PANORAMA EXCEPTION

DATE / PLACE
PRESENTATION OF THE ADAGP

ADAGP: A COMPANY CREATED & MANAGED BY ARTISTS

Created in 1953, ADAGP is the French royalty collecting and distribution society in the field of graphic and visual arts.

ADAGP is a non-profit partnership, the members of which (artists, beneficiaries, assignees) are also the partners: they control the management, elect the management bodies and decide on company strategy.

ADAGP: THE COPYRIGHT CONTACT

Supported by a global network of almost 50 sister companies, it currently represents more than 110,000 artists in all disciplines of visual arts: painting, sculpting, photography, architecture, design, comic strips, manga, illustrations, street art, digital creation and so on.
PAINTING

Joan MIRO
Marc CHAGALL
Robert COMBAS
Martial RAYSSE
Jean-Michel BASQUIAT
Vassily KANDINSKY
Francis BACON
Roy LICHTENSTEIN
Barthélémy TOGUO
Nicolas DE STAEL
Pierre SOULAGES
Salvador DALI
Jean DUBUFFET
Andy WARHOL
René MAGRITTE
YAN Pei Ming
Marc CHAGALL
Robert COMBAS
Martial RAYSSE
Joan MIRO
SCULPTURE
PHOTOGRAPHY

Joan MIRO
Marc CHAGALL
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Barthélémy TOGUO
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Pierre SOULAGES
Jean DUBUFFET
Salvador DALI
Andy WARHOL
René MAGRITTE
Alberto GIACOMETTI
Ousmane SOW
Niki de SAINT PHALLE
Xavier VEILHAN
Constantin BRANCUSI
Alexander CALDER
CÉSAR
ARMAN
Bernar VENET
Pierre MOLINIER
Valérie JOUVE
Valérie BELIN
MAN RAY
KORDA
Éric BOUTTIER
André VILLERS
Philippe RAMETTE
Valérie BELIN
Willy MAYWALD

Adagp
société des auteurs
dans les arts graphiques
et plastiques
Street Art
ARCHITECTURE
COMIC STRIPS (COLLECTIVE ROYALTIES ONLY)
WHAT IS THE PURPOSE OF ADAGP?

ADAGP manages **all the property rights held by artists, for all modes of use**

- Reproduction right
- Right of public communication
- Resale right
- Collective rights (private copying levy, photocopying …)

Books, media, television / VOD, internet, merchandising …

The process of obtaining permission for using an artwork is made quick and easy by an **online form**.

Each request will be examined specifically so as to offer the most appropriate legal and financial response.
WHAT IS THE COPYRIGHT?

Copyright (or author’s right) is a legal term used to describe the rights that creators have over their literary and artistic works.

There are two types of rights under copyright:

- **Economic rights**, which allow the rights owner to derive financial reward from the use of his works by others;

- **Moral rights**, which protect the non-economic interests of the author.

WHAT ARE THE EXCEPTIONS ON COPYRIGHT?

Copyright laws allow certain limitations on economic rights, in order to maintain an **appropriate balance between the interests of right holders and users of protected works.**

Protected works then may be used without the authorization of the right holders.

Limitations and exceptions to copyright and related rights **vary from country to country due to particular social, economic and historical conditions.**

**International Treaties** acknowledge this diversity by providing **general conditions** only for the implementation of limitations and exceptions.

EXCEPTIONS ON COPYRIGHT: THREE STEP TEST

All the exceptions to copyright have to respect the “three-step-test”, added by the 1967 Stockholm Revision Conference to the Berne Convention (Article 9(2))

Exceptions:
- Have to be limited to certain special cases,
- Shall not conflict with a normal exploitation of the work
- Shall not unreasonably prejudice the legitimate interests of the author.

The three-step-test also applies under TRIPS (article 13), WCT (article 10) and the Directive 29/2001 (article 5.5).
The Directive 2001/29/EC of 22 May 2001 is intended to harmonize the legal protection of copyright and related rights with particular emphasis on the information society.

According to this text “A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation [...] and lead in turn to growth and increased competitiveness of European industry [...] . This will safeguard employment and encourage new job creation”.

This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public.
EXCEPTIONS TO COPYRIGHT IN EUROPE

The Directive 2001/29 introduced one mandatory exception to the right of reproduction about the temporary acts of reproduction which are integral to a technological process.

The Directive also makes provision for other non-mandatory exceptions to the rights of reproduction or communication.

The visual arts are the most concerned by the exceptions on copyright: 12 of the 22 cases provided by the Directive 2001/29.
Exceptions to copyright in Europe

In France, case law has also admits the “accessory exception”, in addition to the exception provided by the law.

Cour de cassation, 15/03/2005, Place des Terreaux: there is no copyright infringement when the artwork [the flooring made by Daniel Buren] is “accessory compared to the main represented or handled subject” i.e. when the artwork is not intentionally included as the main element of the representation.

WHAT IS THE EXCEPTION OF PANORAMA?

The Panorama exception is one of 20 optional exceptions provided for by Directive 2001/29.

It applies to the « use of works, such as architecture or sculpture, made to be located permanently in public places »

And many other artworks, like street art!
Each Member State decides to introduce or not those non-mandatory exceptions provided by the Directive 2001/29.
COMMERCIAL USES: THE REAL ISSUE

Artworks have an extraordinary power of attraction to the public

Using them in a commercial purpose is a choice, not an obligation

Artists cannot be deprived of their right to grant authorisations and of a fair remuneration
EXAMPLES OF COMMERCIAL USES OF ADAGP’S CATALOGUE

Christian PORTZAMPARC, Tripode (Nantes)

Renault’s advertising
EXAMPLES OF COMMERCIAL USES OF ADAGP’S CATALOGUE

Daniel BUREN, Les Anneaux (Nantes)

Orange’s advertising
EXAMPLES OF COMMERCIAL USES OF ADAGP’S CATALOGUE

JONONE x Perrier

KASHINK x Converse
COMMERCIAL USES: THE REAL ISSUE

Point 46 of the “new” Reda report:

“Considers that the commercial use of photographs, video footage or other images of works which are permanently located in physical public places should always be subject to prior authorisation from the authors or any proxy acting from them”
COMMERCIAL USES: THE REAL ISSUE

• **Internet users will still be free** to post photos/videos of artworks on their social media account and share them

• **Internet platform providers should have to pay**, due to their commercial activities

  ➢ **Platform providers have to take part to the shared value**
COMMERCIAL USES: THE REAL ISSUE

- More than exception on copyright issue, the question of the exemption of the platform providers is a global policy issue.
MAIN ARGUMENTS FOR THE ADOPTION OF THE PANORAMA EXCEPTION

In 2015, there are more artworks available than ever and artists are the firsts to communicate their creations to the rest of the world.

However, there are more criticisms about copyright than ever:

1) Copyright is a barrier to a full access to artistic heritage

2) Web users would be under threat to be pursued by authors of art works in public places for up-loading private photos and videos on social media entries when these images included protected works

3) Differences between the legislations would be making cross-border uses difficult
1) **Copyright: Consumers would be under threat to be pursued by authors?**

Artists are the firsts to communicate their creations to the rest of the world.

ADAGP witnesses that its members are the first ones to give clear indications in order to exonerate the non-commercial uses of their works from copyright royalties.

But artists must remain **free** to grant or not this kind of authorization.
1) **Copyright: consumers would be under threat to be pursued by authors?**

- **Is it possible to take picture of artworks?**
  
  **YES** (and not only of those located in public spaces!)

- **Is it possible to upload them on social media?**
  
  **YES:** even though there is no exception, **NO ONE has ever been threatened or sued for that**

- **Why not go for an exception for those uses?**
  - Because it is **useless**
  - Because it could **prevent the payment of copyright royalties by social media platforms**
1) **Copyright: Consumers would be under threat to be pursued by authors?**

“Facebook users would be under threat because Facebook’s terms and conditions give Facebook a licence to use their photograph for any purposes”

- Can we accept that Facebook make a commercial use of outdoor artworks, either directly or through a third party without paying any fee for copyright?
1) Copyright: consumers would be under threat to be pursued by authors?

Market capitalisation: 247,65 Md $

Statement of Rights and Responsibilities:
“2.1: For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License)”

Extract from Facebook’s Terms of Service (https://en-gb.facebook.com/legal/terms/update)
1) **COPYRIGHT: CONSUMERS WOULD BE UNDER THREAT TO BE PURSUED BY AUTHORS?**

« Our goal is to deliver advertising and other commercial or sponsored content that is valuable to our users and advertisers. In order to help us do that, **you agree to the following:** You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that **you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you.**

Market capitalisation: 22,76 Md $ 

Twitter Terms of Service: 
“You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed)”
1) **Copyright: consumers would be under threat to be pursued by authors?**

Facebook and Twitter are not the only ones who will have to pay, but also Instagram, Flickr, Pinterest, Picasa …
THE IMPORTANCE OF THE SOFT LAW

2010: agreement Youtube / ADAGP & SACD (French authors’ societies)

- Fees = same level as TV channels
- Compensation for 28 000 artists

Youtube can pursue the development of its video offering while providing remuneration for authors and creators.
WHY THERE IS NO NEED FOR AN EXCEPTION OF PANORAMA: THE EIFFEL TOWER EXAMPLE

Illuminations / light shows of the Eiffel Tower are protected by copyright. However, pictures of the Eiffel Tower may be taken by private persons, by day or by night, and published for instance on social media entries or personal websites.

Source: http://www.toureiffel.paris/utiliser-limage-de-la-tour-eiffel/tourner-a-la-tour-eiffel.html
What if the European legislator finally takes into account the “full access to artistic heritage” argument to justify the adoption of the exception of panorama?

In this case, this argument would be applicable to any work located in public places: paintings in museums, the music played during concerts, the movies projected in public…

Do copyright must be purely and simply sacrificed?

Concert au Marais, Paul Ambille, 1990, © ADAGP
Copyright is also there to protect this heritage and to sustain those who work today to constitute tomorrow’s cultural heritage.

Every day, ADAGP and her sister companies all over the world grant hundreds of authorizations for the uses of the artworks of their catalogues.
HAVE YOU EVER SEEN THOSE BUILDINGS?

European Parliament,
© Ralf Roletschek - Architecture Studio - ADAGP

La Grande Motte © Jean Balladur - ADAGP

La Bibliothèque nationale de France
© Dominique Perrault - BNF - ADAGP

Stade de France
© Macary - Zublena & Regembal - Costantini, Architectes - Adagp

L’Institut du Monde arabe
© Jean Nouvel - Gilbert Lézénès - Pierre Soria - Architecture Studio - ADAGP
Copyright varies from country to country, what is also the case for other rights within the European Union.

The Berne Convention (Article 5.2) provided for more than a century international private law rules regarding copyright laws, used daily.

The ADAGP itself deals with a catalogue of 110 000 artists, living in about fifty countries (and as many legislations), what does not prevent it from delivering each week hundreds of authorisations of exploitation.
ADAGP proposed an agreement to Wikipedia in order to provide the uses of the artworks of its catalogue on the platform.

Wikipedia has set his conditions as conditions as follows (CCbySA licence, 2002):

• High Definition files
• Right to modify the artworks
• Right to make commercial uses of the artworks (!)

Such conditions could only be inacceptable for the authors…
THE WIKIPEDIA POSITION

Do this Community has been told about the incompatibility between the CCbySA licence and the copyright issues?

Why the Community didn’t choose to change the licence system [BY-NC-ND] (Attribution + NonCommercial + NoDerivatives) into a more restrictive one, respectful of the copyright?

Why did Wikipedia refused this option?

Do Member States have to modify their own law and have to bend in front of a shadow Community?
THE WIKIPEDIA POSITION

According to an article intitled *Clarifier les enjeux autour de la liberté de panorama* posted on the Wikimedia’s blog, on April 2th 2015: “the existence of rights in architectural buildings prevents the publication of numerous photos of contemporary works that are part of the heritage of France”.

The article is illustrated with this picture of the French city of Le Havre, assumed to be “the only view of Le Havre available on Wikimedia Commons because of the lack of freedom of panorama”.

Source: http://blog.wikimedia.fr/clarifier-les-enjeux-autour-de-la-liberte-de-panorama
Le Havre is a city in Normandie, north-western France

The city has been destroyed during the WW2

Most of the reconstructed buildings are still protected by the copyright of its architects (Auguste Perret, Oscar Niemeyer, Georges Candilis …)

In 2005, UNESCO inscribed the central city of Le Havre as a World Heritage Site
LE HAVRE: THE WIKIPEDIA EXAMPLE

Source: http://commons.wikimedia.org/wiki/Le_Havre
LE HAVRE: THE WIKIPEDIA EXAMPLE

Source: http://commons.wikimedia.org/wiki/Le_Havre
LE HAVRE: THE WIKIPEDIA EXAMPLE

Source: http://commons.wikimedia.org/wiki/Le_Havre
Wikimedia is a service based on voluntary contributions which has obtained a dominant position - close to a monopoly - in the field of online dictionary services.

The fact that Wikimedia will always remain a non-commercial service is not certain.

Indeed, it is a private entity and, as such, there is in principle an option for change in governance resulting from a modification of its status.
Copy screen of the page of the article *Clarifier les enjeux autour de la liberté de panorama* posted on the Wikimedia’s blog, on April 2th 2015

Today: there are 122 items, not really free. What about tomorrow?
CONCLUSION ABOUT THE ARGUMENTS PRO EXCEPTION OF PANORAMA

None of the arguments of the opponents stands up to the test of a serious opposite demonstration.

• In case of non-commercial exploitation of the works, the European citizens can freely access to their cultural heritage, fearless of legal proceedings and without any concern regarding international private law rules.

• In case of commercial exploitation of the works on the contrary, the entrepreneur will logically have to take those steps.

The ADAGP and its network of sister societies are there to be a unique interlocutor for demands of authorisation and to offer legal security to its users, by resolving itself practical and legal issues.
By their very nature, exceptions on copyright are strictly limited. The exception of panorama wouldn’t respect the three-step-test:

<table>
<thead>
<tr>
<th>Special case</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>(general exception to all the works situated in public places)</td>
<td></td>
</tr>
<tr>
<td>Conflit with a normal exploitation of the work</td>
<td>YES</td>
</tr>
<tr>
<td>Unreasonably prejudice the legitimate interests of the author</td>
<td>YES</td>
</tr>
</tbody>
</table>

Such exception would generate a **loss between 10 and 19% of the fees collected by the ADAGP** (between 3 and 6 millions €/year).

Such exception would **deprive some authors** (such as architects, sculptors, street art creators ...) **of the possibility to received any copyright fee**, even if their artworks are exploited in a commercial way by third people!
COPYRIGHT ≠ OBSTACLE TO INNOVATION

Reda Report: “the European legal framework for copyright and related rights is central to the promotion of creativity and innovation, and to access to knowledge and information”.

Regulation never prevent the appearance of new actors and new economic models.
COPYRIGHT ≠ OBSTACLE TO INNOVATION

1st social network dedicated to art
Each member can share pictures of artwork within an art lover community.
FRENCH GOVERNMENT’S POSITION

Ministère CultureCom @MinistereCC · 17 mai
#DroitAuteurNumerique @manuelvalls "les exceptions au droit d'auteur n'ont de sens que si elles restent rares" @fleurpellerin #Cannes2015

Ministère CultureCom @MinistereCC · 17 mai
#DroitAuteurNumerique @manuelvalls "l'ampleur de la révolution numérique ne doit pas nous conduire à revoir les fondements du droit d'auteur"

Ministère CultureCom @MinistereCC · 17 mai
#DroitAuteurNumerique @manuelvalls "le droit d'auteur est un mécanisme protecteur des artistes, un vecteur de notre identité collective"

Ministère CultureCom @MinistereCC · 17 mai
#DroitAuteurNumerique @manuelvalls "la diversité de création européenne est sa première richesse, la vigilance de la France s'or sans faille"

Colloque sur l'avenir du droit d'auteur en Europe, Cannes, May 17th 2015
WHY THERE IS NO NEED FOR AN EXCEPTION OF PANORAMA

Even in the countries where there is no exception for works in public places the private uses are not pursued.

The providers of platforms on which private persons post pictures and videos taken or share image material they made are not private users and generate financial gains with the running of their services.

Exception of Panorama would be contrary to the three-step-test.

There is no need for a legislator’s intervention.

➢ It would create an unjustified damage to the authors.
TO GO FURTHER …

EUROPEAN VISUAL ARTISTS

Exceptions for Works Permanently Located in Public Places

Introduction

One of the outstanding objectives of the digital single market is the creation of economic growth and employment. The visual sector is one of the leaders in this respect within the European Union with a turn-over of 127.6 bn € and 1,231 million jobs in 2012. As Commissioner Öttinger says, Europe is leading as concerns cultural content. In order to maintain this position the authors of visual works should not become subject to prejudice caused by unjustified and unremunerated exceptions and an appropriate return of value which has been created based on authors’ works should be ensured.

Member countries have introduced the exceptions 5.3 (h) on works in public places and 5.3 (j) on incidental inclusion with some differences following their national traditions and within the flexibility provided by the EU Directive 29/2001. There are, however, serious doubts that exceptions including commercial uses are in compliance with the three-step-test.

Position de l’ADAGP quant à une éventuelle consécration légale d’une exception dite de « liberté de panorama »

L’ADAGP a été alertée sur la tentation de consacrer dans le projet de loi sur le numérique une exception dite de « liberté de panorama » qui autorisait la reproduction et la représentation des œuvres situées dans un lieu public.

Il est rappelé, au préalable, qu’il existe déjà, en droit français, plusieurs exceptions légales ou jurisprudentielles qui affectent directement les auteurs des arts graphiques et plastiques (peintres, sculpteurs, photographe, designers, architectes, graffeurs…), et couvrent en tout ou partie les reproductions d’œuvres situées dans un lieu public :

- L’exception jurisprudentielle applicable aux reproductions accessoires (récentement : Cass. civ 1ère, Getty, 12 juin 2012 ; Cass. civ. 1ère, 12 juillet 2012, Aufeminin.com) ;
- L’exception d’information immédiate (L. 122-5 9°), qui autorise la presse à reproduire ou représenter une œuvre (bien souvent située dans un lieu public) pour faire état d’une actualité liée à cette dernière.

En outre, l’ADAGP applique et a toujours appliqué de manière souple et raisonnante les règles du droit d’auteur : les blogs de photos de vacances ou les pages de Wikipedia n’ont jamais donné lieu à l’facturation.

La nécessité sociale d’une telle exception de « liberté de panorama », qui en réalité sert des intérêts sectoriels particuliers, parait dans ces conditions douteuse. À l’inverse, les auteurs des arts visuels ont de plus en plus le sentiment que, du fait des spéculativités de leur secteur (notamment, sans filière industrielle), ils sont une proie facile que l’on sacrifice préférentiellement lorsqu’il s’agit de faire des concessions politiques dans le domaine du droit d’auteur.

Par ailleurs, une telle exception heurterait frontalement tant le droit de propriété que le test en trois étapes : sa constitutionnalité ne pourrait donc être que remise en cause, soit à l’issue des débats parlementaires, soit à l’occasion d’une inévitable question prioritaire de constitutionnalité.
THANK YOU!