

Kluwer Copyright Blog

Copyright implications of Augmented Reality for cultural goods – Part 2

Cristiana Sappa (IÉSEG School of Management, Lille-Paris) · Wednesday, December 7th, 2022

Part 1 of this post outlined augmented reality (AR) technology, its applications in the cultural heritage sector and its potential copyright implications. This part discusses the relevant copyright exceptions and limitations.



Exceptions enabling AR for fostering education and participation in cultural life

Image by Tumisu from Pixabay

Currently, EU law does not contain any broad clause enabling exploitations related to the development of AR. Copyright exceptions and limitations that may have an impact on AR are contained in Art. 5 of the [InfoSoc Directive](#), as well as in the [Orphan Works](#) and the [CDSM Directives](#).

The [InfoSoc Directive](#) includes several clauses that may have relevance for AR development:

- **5(1) InfoSoc Directive**, covering **temporary reproductions** and reproductions that last no longer than the necessary time for data processing: within an AR experience, at least two reproductions occur on the server RAM. Should it be confirmed that these copies are copyright-protected reproductions, the exception under Art. 5(1) InfoSoc Directive would apply to all copies transmitted from the server to the device embedding the photo camera and vice versa.
- **5(2)(c) InfoSoc Directive on specific reproductions made by libraries, educational establishments, museums or archives** that are open to the public, and not made for direct or indirect economic or commercial advantage: the clause applies to works hosted by Cultural Heritage Institutions (CHIs), but also to those not hosted but reproduced by them. It concerns only specific reproductions. AR is used by CHIs to attract visitors where the main aim is to educate individuals with regard to cultural heritage. From this perspective it is likely that there is

no indirect economic advantage and therefore the application of the exception cannot be excluded. As far as reproductions, storage and indexing of markers by CHIs are concerned, the exception may apply, as it does not involve the right of communication to the public.

- **5(3)(d) InfoSoc Directive for quotations:** the clause applies to bodies that manage cultural goods and to the works of art they collect. This clause frees reproductions and communications to the public when a quotation is used for criticism, research or educational purposes, whether directly or indirectly. This easily applies to AR in the context of CHIs because the research, education or criticism purposes in such initiatives are present most of the time. The exception, however, concerns only the works reproduced from the real world. The main issue with this exception relates to the portion of a work that can be reproduced in order to be compatible with the notion of quotation, since case law in several jurisdictions, such as France, Italy and Germany often considers that the quotation exception does not apply to the entire reproduction of works of art. This may be problematic, since AR development frequently requires entire reproductions of works of visual art.
- **5(3)(h) InfoSoc Directive** allows the **reproduction and communication to the public of works created to be permanently located in public places:** the extension to both rights makes it viable for any of the activities related to AR. If the reference to public is interpreted as ‘accessible to the public’ and not only ‘owned’ by a public sector body, both outdoor and indoor works – such as museums’ collections – would be covered by the exception. In any case, as long as AR content is developed on outdoor goods and works, the exception facilitates the initiative to all private operators that develop AR initiatives autonomously and independently.
- **5(3)(n) of the InfoSoc Directive**, under which **reproductions and communications to the public are authorized on terminals located within the CHI’s premises for research or private study purposes**, when such acts concern works owned or permanently possessed by the CHI’s collections: this exception can be interpreted as also applying when mobile devices are used instead of terminals within the CHI’s premises. Thus, it can concern AR experiences on cultural goods permanently collected within the CHI’s premises only.

Alongside the InfoSoc Directive, **Art. 6 Orphan Works Directive** is of interest for AR. Such a clause exempts reproductions for the purpose of making orphan works available, and the activity of making them available for specific purposes, such as digitization, preservation, restoration, cataloguing or indexing. According to Art. 6(2), CHIs exploit orphan works to achieve aims related to their public-interest mission. This means that the exception covers the reproductions of markers in orphan works, when this is led by CHIs or at their request.

Finally, the **CDSM Directive** contains several clauses of interest for AR development:

- Art. 3 and Art. 8 may apply for AR that is not developed for commercial purposes, thus all initiatives developed by third parties that are market operators are excluded.
- More precisely, **Art. 3 on data mining** may facilitate reproductions and extractions of information from a digital collection on cultural heritage, in order to develop specific AR aimed at research purposes. **Art. 8 on out-of-commerce works** brings similar concerns to those expressed with respect to the interpretation of Art. 5(3)(n) InfoSoc Directive. Under the two regimes introduced by the exception for out-of-commerce works, authorized reproductions are of two kinds. Reproduced works can be available for non-commercial purposes, such as those displayed on a non-commercial website; or they may be unrelated to any making-available initiative, such as reproduced markers that are then stored in a database hosted on a server. Additionally, when there is no commercial purpose, they can be displayed and overlaid on a real-world object. If the rules apply to cultural goods that are out of sale, such as museum goods, it

would solve part of the issue because only goods that are permanently exhibited or collected by museums would be covered by the exception. And in any case the mechanism described by Art. 8 applies to non-commercial uses only.

- Alongside these two clauses, **Art. 6 enables CHIs to reproduce works or other material permanently located in their collection for preservation purposes**. This exception is unlikely to cover the reproduction of markers and the visualization of information on the screen during AR initiatives.

Conclusion

An upstream clearance of rights by CHIs and bodies that manage cultural goods is crucial for implementing AR cultural heritage applications. In the absence of these clearance procedures, often skipped because of the relatively high cost they entail, other paths have to be explored. When works used for developing AR initiatives are in the public domain, and when a body managing cultural heritage owns the existing rights in such works, [rules on the re-use of public sector information \(PSI\)](#) can apply and therefore facilitate the development of initiatives based upon the reproduction and making available of works embedded in cultural goods. Alongside this, exceptions and limitations play a particular role in AR development. More precisely, some of the current exceptions of the EU copyright framework may enable AR-related reproductions, in particular when they are stored and indexed in a cloud database. However, when the reproductions of copyrighted works are made available via AR on a permanent basis, existing exceptions and limitations may not be enough to enable such important initiatives. When neither PSI rules nor copyright exceptions can apply, individually or collectively licensing through collecting societies seem to be the only tool left for developing AR initiatives in compliance with copyright rules.

This blogpost is an elaboration of the article Sappa, *Participating in cultural life via augmented reality on cultural goods: what role for copyright?*, published in *Grur. Int.* 2022, 618ff..

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please [subscribe here](#).

Kluwer IP Law

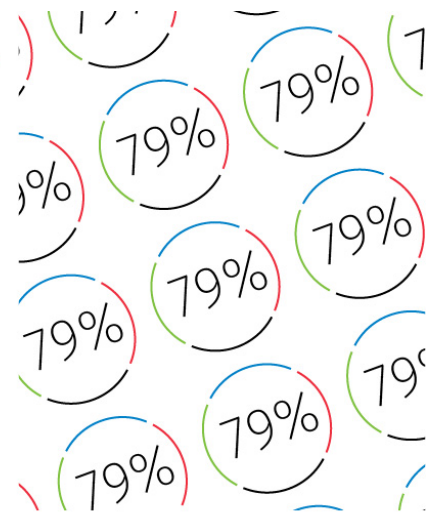
The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.

79% of the lawyers think that the importance of legal technology will increase for next year.

Drive change with Kluwer IP Law.

The master resource for Intellectual Property rights and registration.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Wednesday, December 7th, 2022 at 12:54 pm and is filed under [CDSM Directive, European Union, Exceptions and Limitations](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.