For over 150 years, the plinth's fate was the subject of debate until, in 1998, the Royal Society for the Encouragement of Arts, Manufactures and Commerce commissioned three contemporary sculptures to be placed temporarily on this plinth. This idea was a success, and later, the pedestal began to be used for the temporary display of modern works of art. The terms of their placement vary; on average, one and a half to two years.[24] Therefore, while the statues and sculptures on the other three pedestals are permanently placed in public space, the works on the fourth plinth do not have this characteristic.

The main criterion of the concept of 'permanent location' is the primary purpose of placing the work in a public space for an indefinite period of time. In the words of Adrian Niewęgłowski, the rule of freedom of panorama applies 'if an item is placed in a public space in a way that can

[24] Katey Goodwin, 'Lists of London: Fourth Plinth' <https://artuk.org/discover/curations/lists-of-london-fourth-plinth> accessed 5 December 2023.

usually be treated as a decision to leave it permanently'.[25] Therefore, it should not be a factor whether the work is available for perception 24 hours a day or can be seen only under certain circumstances. For example, the illumination of the Eiffel Tower can only be seen at night, but it has been on the tower continuously since the installation of the lighting effects, and at least the approximate date of its possible removal is unknown.[26] In contrast, if the work appears in a public place for a predetermined period of time when the subsequent removal of the work from this place is immediately foreseen, such placement is temporary.

Many works have a relatively short existence and gradually deteriorate due to the instability of the materials used to create them (chalk, sand, snow, ice, fresh flowers, etc.). According to the Supreme Court of Spain, such works are born with a call to ephemeral rather than perennial life.[27] When such a work is displayed in a public place, it is apparent that it will remain there for a relatively short period of time. Nevertheless, the relatively short natural existence of a work does not mean that its placement in a public space is necessarily temporary. Even monumental objects made of durable materials that could continue to hold its shape for centuries can be destroyed by natural phenomena such as earthquakes. Therefore, the permanent location of a work in a public place is determined not by the durability of the material used to create the work, but by the primary purpose of placing the work in a public place for an indefinite period of time.

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[25] Adrian Niewęgłowski, *Prawo Autorskie. Komentarz* (Wolters Kluwer 2021) 403.

[26] The Eiffel Tower, built in 1889, is already in the public domain, so from a copyright perspective, images of it can be freely created and used. However, the illumination on the Eiffel Tower is a protected work, thus, the image of the illumination can only be freely used in accordance with the conditions of freedom of panorama in France.

[27] STS 6958/2006 – ECLI:ES:TS:2006:6958, 1082/2006, 6.11.2006. <https://www.poderjudicial.es/search/AN/openDocument/3a22a652b74fd0f2/20061214> accessed 5 December 2023.

In some Member States, freedom of panorama applies directly to works created for the purpose being permanently installed in public places.[28] This approach seems successful because it eliminates the doubt as to whether a work that has had a short 'life' but has 'lived' all or a significant part of it in a public place falls under freedom of panorama. In other states, such conclusions were made by courts. For example, the Tribunal of Paris, in the case of graffiti on the wall of a building, emphasized that the permanent nature of its presence in a public place is undeniable since it cannot be removed without certain work, at least painting.[29] Although the paint may gradually fade in the sunlight and be washed away by natural precipitation, which means that graffiti will eventually disappear, it remains in a public place throughout its natural existence. The Federal Court of Justice of Germany was even more specific in the *Verhüllter Reichstag* case, noting that the characteristic of 'permanent' must be determined by the intent of the rightsholder. A work of art installed in a public place for its entire life is there permanently, even if that life is limited by the material it is made of. In this case, the rightsholder dedicated the work to the public by locating it in a public place for the entire period of the natural existence of the work. However, the situation changes when the rightsholder limits the public display to a period shorter than the natural life of the work. In this case, the work is not in a public place permanently, but only temporarily dedicated to the public. It makes no difference whether the work continues to exist

[28] Austria: Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (n 5); Belgium: Code de droit économique (n 5); Lithuania: Law on Copyright and Related Rights (n 5); Malta: Copyright Act (n 5); The Netherlands: Auteurswet 1912, Art. 18; Portugal: Código do Direito de Autor e dos Direitos Conexos (n 5).

[29] TJ Paris, 21 janv. 2021, n° 20/08482. Lire en ligne. <https://www.doctrine.fr/d/TJ/Paris/2021/U62471CB202613F31B0CF> accessed 5 December 2023.

after it has been withdrawn or whether it was destroyed in the process of its withdrawal.[30]

Thus, the permanent nature of a work located in a public place is determined by the purpose of its placement in the public space. The work is permanently located in a public place if it was made accessible to the public for an undefined period of time or a period that constitutes a significant part of the natural existence of the work. From the same standpoint, it is advisable to address cases where the destruction of the work was the result of deliberate actions that were not known at the time of the exhibition. For example, an emergency building that is unreasonably expensive or difficult to repair may be demolished by the decision of a competent authority or the destruction of works may be the result of an act of terrorism, sabotage, or armed aggression. In many countries, monuments to persons who were once considered prominent figures but were later recognized as dictators have been removed from streets and squares. According to Jonathan Barrett, 'the fate of the Communist era statues of Marx, Lenin and Stalin indicate the most monumental of sculptures may not, in fact, be permanent'.[31] It is difficult to agree with this statement since such statues were intended to be placed in a public space and would have continued to be there if no unplanned action had been taken in advance that led to their destruction or dismantling.[32] Accordingly, the entire time that such a work is displayed in a public space should be considered as a permanent location in a public place.

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[30] BGH, I ZR 102/99 (KG), 2002 – Verhüllter Reichstag. <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=23154&pos=0&anz=1> accessed 5 December 2023.

[31] Jonathan Barrett, 'Time to Look Again? Copyright and Freedom of Panorama' (2017) 48(2) Victoria University of Wellington Law Review 261, 270.

[32] The problem of dismantling, damaging and destroying works of art is very important in the context of both copyright to such works and compliance with legislation in the field of culture and cultural heritage protection, as well as

If a work was displayed in a public place for some time and then transferred either to an inaccessible institution or to a private collection, then the work's initial location in a public place should be taken into account. If a work is initially displayed for an undefined period of time, and the decision to remove the work from a public place was made under the influence of new circumstances, such cases should be qualified as the permanent placement of artwork in a public place for the entire time that it was there.

However, in practice, the opposite is also true. In this regard, there is the example of the Eiffel Tower that was built in mid-1889 as a temporary construction and planned to be dismantled 20 years after completion. In other words, it was initially placed in the public space for a long, but limited and known period of time. Under the influence of circumstances, the Eiffel Tower was eventually not dismantled and turned into a work that is permanently located in a public place. Thus, if freedom of panorama had existed in France at the time, the Eiffel Tower would not have been subject to it until the decision was made that the Tower would remain in the place where it was built for the unknown period of time.

Freedom of panorama does not mean the work must be exclusively stationary and always located in the same place. It is possible to imagine a

protection of property rights. Except in extraordinary circumstances, such as protests or armed hostilities that lead to unforeseeable destruction, decisions to dismantle or destroy works of art should be reasonable and made in accordance with the procedure established by law. Damage to or destruction of works of art initiated by an individual(s) is recognised as a criminal offence in many countries and cannot be justified by freedom of expression or disagreement with the existence of such a work. Even when the monument is dedicated to a controversial historical figure, according to the Court of Appeal in *Attorney general's reference no 1 of 2022* [2022] EWCA Crim 1259, the debate about the fate of such a monument had to be resolved through appropriate legal channels, irrespective of evidence that those channels were thought to have been slow or inefficient, and not by what might be described as a form of criminal self-help. See: *Attorney general's reference no 1 of 2022* [2022] EWCA Crim 1259.

case where a sculpture was created in honour of a certain event, installed in a particular public place where the festivities took place and then moved to another public place after they were over. There is also the possibility of redeveloping and reconstructing the areas so that the sculptures and other works placed on them can be moved to other areas. In this regard, the Federal Court of Justice of Germany in the *AIDA Kussmund* case noted that the law does not require that the work is permanently located in a certain place. A work within the meaning of the law is on public roads, streets or squares if it changes its location and the various places where the work is located are public places.[33] That is, changing the geographical coordinates of the location of the work does not affect the qualification of this work as being permanently displayed in a public place if all these places are open to the public.

When a work is briefly removed from the public space for objective reasons and later becomes available to the public again, such cases should not be considered as a non-permanent presence of the work in a public place. One example is, if a statue needs restoration and moves to a private workshop before subsequently returning to the place of its original installation or another public location. However, there is a question about works occasionally outside public spaces. This refers to images painted on the surface of vehicles that periodically or regularly disappear from public view while the vehicle is in private or inaccessible to the public area.[34]

Clarification in this regard was provided by the Federal Court of Justice of Germany in the aforementioned *AIDA Kussmund* case. Among other things, the court noted that an image of 'kissing lips' found on the nose and sides of a cruise ship could be protected by freedom of panorama. Even though the ship could sometimes be hidden away from public view, it was often visible

[33] BGH, I ZR 247/15, GRUR 2017 – AIDA Kussmund (n 7).

[34] See, i.e., the artworks of Ukrainian artist Olena Spodina who has been creating paintings on cars and motorcycles since the beginning of 2000 <https://www.mukachevo.net/ua/news/view/56446> accessed 5 December 2023.

to the public when docked at port or during its voyage. It is not important that the 'kissing lips' image changes location with the cruise ship. The decisive factor is that the work is printed onto the cruise ship in accordance with its purpose in various public places for a more extensive period of time. The fact that the ship can temporarily be in areas inaccessible to the public – for example, at a shipyard – does not prevent the application of Article 59 of the German Copyright and Related Rights Act (freedom of panorama).[35]

However, what if the vehicle on which the work is displayed is kept in a private garage or other place inaccessible to the public most of the time? Should it be considered that the work is temporarily in a public place? It seems that in such cases, it is inappropriate to compare the duration of the vehicle's public and private location. Vehicles are intended for movement on public roads on land, in water and in the air. In each case, the intended use of the vehicle is carried out in a place open to other persons; therefore, the nature of such use is public. By applying the work to the surface of a vehicle, the owner understands and expects that this work will be visible to others while the vehicle is in a public place. This can be equated to the permanent locating of a work in a public place that is covered by freedom of panorama.

In sum, the qualification of permanent location of a work in a public place should not cause difficulties. The lack of legislative specificity concerning the relation between the permanent and temporary location of a work in the public space is, to some extent, compensated for by the conclusions of judicial practice. In France and Germany, the courts have successfully interpreted this relationship. However, in other states, where there are no such judgements yet, the issue of understanding the permanent location of a work in a public place remains more acute. Therefore, it is advisable to provide clear definitions of this concept in legislation.

III. The Hidden Sides Of Freedom Of Panorama

When creating images of works that are permanently displayed in public places, users may strive for a certain creative expression. This may involve

[35] BGH, I ZR 247/15, GRUR 2017 – AIDA Kussmund (n 7).

capturing work from an atypical angle, requiring the use of a tool to photograph an image. Creative expression may prompt the user to add or remove something from the image. To implement their ideas, the user can choose a filter that will brighten the photo or otherwise change its natural colours or apply a certain inscription to the image of the work.

All these actions may seem permissible because the copyright laws usually do not mention them and, therefore, do not prohibit them. However, the judicial practice of some EU Member States has developed certain criteria that limit users' activities within the freedom of panorama. These issues have not been addressed in academic publications. This is perhaps because there are only a few judgments in local judicial practice with no pan-European force. Therefore, further research will mainly rely on the provisions of legislation and judgments, as no academic publications have highlighted these issues. However, the question of how freely the user's creative choice can be expressed is worth discussing, as it directly affects the scope of the freedom of panorama rule. On the one hand, it may more clearly explain to users the opportunities they have when creating and using images of works permanently located in public places. On the other hand, an analysis of the hidden aspects of freedom of panorama in court practice – where the creator of the image should be located (1); whether they can use a ladder or other aids (2); whether they can make changes to the image of the work (3); or add a title or description to the image of the work (4) – may contribute to the development of a more reasonable approach to the legal qualification of such cases.

1. Location of the person who creates the image of the work

The location of the work that falls under freedom of panorama is more or less clear, while the laws do not specify the permitted location of the image creator. The absence of such specifications may be perceived as meaning that the user can stay in any place from where the work is visible. Since the location of the work, not the user, is relevant for the qualification of freedom of panorama, it is logical to consider that an image of a work that is permanently located in a public place may be created from a private balcony or courtyard from where the work can be seen. However, the case law of some Member States has concluded that the image creator must also be located in a public place.

A well-known case in this context is the *Hundertwasser-Haus* case, where the subject of consideration was a photograph of an architectural work taken from the private balcony of another house. The Federal Court of Justice of Germany noted that the purpose of establishing freedom of panorama is to allow the public to see what they can see with their own eyes from the street in the form of a painting, drawing, photograph or film.[36] The purposes of legal regulation do not include cases when, for example, a photograph captures a view from a place inaccessible to the general public. If the building captured can be seen by the wider public only from a certain angle, there is no need to extend exceptions and limitations to images in which a completely different angle is chosen. Freedom of panorama does not justify photographing a building's courtyard facing a public street or square. Similarly, aerial photography is not permitted, at least because it shows parts of the building that are not visible from the road, street or square.[37]

In a case in Spain, a dispute arose over the image of a house built on a rock. Part of this house can be seen from the public road, while the photo shows another part that faces the side of the abyss under the rock. The defendant

[36] BGH, I ZR 192/00, GRUR 2003, 1035, 1037 – Hundertwasser-Haus (n 6).

[37] BGH, I ZR 192/00, GRUR 2003, 1035, 1037 – Hundertwasser-Haus (n 6).

argued that such a picture could have been taken from the sea or air, which are public places, and therefore the rule of freedom of panorama should be applied to this case.[38] The local court of Madrid rejected these arguments and noted that the rock on which the house is built is not by a public road where pedestrians and vehicles can move. Although the building is located near a public road, capturing the image in question from the road would have been impossible. The sea and airspace do not fall under the concept of a public highway, although they are spaces belonging to the public.[39]

In both cases, the courts applied the attribute of being located in a public place to both the piece of work and the user in the absence of such reservations in the written laws of Spain and Germany. In addition, the local court of Madrid narrowly interpreted the scope of public roads, excluding waterways, even though the photographer could theoretically be in a boat on the water that is not a private water reservoir, which can also be considered a public highway. It is interesting to note that three years later, the Federal Court of Justice of Germany, in the above-mentioned *AIDA Kussmund* case, referred to seas, territorial waters, and other waterways as public places covered by freedom of panorama.[40] This once again reminds us how important it is to define in the legislation which places are public, since not only users but also courts can interpret them differently.

So, what is the basis for the conclusion that freedom of panorama requires the image creator to be in a public location? The only rational explanation can be found in the *Hundertwasser-Haus* case where freedom of panorama does not justify capturing the courtyard of buildings which are not visible to the general public.[41] Indeed, the purpose of freedom of panorama is to allow the reproduction of a view of the work that can be reproduced by many different persons. Therefore, I support the idea that the image should only

[38] SAP M 11756/2014 – ECLI:ES:APM:2014:11756 (n 13).

[39] SAP M 11756/2014 – ECLI:ES:APM:2014:11756 (n 13).

[40] BGH, I ZR 247/15, GRUR 2017 – AIDA Kussmund (n 7).

[41] BGH, I ZR 192/00, GRUR 2003, 1035, 1037 – Hundertwasser-Haus (n 6).

represent the part of the work that can be seen by the majority of the general public. This shall not, however, apply to the angle of the image, such as a top view, so long as the image shows only the publicly visible parts of the work.

In my opinion, there are reasons to discuss the restriction of the location of the person who creates the image. Considering that neither the InfoSoc Directive nor the national legislation indicates where this person should be located, it seems that it is more appropriate to consider the content of the image rather than the place from which it was taken as a reference point. The fact that a building or monument looks different from the third-floor window or roof than from the ground should not necessarily prevent the application of freedom of panorama. If the image presents the work from a different perspective but contains only the publicly accessible part of the work that others can see from a certain public place, such an image is unlikely to contradict the purpose of freedom of panorama or harm the interests of the author of the depicted work.

2. Means that can be used in the creating of the image of the work

Creating an image always requires specific tools, such as paint and brushes or a camera. The rule of freedom of panorama includes the use of such means because without them it is, in principle, impossible to reproduce the work. However, the situation is not so clear with auxiliary equipment that allows the user to change the angle of the image or take it from the air.

The provisions of the national legislation of the EU Member States neither permit nor expressly prohibit the use of such assistive devices. The only example that may be an exception to the previous thesis is the law of France. Article L122-5(10) of the *Code de la propriété intellectuelle* only allows for the reproduction of works permanently displayed in public places to be carried out by individuals.[42] On the one hand, this may mean that the creation of

[42] France: Code de la propriété intellectuelle (n 14).

the image should be carried out directly by a person and not by a technical device controlled by a person from a distance. Therefore, this could put drone images outside the scope of freedom of panorama in France. On the other hand, this provision can be literally interpreted that the creation and use of images of works is allowed only to individuals, not legal entities, regardless of the means used to reproduce the work. The French jurisprudence still needs to clarify this issue, while in some other jurisdictions, the courts have expressed some considerations in this regard.

The Federal Court of Justice of Germany decided that the use of ladders is not covered by freedom of panorama. According to the court, the purpose of the freedom of panorama provision does not apply to images taken with the help of special means (e.g., ladders) to overcome existing obstacles (e.g., hedges). Such views on the work are not part of the street scene perceived by the broad public.[43] In the case considered by the local court of Madrid, the image of the building was obtained using a drone. The court has decided that the use of this image requires the permission of the author or other rightsholder since the content of the freedom of panorama provision does not imply that the image can be created using more or less complex procedures.[44]

In these examples, the rule of freedom of panorama is given a somewhat narrower meaning compared to the way it is formulated in the laws of Spain and Germany. In the legislative provisions of these states, there is no list of permitted or prohibited methods of creating an image, and it is not established that the reproduction of a work can only be carried out directly by an individual. However, freedom of panorama is positioned by courts in connection with technologically simple solutions that are available to many members of society and do not require additional effort.

[43] BGH, I ZR 247/15, GRUR 2017 – AIDA Kussmund (n 7).

[44] SAP M 11756/2014 – ECLI:ES:APM:2014:11756 (n 13).

Compared to these approaches, there is a judgement of the Frankfurt am Main Regional Court that presents an entirely different view on this issue. The case concerned an aerial photo of the bridge taken in the air using a drone. The court decided that this image corresponds to the content of freedom of panorama under German law and noted that each rule, including exceptions, must be interpreted correctly and in accordance with its plain meaning. The limited interpretation that the public can perceive the work with little effort or assistance does not follow from the wording used in Article 5(3)(h) of the InfoSoc Directive. The only decisive factor is that the work is located in a public place. The InfoSoc Directive does not regulate the place from which the work should be viewed, nor does it contain any restriction that the use of auxiliary means should be excluded. This fact should be used to interpret the German standard for implementing the freedom of panorama provision. Considering the current developments, these considerations are even more applicable. Therefore, it is not clear why freedom of panorama takes place when the work can be seen from the water but not when the work can be seen from the air.[45] There are no objective reasons for such inequality; in particular, it does not follow the InfoSoc Directive.[46]

These findings seem important. Indeed, the InfoSoc Directive does not contain any criteria used in the case law of Germany and Spain to determine whether the user's actions comply with the provision on freedom of panorama. Given the absence of such criteria in national legislation, there is the question of what precisely guided the courts in their conclusions that freedom of panorama allows only the simplest solutions that do not include the use of a ladder or drone to overcome an obstacle. Apart from France,

[45] Here, the Court refers to the 'AIDA Kussmund' case cited above, in which the Federal Court of Justice of Germany concluded that when a cruise ship is on the high seas, territorial waters, sea waterways and seaports, it is located in a public place to the extent that it is visible from these waters.

[46] LG Frankfurt am Main, Urteil vom 25.11.2020 – 2-06 O 136/20. <https://openjur.de/u/2321628.html> accessed 5 December 2023.

where the use of drones is potentially not covered by freedom of panorama, the laws of other Member States do not restrict the use of any means to create an image of a work. The courts do not have the power to impose such restrictions on their own and should not give the rule of freedom of panorama a meaning that is not provided for by law. Therefore, the mere fact of creating an image should not be subject to differential treatment depending on whether it was made from the ground, standing on a ladder, from the water, or from the air. If the image embodies a work that is permanently located in a public place, and the image shows that part of the work can be seen from the public place, this should be sufficient to recognize that the creation of this image meets the conditions of freedom of panorama.

3. Possibility to make changes to the image of the reproduced work

Within the framework of copyright exceptions and limitations, the processing of a work is allowed when it comes to creating a parody and caricature, while all other cases do not involve any modification of the work. Freedom of panorama implies that the work should be depicted as it stands in a public place. This is directly specified in the laws of Belgium and the Netherlands.[47] In Germany, there is a separate rule that contains a general prohibition to remake works used under the regime of exceptions and limitations, including freedom of panorama. For works of visual art and photographic works, it is allowed to change the work to another size and make such changes as entail the process used for reproduction.[48] This means the author may reduce or increase the scale of the image but must not make the work look different from its original form of expression.

The Higher Regional Court of Cologne expressed an interesting opinion that Article 62(3) of the German copyright law covers all forms of photographic reproduction corresponding as closely as possible to the appearance of the work located on a public street and the use of only those

[47] Belgium: Code de droit économique (n 5) and The Netherlands: Auteurswet (n 28).
[48] Germany: Act on Copyright and Related Rights (n 11).

tools that belong to the usual technologies in the creation of such images. This includes selecting a part of the work and affecting the brightness, colour, and contrast values of the image by setting the focal length and exposure time and any zoom in or out. Conversely, the use of tools such as colour filters and subsequent retouching is unacceptable, as it changes the appearance of the street fragment and the realistic perception of the work beyond a technically unavoidable extent that is no longer caused by the process of reproduction. This is because these processes present the viewer with a reality that is largely falsified, unlike reproduction through painting or graphics, where more significant changes are understood and expected by the audience.[49] The photo should convey the appearance of the work as accurately as possible and not have such a deviation from reality that the work in the image is perceived differently than it can be perceived visually in the place of its location. The depiction of the work by drawing or graphics may allow for more deviations from reality but the work should look realistic.

In the legislation of the other Member States, there is no direct prohibition of processing the work within the rule of freedom of panorama. At the same time, the rule of freedom of panorama is, in most cases, formulated as the right of users to reproduce works located permanently in public places. Despite some differences in the interpretation of the term 'reproduction', its use is not accidental, as it emphasizes that the image of the work must be created in the original condition as the work exists. The free use of the work within the framework of freedom of panorama does not allow any modification in the image of the work, the introduction of new elements into the image of the work, or the removal of any parts of the work: the user must create an image of the work that is true to its original appearance.

However, the question remains whether other objects located near the work, such as a fence, plants, buildings, or sculptures that are a permanent part of

[49] OLG Köln, Urteil vom 09.03.2012 – 6 U 193/11. <https://openjur.de/u/536357.html> accessed 5 December 2023.

the cityscape but were not the purpose of the reproduction, can be changed in the image. On the one hand, such elements are secondary to the object of reproduction. Removing them from the image does not violate the conditions of freedom of panorama if the work to which the image is dedicated retains its realistic appearance. On the other hand, such elements form a certain environment where the public perceives the work in its location, and if the removal of these elements changes the perception of the work in the image, it can be considered to be an overstepping of the freedom of panorama.

There can be no single universal answer to this question, and in each case, it will depend on the context. It is reasonable to think that freedom of panorama cannot allow such a change in the environment around the work that the work would not look and be perceived realistically. Likewise, changing the image around the work to a completely different area, such as a desert, a seaside, a street, or a square in another city, would contradict the purpose of freedom of panorama. However, when the objects around the work are blurred in a photo editor so that the attention is entirely focused on the work, this may not always be considered a violation of the conditions of freedom of panorama. Instead, in some Member States, freedom of panorama implies the depiction of a more or less general view of a certain area.[50] This applies when no single work is the central element of the composition and the main purpose of reproduction is not commercial. Within such restrictions, the preservation of the environment around the image of the work may be important to ensure the legitimate use of the image of the work.

[50] Denmark: The Consolidated Act on Copyright (Consolidate Act No. 1144 of October 23, 2014), Art. 24(2); Estonia: Copyright Act (consolidated text of January 1, 2023), Art. 20-1; Finland: Tekijänoikeuslaki (n 5); Lithuania: Law on Copyright and Related Rights (n 5); Romania: Lege nr. 8 din 14 martie 1996 privind dreptul de autor si drepturile conexe (modificată până la Legea nr. 69/2022), Art. 35(1)(f).

Regarding the elements that are not a permanent part of the cityscape, the removal or addition of such elements may be carried out at the discretion of the image creator. This is especially important when a person draws a view of a specific area and adds other objects that express a particular creative idea along with a realistic image of the work. The only requirement should be the realism of such elements in relation to the location of the reproduced work; thus, such elements may appear near the work at a certain time or season. The representation next to the work of a mermaid or a flying saucer with aliens is likely to be qualified as an action that does not meet the conditions of freedom of panorama.

Consequently, the reproduced work may not be subjected to any alteration. While some changes in the environment around the work may be allowed, it should generally maintain the perception of the reproduced work in line with the perception in the real world.

4. Possibility to add text to the image of the reproduced work

A separate issue that may arise when using images of works permanently situated in public places is the possibility of adding inscriptions to the image. No Member State legislation mentions this aspect, although such cases occur in practice.

In particular, in June 2017, the street artist Christian Guémy, working under the pseudonym C215, found that the image of his mural painted on a building in Paris was used as a banner on the Twitter account of the political party 'En Marche!'. The name of the party, 'En Marche!', was applied over the image of the mural. The artist categorically denied the legitimacy of such use, as the addition of the slogan could give the public the false impression that he was part of the movement. After the artist appealed to the leadership of the movement, the image with the inscription was removed from the

Twitter account.[51] This conflict was settled without applying to the court, although it would be interesting to analyse the arguments that would be used by the court in this case.

Freedom of panorama does not allow for the possibility of supplementing the work with any elements that cannot naturally appear in the environment in which the work is located. The only inscription on the image of the work that does not contradict the principles of free use of works is the name or pseudonym of the author, the title of the work, the year of its creation, and the name of the street, city, or country where the work is located. Any other inscriptions have no connection with the work and its author and therefore the application of such inscriptions is not justified. Even absolutely neutral texts, such as "summer in Paris", cannot be added to the image of the work at the user's discretion, as the concept of reproduction of the work does not cover this. Moreover, placing in the image of the work the logo, name or any other symbols of a political movement, party, or any other organization, may cause misleading impressions about the author. These misleading impressions may damage the author's reputation.

Therefore, even though the creation and use of the image of the work within the framework of freedom of panorama are carried out without the permission of the author or another rightsholder, the application of any third-party inscriptions on this image is not an element of permissible user behaviour. Although the laws of the Member States do not explicitly prohibit adding third-party text to an image, this does go beyond the scope of reproduction of the work.

[51] Romain Herreros, 'L'artiste C215 dénonce les "menaces" d'En marche après avoir demandé de ne pas utiliser son oeuvre' (2017). <https://www.huffingtonpost.fr/2017/06/05/c215-en-marche-paris13_a_22126222/> accessed 5 December 2023.

IV. Conclusion

In the EU, freedom of panorama has many different variations, but all of them are united by two indispensable conditions: the work must (i) be permanently displayed (ii) in a public place. These key characteristics are not sufficiently clearly defined in the laws and can negatively affect both authors or other rightsholders who do not fully understand the boundaries of their rights. Users who do not have comprehensive instructions on what they are allowed to do are also negatively affected by the lack of clear legal definitions. In particular, this refers to specifying which places are public and whether outdoor areas or certain types of indoor premises are also covered. I support the approach that freedom of panorama applies only to outdoor public spaces; however, this may still leave room for debate whether all outdoor public places, such as cemeteries, fall within the scope of freedom of panorama.[52] Also, in several Member States, users have demonstrated a failure to understand the concept of the permanent location of a work in a public place. On the basis of the above discussion, I suggest that the law should directly specify that a work is permanently located in a public place if it is intended to be in such a place for an indefinite period or a period that constitutes a substantial part of the natural life of the work.

In the case law of some Member States, freedom of panorama has been placed in a framework which is not expressly provided for by law. In some cases, the courts of Spain and Germany have concluded that the creation of the image of the work must be carried out while the user is in a public place, and the image must express the appearance of the work visible to the general public. Also, in some cases, the courts have ruled that users are not allowed to use additional equipment to create images, although the law does not impose any clear restrictions in this regard. I suggest abandoning this framework because the only aspect relevant for the qualification of freedom of panorama is the permanent location of the work in a public place.

[52] Adrian Niewęgłowski (n 25) 403.

I fully agree that the image should include only those parts of the work that are visible from public places, while creating an image of a courtyard or other parts of the work that are closed to the public should not be allowed under the free use of works. However, if the image embodies publicly accessible parts of the work, it should not matter whether the image was created by a person from a private balcony, or elsewhere and what means were used to create the image. Such an expanded approach will not harm the interests of the author, will not limit the possibility of the normal use of the work, and will not negatively impact other protected rights, freedoms, and interests; in particular, it will not interfere with the privacy of others. At the same time, this will increase opportunities for the creative self-realization of users and will promote the dissemination of information.