Kluwer Copyright Blog

Freedom of panorama: what copyright for public art and architectural works?

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The relationship between copyright and public art has always been difficult. From the initial reluctance to include architectural works as copyrightable subject matter because of their functional dimension, to the attempt at copyrighting works that, like the Egyptian pyramids, have never been protected (see here), passing on through the cases of "duplitectural marvels". Moving beyond the question of why, when in China, we would want to visit the Austrian town of Hallstatt, these trends do say something. They show that we have entered into the age of repeatability for architecture, as recently demonstrated by the copy of Zaha Hadid's Wangjing Soho that has been built in Chongqing. On the one hand, this look-a-like architecture cannot simply be seen as the latest evidence of a sort of knock-off culture, rather, it demonstrates national aspirations to build new global cities as well as the global spirit that landmark architecture can acquire. On the other hand, from a legal standpoint, these trends raise the question as to what protection copyright law should offer to architectural works, given their public nature. As the recent discussion on "duplitecture" shows, authors of architectural works can control their personality and reputation (the moral side of copyright) and may also have the chance to receive compensation for unauthorised copies (the economic side of copyright). Yet, what is very unlikely is that they will see the copycat structures torn down (the remedial and reintegrative side of copyright). Any measure that could prevent access to architectural works would certainly be undesirable, since their being permanently publicly displayed produces a threefold relationship, work/author/society, which strikes a new balance between the public and private interests that underpin these works.

The above holds true not only for architectural works but for the whole category of public art works to which they belong. Indeed, public art comprises all works that are meant to be displayed in outdoor public spaces, such as buildings, monuments, sculptures, memorials and civic statuaries as well as various features of the built environment like street furniture, street lighting and graffiti. The features of being publicly displayed as well as being works in a single copy categorise architectural works as public art even though structures such as buildings or bridges encompass a functional dimension that is usually lacking in the case of other public art works.

Because of their specific features – being publicly displayed and being works in a single copy – public art and architectural works represent a field where the public interest and private interests

collide, thereby giving rise to a wide stream of litigation. In principle, conflicts can be categorised as four types: (i) clashes between the private interest of the author – i.e. copyright – and the private interest of the owner or commissioners of the work – i.e. property rights; (*ii*) clashes between the private interest of the author – i.e. copyright – and the public interest of the users of the public space; (*iii*) clashes between the private interest of the owner or commissioners and, again, the public interest of users of public space; but also (*iv*) clashes between the public interest of municipalities and general society to preserve works listed as heritage works and the public interest of citizens in altering cities and urban landscapes.

Moreover, these features also confer a significant role in the public interest, namely the expression of cultural and economic needs as well as of social and environmental demands. This is what guides – or should guide when it does not already – the solution to the many conflicts between the public interest and private interests that these works cause around the world. For example, in New Zealand, the leading case *Radford v Hallensteins Bros Ltd* involved a sculptor, John Radford, who created three architectural forms situated in a public park of Auckland, and the clothing retail chain Hallensteins, which sold T-shirts with photographs of these forms along with other design elements. The conflict pivoted around the author's economic right to control the two-dimensional reproduction of his work and the public interest in using a reproduction of it. The Court held that there was no infringement as the relevant provisions set aside "*any copyright in the work that the author might otherwise enjoy*" so that the public interest becomes the top priority. In other words, the landmark status gained by the sculptures over the years produced a change in the way in which the balance would traditionally be struck, leading to the public interest outweighing the interest of the author in controlling exploitation of his work. A similar conflict was raised in the French case *Buren et Drevet v Lyon* where the Court ruled against the artists Daniel Buren and Christian Drevet as authors of the 72 small fountains decorating *Place des Terreaux* in Lyon. Buren and Drevet had sued a number of publishers who had reproduced and sold postcards of the square without their permission and without mentioning their names on the back of the postcards. This is what is usually required for other public spaces in France like the Pyramid of the Louvre, the Bibliothèque nationale de France, or the Grande Arche de la Defense, if commercial exploitation is envisaged. According to the Court, the centrality of the artwork in the image is what usually represents the turning point, and this was not the case – surprisingly enough – for the fountains in the postcards of *Place des Terreaux.* Although with a very different argumentation, even in France, there might be the case that public art works are freely accessed and used by the public.

The public interest in accessing and using public art and architectural works is mainly granted by the so-called 'freedom of panorama', which, broadly speaking, is the exception permitting third parties to reproduce works of art that are made to be located permanently in public places. The public interest that the current freedom of panorama safeguards varies from jurisdiction to jurisdiction as copyright law is principally a matter of domestic regulation. In common law countries the public interest in architectural works is broadly recognised, for example in Australia a blanket exception from copyright protection is provided for every artistic work situated, otherwise than temporarily, in a public place, providing a very extensive 'freedom of panorama'. New Zealand embraces – similarly to the United Kingdom – an "open" approach for all public art works (except paintings), provided that the reproduction of works in the public space is incidental to creating a new work, regardless of whether this is made for profit or not. It is, however, in the US that the public interest is even better protected. Here, the public interest is not safeguarded by the freedom of panorama exception, but is guaranteed by a narrower scope of the copyright prerogatives. Indeed, when architectural works are at stake, the economic rights granted to authors do not cover the right to prevent two-dimensional reproductions such as photographs.

In Europe, the discretionary nature of Article 5(3)(h) of the InfoSoc Directive has so far allowed EU Member States to regulate the matter on their own terms. For example, while in France, the freedom of panorama is not statutorily introduced, and thus the balance between private and public interests is left to the judge, other countries belonging to the civil law tradition, like Denmark and Spain, have introduced this exception but limited it to reproductions made for private and not commercial purposes. As a result, while in France decisions vary widely on a case by case basis since courts are "free" to favour authors when the use of the image is for commercial (e.g. postcards) and not for informational (e.g. newspapers) purposes, other national courts are bound to find the balance between the author's interest and the interest of the public, according to what is dictated by the exception to the exclusive right to reproduce inserted within their national copyright laws.

Over the last few months, the freedom of panorama has been in the limelight as part of the process of reforming the EU InfoSoc Directive. The Legal Committee of the European Parliament recently voted on an amended version of the draft Report initially prepared by MEP and Pirate Party member Julia Reda on the implementation of the InfoSoc Directive. Instead of recommending that the freedom of panorama provided by Article 5(3)h is made mandatory – as it was in the original version of the Report written by Reda – the amended version approved by the Legal Committee recommended 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 authorization from the authors or any proxy acting for them". However, on the 9th of July the Parliament adopted a non-binding resolution that, *inter alia*, rejected the suggestion to limit the freedom of panorama, leaving the current European scenario as it is.

Now, while the intention of having a mandatory freedom of panorama is a positive one, as it would eliminate national differences once all Member States were mandatorily required to adopt it, if they were required to adopt it in its current amended form this may have a negative effect as it does not take into consideration how the public nature of these works should shape copyright protection. What is at stake here is the rejuvenation of the traditional vision of copyright law under which protection is given mainly in the interests of the authors, against a more modern vision of a copyright law that takes into consideration the specific features of public art and architectural works, i.e. a vision within which the public interest is the expression of the members of the public that access the space where the work is located. It is by acknowledging the real pluralistic instances that constitute the public interest underpinning public art and architectural works that we can determine the extension of the exclusive rights granted by copyright law to their authors.

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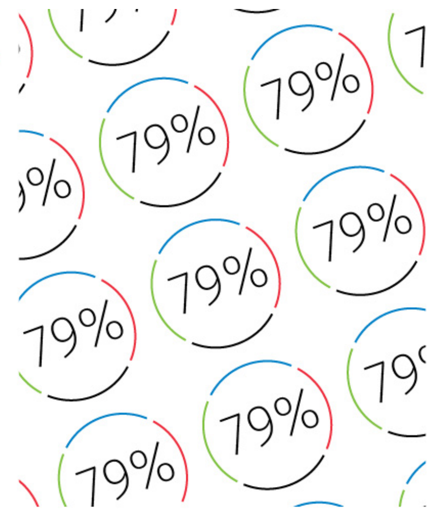

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