The EU Consultation on ancillary rights for publishers and the panorama exception: Modernising Copyright through a ‘one step forward and two steps back’ approach

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On March 23 the European Commission launched a public consultation on both the role of publishers in the copyright value chain and the ‘panorama exception’. The intent was to gather views on several issues: first, whether publishers of newspapers, magazines, books and scientific journals are facing problems in the digital environment as a result of the current copyright legal framework, with regard to their ability to license and be paid for online use of their content; secondly, to understand whether the granting of a neighboring right to publishers is needed; and finally what the impact of such a right could be on the publishing sector, citizens and creative industries.

This action comes as a surprise since it is controversial whether the adoption of a neighboring right for publishers was part of the 2015 European Commission’s Communication that set out the copyright reform program for the modernisation of copyright in the EU. It is also somewhat surprising that the panorama exception is again a matter of discussion since, in the aftermath of the Reda Report, it clearly emerged, from the huge protest raised by citizens, photographers, and civil society organisations, that the current formulation under Article 5(3)h of Directive 2001/29 is the only acceptable one.

It is likely that the call for a neighbouring right has been triggered by the *Reprobel* case, where the ECJ, on a reference from Belgium, denied book publishers a 50 percent share of the fair remuneration collected by collecting societies under Article 5(2)(a) and (b) of Directive 2001/29, as compensation for rightholders in relation to the reprography and private copying exceptions. Indeed, the Court held that publishers are not named among the rightholders to be compensated (only authors, performers, phonogram producers, film producers and broadcasters are listed). Likewise the Advocate General’s opinion added that compensation for publishers should in no way prejudice the fair compensation granted to authors on the basis of the above mentioned Directive. However, in so stating the Court also seems to leave the door open for the national legislator to provide a separate compensation for publishers – i.e.: outside the scope of the Directive – as a matter of national law.

On the other hand, the further consideration of the panorama exception likely arises from the need for a more harmonised provision on public space and public art images. While the consultation was in progress, two Member States that had not previously adopted an explicit panorama exception amended their national laws to accommodate one. In doing so they have achieved very different outcomes, thereby increasing the lack of harmonisation. While the French panorama exception – introduced after a debated process that ended in front of the Commissione mixte paritarie – provides a narrowly carved exception stating that “*les reproductions et représentations d’œuvres architecturales et de sculptures, placées en permanence sur la voie publique, réalisées par des personnes physiques, à l’exclusion de tout usage à caractère commercial*”, the Belgian version complies with the formulation of Article 5(3)h, therefore allowing reproductions for both commercial and non-commercial purposes.

Against this background, it should not come as a surprise that there is a certain negative attitude – and significant concern – as to the introduction of a neighboring right for publishers and a panorama exception somehow more limited than the current version under Article 5(3)h. Although the Commission has not yet published the results of the consultation, of the almost 3,000 responses collected by the YouCanFixCopyright Answering Tool (see here), around 95 percent of the respondents felt that the adoption of a neighboring right for publishers – regardless of the nature of the publisher – would have a strong negative impact. A slightly lower percentage of responses (almost 88 percent) show strong support for the introduction at EU level of a panorama exception covering both commercial and non-commercial use of works of architecture or sculpture that are made to be located permanently in public places.

The reasons for this strong reaction are several. As far as the neighboring right for publishers is concerned, they can be grouped into three main clusters. In the first place, the consultation does not define the neighbouring right as to its subject matter, length and scope. This – beside making it difficult to provide informed answers to the questions – generates a wary attitude towards it. Secondly, the adoption of such a neighboring right is deemed to introduce a certain degree of legal uncertainty. Although its introduction is underpinned by the assumption that publishers perform the same role as phonogram and film producers, in the publishing sector there is no need to incentivise publishers, as they are already rewarded by the transfer of authors’ copyrights. A further right for the publisher would double the layers of rights and result in higher transaction costs when right clearance is sought; create co-ordination issues for the exceptions and limitations regime; and, possibly, decrease the share reserved to authors (see here). Finally, significant concern emerges in relation to the effect that such a right may have on open access publishing – not to mention the more general activities that educational institutions undertake. A neighbouring right for publishers would greatly limit or hinder academics’ options to put their articles and other scientific content in open archives with the intent to encourage Open Access to their results. Should a specific and exclusive right be granted to publishers, a contract authorising open access publication would be useless as publishers would be entitled to oppose any making available of the published versions of the articles, including in open access, irrespective of the contractual provision preserving that right of authors (see here).

The panorama exception, on the other hand, is strongly perceived as in need of being made mandatory, as the current fragmented scenario is significantly affecting the dissemination of European cultural heritage, as well as hindering cross-border activities by raising barriers to end-users’ and intermediaries’ day-to-day activities on the Internet. The recent amendments that have taken place in France are a clear example of this. The narrow version of the panorama exception introduced there not only increases the level of dissonance at EU level, but also requires a not irrelevant effort of coordination within the national boundaries. It should be blended with the previous case law that had set a sort of exception for portrayal of an accessory to the main subject of the picture, thereby enabling – despite the difficulty of establishing with legal certainty the thin line between accessory and principal portrayal of a copyrighted work – the posting of pictures online on the condition that the copyright work was not the main subject targeted. The scenario is even more worrisome when another piece of legislation recently adopted in France enters the picture: the bill on “creation, architecture and heritage sites”. According to this, search engines would have to pay collecting societies a levy for pictures they automatically index, even if they are free to use. These statutory choices isolate France from the other European countries and significantly raise the level of fragmentation on the topic.

If a mandatory panorama exception is to be adopted, there is consensus on the fact that it should be in the current wide formulation of Article 5(3)h of Directive 2001/29/EC, which also authorises commercial uses. In fact, the introduction of a limitation solely for the non-commercial use of photographs of architectural works would make it unlawful to post on online platforms a wide range of photographs that are currently a vital part of the user-generated content phenomenon. This has a negative impact not only on user-generated content platforms – such as, for example, TripAdvisor – but also on platforms such as Wikimedia, as a recent Swedish decision illustrates. The European Commission should therefore take this opportunity to balance the rights of creators with the public interest in accessing and using works of art, as a way of accessing culture and promoting education and as a major form of freedom of expression, by also expanding the panorama exception beyond works of architecture or sculpture to include all works of art that are made to be located permanently or temporarily in a public space, including other visual art (e.g., murals and paintings).