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INTRODUCTION IN BELGIAN LAW OF A NEW COPYRIGHT EXCEPTION:

« THE PANORAMA EXCEPTION »

In Belgium, as well as in France, many strived for years in order to introduce a new copyright exception, which would allow the reproduction and communication to the public of works which are permanently situated in public places (the so-called « panorama exception »). Next to France, Luxemburg, Italy and Greece, Belgium was one of the few EU Member States, which did not foresee such an exception in its copyright laws.

In Germany the concept «Panoramafreiheit» exists already since 1876. And there is a similar exception in the United Kingdom, introduced by the de Copyright, Designs and Patents Act of 1988, which even applies to the interior of public buildings. Eventually Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society foresaw in 2001 the possibility to create exceptions to the property rights when there is «*use of works, such as works of architecture or sculpture, made to be located permanently in public places*» (article 5.3, h of the Directive).

After much debate, the French Assemblée Nationale decided on 21 January 2016, to line up with the numerous Member States which already knew the exception by accepting a freedom of panorama, however, limited to usage with non-lucrative ends.

As is clear, the exception has a vast number of varieties. The one, which was ultimately introduced in Belgium by the law of 5 July 2016 allows “*the reproduction and communication to the public of works of visual, graphic and architectural art, which are made to permanently remain in public places, provided that the work is reproduced as it is and 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*”. The preparatory works point out that the concept «public places» is not applicable to the interior buildings, which are not permanently open to the public. Furthermore, the text points out that the work must be reproduced «as it is», which means that «in the public space». These clarifications seems to prevent certain acts from being possible, as for example photomontages containing the photographed building.

During the legislative process, the question arose whether the French model of the exception should be taken as a reference, and if a direct or indirect commercial purpose should be excluded from the exception. One may think, for instance, at the selling of postcards containing a picture of the copyrighted work. An amendment in that sense was proposed, but was ultimately rejected. The reason given to that rejection was that this limitation was unnecessary: the guarantee that the reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author, would be sufficient to prohibit such commercial uses. These conditions correspond to the second and third conditions of the so-called *triple test* (see article 5.5 of the Directive).

What are the practical consequences for Belgian law and what exactly will change? Inspired by the expression of Rémi Mathis in an article in the newspaper *Le Monde* (http://www.lemonde.fr/idees/article/2011/09/27/rendre-aux-francais-leur-paysage-architectural_1578046_3232.html) we can hold that it will « give Belgians their architectural landscape back ».

Some will be surprised to read that before the introduction of the panorama exception, it was prohibited to reproduce or communicate to the public a picture of which the central subject was a copyright protected work present in the public place. Therefore, it was necessary, for example, to ask the authorisation of the architect of the Atomium (or his successors in title) to publish a picture of it on the internet.

However, such reproduction or communication to the public was not prohibited in all situations. When the copy was purely made for private purposes, it was allowed. Tourists could, thus, freely take pictures of the Atomium, as long as these were not afterwards published. Moreover, Belgian law already contained an exception to the reproduction and communication to the public of a work located a public place, provided that the main subject of the reproduction or communication was not the work itself. Therefore, a picture of a couple posing in front of the Atomium, for example, could legally be put on the internet.

Because of the introduction of the panorama exception, it is nowadays possible to photograph all visual, graphic and architectural works, which are intended to be permanently placed in public, even if the general subject of the photo is the protected work itself, and furthermore, to communicate these pictures without authorisation of the author of the work concerned. However, attention has to be paid to the limitations of the new exception. Indeed, the work has to be reproduced or communicated to the public as it is placed in the public space. Furthermore, the reproduction or communication may not conflict with the normal exploitation of the work and may not unreasonably prejudice the legitimate interests of the author.

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