Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception'

Fields marked with * are mandatory.

General information about you

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Fields marked with * are mandatory.

*

I'm responding as:

- ○ An individual in my personal capacity
- ◉ A representative of an organisation/company/institution

*Please provide your first name:

Reema

*Please provide your last name:

Selhi

*

Please indicate your preference for the publication of your response on the Commission's website:

- ( ) Under the name given: I consent to publication of all information in my contribution and I declare that none of it is subject to copyright restrictions that prevent publication.
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*Please enter the name of your institution/organisation/business.

DACS (Design and Artists Copyright Society)

What is your institution/organisation/business website, etc.?

www.dacs.org.uk

*What is the primary place of establishment of the entity you represent?

- ( ) Austria
- ( ) Belgium
- ( ) Bulgaria
- ( ) Croatia
- ( ) Cyprus
- ( ) Czech Republic
- ( ) Denmark
- ( ) Estonia
- ( ) Finland
- ( ) France
- ( ) Germany
- ( ) Greece
- ( ) Hungary
- ( ) Italy
- ( ) Ireland
- ( ) Latvia
- ( ) Lithuania
- ( ) Luxembourg
- ( ) Malta
- ( ) Netherlands
- ( ) Poland
- ( ) Portugal
- ( ) Romania
- ( ) Slovakia
- ( ) Slovenia
- ( ) Spain
- ( ) Sweden
- (•) United Kingdom
- ( ) Other

*

My institution/organisation/business operates in: *(Multipe selections possible)*

- [x] Austria
- [x] Belgium
- [ ] Bulgaria
- [ ] Croatia
- [ ] Cyprus
- [x] Czech Republic
- [x] Denmark
- [x] Estonia
- [x] Finland
- [x] France
- [x] Germany
- [x] Greece
- [x] Hungary
- [x] Italy
- [x] Ireland
- [x] Latvia
- [ ] Lithuania
- [ ] Luxembourg
- [ ] Malta
- [x] Netherlands
- [ ] Poland
- [x] Portugal
- [ ] Romania
- [x] Slovakia
- [ ] Slovenia
- [x] Spain
- [x] Sweden
- [x] United Kingdom
- [ ] Other

*

Is your organisation registered in the Transparency Register of the European Commission and the European Parliament?

- (•) Yes
- ( ) No

*

Please indicate your organisation's registration number in the Transparency Register.

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The role of publishers in the copyright value chain

In its Communication Towards a modern, more European copyright framework of 9 December 2015, the Commission has set the objective of achieving a well-functioning market place for copyright, which implies, in particular, "the possibility for right holders to license and be paid for the use of their content, including content distributed online."[1]

Further to the Communication and the related stakeholders' reactions, the Commission wants to gather views as to 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 notably to their ability to licence and be paid for online uses of their content. This subject was not specifically covered by other public consultations on copyright issues the Commission has carried out over the last years. In particular the Commission wants to consult all stakeholders as regards the impact that a possible change in EU law to grant publishers a new neighbouring right would have on them, on the whole publishing value chain, on consumers/citizens and creative industries. The Commission invites all stakeholders to back up their replies, whenever possible, with market data and other economic evidence. It also wants to gather views as to whether the need (or not) for intervention is different in the press publishing sector as compared to the book/scientific publishing sectors. In doing so, the Commission will ensure the coherence of any possible intervention with other EU policies and in particular its policy on open access to scientific publications.[3]

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Selection

Do you wish to respond to the questionnaire "The role of publishers in the copyright value chain"?

- (●) Yes *(Please allow for a few moments while questions are loaded below)*
- ( ) No

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[1] COM(2015)626 final.

[2] Neighbouring rights are rights similar to copyright but do not reward an authors' original creation (a work). They reward either the performance of a work (e.g. by a musician, a singer, an actor) or an organisational or financial effort (for example by a producer) which may also include a participation in the creative process. EU law only grants neighbouring rights to performers, film producers, record producers and broadcasting organisations. Rights enjoyed by neighbouring rightholders under EU law generally include (except in specific cases) the rights of reproduction, distribution, and communication to the public/making available.

[3] See Communication COM(2012) 401, Towards better access to scientific information: Boosting the benefits of public investments in research, and Recommendation C(2012) 4890 on access to and preservation of scientific information.

Category of respondents

*Please choose the category that applies to your organisation and sector.

- ○ Member State
- ○ Public authority
- ○ Library/Cultural heritage institution (or representative thereof)
- ○ Educational or research institution (or representative thereof)
- ○ End user/consumer/citizen (or representative thereof)
- ○ Researcher (or representative thereof)
- ○ Professional photographer (or representative thereof)
- ○ Writer (or representative thereof)
- ○ Journalist (or representative thereof)
- ○ Other author (or representative thereof)
- ◉ Collective management organisation (or representative thereof)
- ○ Press publisher (or representative thereof)
- ○ Book publisher (or representative thereof)
- ○ Scientific publisher (or representative thereof)
- ○ Film/audiovisual producer (or representative thereof)
- ○ Broadcaster (or representative thereof)
- ○ Phonogram producer (or representative thereof)
- ○ Performer (or representative thereof)
- ○ Advertising service provider (or representative thereof)
- ○ Content aggregator (e.g. news aggregators, images banks or representative thereof)
- ○ Search engine (or representative thereof)
- ○ Social network (or representative thereof)
- ○ Hosting service provider (or representative thereof)
- ○ Other service provider (or representative thereof)
- ○ Other

Questions

1. On which grounds do you obtain rights for the purposes of publishing your press or other print content and licensing it? *(Multipe selections possible)*

- ☐ transfer of rights from authors
- ☐ licensing of rights from authors (exclusive or non-exclusive)
- ☐ self-standing right under national law (e.g. author of a collective work)
- ☐ rights over works created by an employee in the course of employment
- ☑ not relevant
- ☐ other

Please explain

Many questions in this consultation have been aimed at users of copyright protected materials rather than original creators whose rights and opportunities for remuneration are likely to be affected by any changes.
DACS represents visual artist rightsholders who have granted us an exclusive licence to exploit the copyright in their work, including for the purposes of publishing the content for multiple purposes. DACS does not ask for a transfer of rights from creators, nor does DACS transfer any rights but licenses them to users, such as publishers, on a non-exclusive basis. DACS operates under transparent, published licensing tariffs and under agreements that require the work is only used in a prescribed manner.
However, where visual artist rightsholders enter into their own agreements on a non-licensing basis for example, it is often the case that the publishers will insist on complete assignments of copyright, waivers of ancillary rights or unlimited scope of use for incommensurate remuneration.
The recent judgments at CJEU level including Svensson and Bestwater on linking and framing have created ambiguity over what constitutes 'linking' in respect of a visual image: for example it is unclear what a 'snippet' of an image would be. The Svensson decision could have a negative impact on the rights of visual artists as it seems to run contrary to the doctrine of exhaustion of rights in Article 3 of the Copyright Directive (that exclusive rights shall not be exhausted by any act of communication to the public). When a publisher puts an image online under Svensson, the digital rights are literally exhausted because the possibility of linking put the work outside of the control of the copyright owner.

2. Have you faced problems when licensing online uses of your press or other print content due to the fact that you were licensing or seeking to do so on the basis of rights transferred or licensed to you by authors?

- ○ yes, often
- ○ yes, occasionally
- ○ hardly ever
- ○ never
- ○ no opinion
- ◉ not relevant

If so, please explain what problems and provide examples indicating in particular the Member State, the uses you were licensing, the type of work and licensee.

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Although this question is directed at publishers, we would like to use this
opportunity to highlight the general business practice of publishers who make
in their standard terms and conditions provisions to acquire all rights in a
creator’s work beyond those the publisher really needs. Press publishers in
particular claim that the use of a work is covered by an exception and
therefore they do not attempt to license the use of the works from the author,
yet they then license the works to other parties for their own benefit.
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3. Have you faced problems enforcing rights related to press or other print content online due to the fact that you were taking action or seeking to do so on the basis of rights transferred or licenced to you by authors?

- ○ yes, often
- ◉ yes, occasionally
- ○ hardly ever
- ○ never
- ○ no opinion
- ○ not relevant

If so, please explain what problems and provide examples indicating in particular the Member State, the type of use and the alleged infringement to your rights.

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Visual artworks are frequently reproduced online, with images being hosted by
online platforms without authorisation or compensation back to visual artist
rightsholders. Online platforms, which make works available across Member
States, rely on safe harbour provisions under Article 14 of the E-Commerce
Directive (2000/31/EC). Online platforms have not been willing to negotiate
with rightsholders for fair remuneration for making their works available.
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4. What would be the impact on publishers of the creation of a new neighbouring right in EU law (in particular on their ability to license and protect their content from infringements and to receive compensation for uses made under an exception)?

- ○ strong positive impact
- ○ modest positive impact
- ◉ no impact
- ○ modest negative impact
- ○ strong negative impact
- ○ no opinion

Please explain

DACS has a large number of publisher clients who enter into non-exclusive licence agreements for the reproduction of works of visual artist rightsholders (our members). As such, in these instances, the content does not belong to the publisher client, therefore this question is misleading where it refers to ‘their content’.
There is not any substantive evidence that a neighbouring right for publishers is needed, and any new right would muddy the waters between authors/creators and publishers. Furthermore, it is not clear what the publishers’ right would actually attach to or what the specific issue would be addressed by introducing the right. Given the considerable harm the publishers’ right could cause to author/creator rightsholders, together with the lack of evidence that there would be any positive impact for publishers, DACS considers a new neighbouring right should not be created.

5. Would the creation of a new neighbouring right covering publishers in all sectors have an impact on authors in the publishing sector such as journalists, writers, photographers, researchers (in particular on authors' contractual relationship with publishers, remuneration and the compensation they may be receiving for uses made under an exception)?

- ○ strong positive impact
- ○ modest positive impact
- ○ no impact
- ○ modest negative impact
- ◉ strong negative impact
- ○ no opinion

Please explain

Visual artists, like other authors, have a weak bargaining position against publishers already. Creators' contracts can be long, over complicated and request a transfer of rights or a perpetual, wide ranging licence. The creation of a new neighbouring right for publishers will serve to diminish authors' bargaining position even further. DACS is a member of the International Authors Forum, who recently engaged in a project that established principles for fair contractual rights for authors as contractual terms are often biased to favour the publisher.
The CJEU showed in the cases HP v Reprobel and EGEDA v Administracion del Estado that remuneration schemes are in place to protect and support the authors of the work and to compensate them for the specific harm caused by private copying. This is a very important concept and we believe there is a risk this will be undermined substantially if publishers were considered rightsholders under the InfoSoc Directive in the same way as authors. It is also important to note that creating a new right for publishers will not result in the availability of more compensation so existing fair remuneration schemes would be squeezed amongst creators even further. The EGEDA case showed the intention of the CJEU that the remuneration should relate to the actual harm done to the rightsholder.
Furthermore, DACS considers that it is important that the CJEU's rulings are upheld in the proper manner and that new laws are not created that circumvent them.

6. Would the creation of a neighbouring right limited to the press publishers have an impact on authors in the publishing sector (as above)?

- ○ strong positive impact
- ○ modest positive impact
- ○ no impact
- ○ modest negative impact
- ◉ strong negative impact
- ○ no opinion

Please explain

As per our answer to question 5.

7. Would the creation of a new neighbouring right covering publishers in all sectors have an impact on rightholders other than authors in the publishing sector?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain

As a visual work can't be represented as a snippet or quotation, a neighbouring right for publishers will have a particularly strong impact for visual creators especially given the nature of a visual image and that when it is represented it is most often done so in its entirety. Therefore the harm caused by a neighbouring right for publishers that diminishes the right of a creator is particularly damaging.
Other than a few examples such as press photographers, whose works are used specifically in press publishing, most visual artists' works are not limited to one sector: for example a visual artist is unlikely to just make their works available for print publishing and not for anything else. As such a new publishers' right will confer exclusivity over the use of a visual work contained in the publication, so where a publisher has a right to then, for example, make the publication available online, this will be done without the permission from rightsholders. Due to decisions such as Svensson and Bestwater, the works would also be able to be linked to from elsewhere, all outside of the control or express permission of the rightsholder.

8. Would the creation of a neighbouring right limited to the press publishers have an impact on rightholders other than authors in the publishing sector?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain

Press publishers often directly license with visual artist rightsholders, such as photographers, in highly restrictive terms that already grant a majority of rights to the publisher. The market for visual content is saturated in supply therefore rightsholders are at a disadvantage to demand fairer terms. A new right to publishers will therefore have a deeply negative impact on creators or authors, as it will diminish their rights and bargaining power even further.
Additionally, online service providers are benefitting from the widespread use and reproduction of visual works online without compensation to the rightsholder. Online services use the defence of safe harbour under the E-Commerce Directive to absolve themselves of the responsibility to remunerate authors and creators, but there is no clarity on whether this is justified. DACS considers that the lack of clarity in the E-Commerce Directive needs to be addressed and that the European Commission should also explore, support and facilitate licensing solutions to ensure rightsholders receive fair remuneration.

9. Would the creation of a new neighbouring right covering publishers in all sectors have an impact on researchers and educational or research institutions?

- ○ strong positive impact
- ○ modest positive impact
- ○ no impact
- ◉ modest negative impact
- ○ strong negative impact
- ○ no opinion

Please explain

We consider that educational and research institutions would be impacted by a new neighbouring right for publishers as they will have to clear more rights than usual. In light of this, it would be expected that educational and research institutions would call upon national Governments for wider exceptions on the basis of the negative impact they will feel from the publishers' right. In turn, this will undermine existing licensing solutions and the cooperation between licensing bodies/rightsholder groups and educational institutions.

10. Would the creation of a neighbouring right limited to press publishers have an impact on researchers and educational or research institutions?

- ○ strong positive impact
- ○ modest positive impact
- ○ no impact
- ◉ modest negative impact
- ○ strong negative impact
- ○ no opinion

Please explain

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As per our response to question 9
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11. Would the creation of new neighbouring right covering publishers in all sectors have an impact on online service providers (in particular on their ability to use or to obtain a licence to use press or other print content)?

- ○ strong positive impact
- ○ modest positive impact
- ◉ no impact
- ○ modest negative impact
- ○ strong negative impact
- ○ no opinion

Please explain

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We do not consider that online service providers will be particularly impacted
by rights created under law as they use the safe harbour provisions of the
E-Commerce Directive as protection from remunerating rightsholders and
absolving themselves of any liabilities in this respect.
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12. Would the creation of such a neighbouring right limited to press publishers have an impact on online service providers (in particular on their ability to use or to obtain a licence to use press content)?

- ○ strong positive impact
- ○ modest positive impact
- ◉ no impact
- ○ modest negative impact
- ○ strong negative impact
- ○ no opinion

Please explain

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As per our response to question 11.
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13. Would the creation of new neighbouring right covering publishers in all sectors have an impact on consumers/end-users/EU citizens?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain

Consumers, end-users and EU citizens are more often than not creators of creative content in their own right. User generated content is wide spread online and in publications, especially as more people engage with publishing platforms. There are emerging activities, such as easy payment methods and applications that seek to remunerate creative content from users: for example websites such as Monegraph where everyday citizens and end-users monetise their images online. A publishers' right would in these instances encroach on the users' rights to receive remuneration for this content, and remove the incentives to creating content for remuneration.
Additionally, as it is not clear to concerned stakeholders what positive impact a publishers' right will have, this would be even less clear to users of copyright protected material. End-users and consumers require clear and easy to use legislation to enable them to use copyright protected material in a way that fairly compensates the rightsholder. Creating new legislations that lack clarity and appear to go against decisions made at the CJEU would have a negative impact on how users and consumers view rights protection, especially in a digital environment. Additionally, due to the cases of Bestwater and Svensson, a new publishers' right will create a situation where rightsholders will have so little control over their work as it would be able to be linked to, that there will be no incentive to license their works to publishers in the first place.

14. Would the creation of new neighbouring right limited to press publishers have an impact on consumers/end-users/EU citizens?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain

As per our response to question 13.

15. In those cases where publishers have been granted rights over or compensation for specific types of online uses of their content (often referred to as "ancillary rights") under Member States' law, has there been any impact on you/your activity, and if so, what?

- ○ strong positive impact
- ○ modest positive impact
- ○ no impact
- ◉ modest negative impact
- ○ strong negative impact
- ○ no opinion

Please explain, indicating in particular the Member State.

> Under UK law publishers benefit from rights in a typographical arrangement of a text, which is an ancillary right. Despite the benefit of an express right for publishers, it is nevertheless common that publishers require from creators a full transfer of their rights. Therefore ancillary rights cannot be said to have a positive impact on creators at all, and a new publishers right will increase this negative impact.

16. Is there any other issue that should be considered as regards the role of publishers in the copyright value chain and the need for and/or the impact of the possible creation of a neighbouring right for publishers in EU copyright law?

- ◉ Yes
- ○ No

If so, please explain and whenever possible, please back up your replies with market data and other economic evidence.

> Publishers do play a significant role as content aggregators, but in general they do not make a creative contribution that would warrant granting them their own right in the publications that they already control. This debate should be used to find a fairer and more balanced distribution of remuneration to authors as the publishers often use their position as gate-keepers to remuneration to their advantage. So whilst the publisher definitely has a role to play in the value chain, this should not be to the detriment of authors and the bargaining position of authors should be strengthened.

Use of works, such as works of architecture or sculpture, made to be located permanently in public places (the 'panorama exception')

EU copyright law provides that Member States may lay down exceptions or limitations to copyright concerning the use of works, such as works of architecture or sculpture, made to be located permanently in public places (the ‘panorama exception’) [1] . This exception has been implemented in most Member States within the margin of manoeuvre left to them by EU law.

In its Communication Towards a modern, more European copyright framework, the Commission has indicated that it is assessing options and will consider legislative proposals on EU copyright exceptions, among others in order to "clarify the current EU exception permitting the use of works that were made to be permanently located in the public space (the ‘panorama exception’), to take into account new dissemination channels.”[2]

This subject was not specifically covered by other public consultations on copyright issues the Commission has carried out over the last years. Further to the Communication and the related stakeholder reactions, the Commission wants to seek views as to whether the current legislative framework on the "panorama" exception gives rise to specific problems in the context of the Digital Single Market. The Commission invites all stakeholders to back up their replies, whenever possible, with market data and other economic evidence.

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Selection

Do you wish to respond to this questionnaire "Use of works, such as works of architecture or sculpture, made to be located permanently in public places (the 'panorama exception')?

- (●) Yes *(Please allow for a few moments while questions are loaded below)*
- ( ) No

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[1] Article 5(3)(h) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[2] COM(2015) 626 final.

Category of respondents

*

Please choose the category that applies to your organisation and sector.

- ○ Member State
- ○ Public authority
- ○ Owner or manager of works made to be located permanently in public places (or representative thereof)
- ○ Library or Cultural heritage institution (or representative thereof)
- ○ Educational or research institution (or representative thereof)
- ○ End user/consumer/citizen (or representative thereof)
- ○ Visual artist (e.g. painter, sculptor or representative thereof)
- ○ Architect (or representative thereof)
- ○ Professional photographer (or representative thereof)
- ○ Other authors (or representative thereof)
- ◉ Collective management organisation (or representative thereof)
- ○ Publisher (or representative thereof)
- ○ Film/audiovisual producer (or representative thereof)
- ○ Broadcaster (or representative thereof)
- ○ Phonogram producer (or representative thereof)
- ○ Performer (or representative thereof)
- ○ Advertising service provider (or representative thereof)
- ○ Content aggregator (e.g. news aggregators, images banks or representative thereof)
- ○ Search engine (or representative thereof)
- ○ Social network (or representative thereof)
- ○ Hosting service provider (or representative thereof)
- ○ Other service provider (or representative thereof)
- ○ Other

Questions

1. When uploading your images of works, such as works of architecture or sculpture, made to be located permanently in public places on the internet, have you faced problems related to the fact that such works were protected by copyright?
   - ○ Yes, often
   - ○ Yes, occasionally
   - ○ Hardly ever
   - ◉ Never
   - ○ No opinion
   - ○ Not relevant

If so, please explain what problems and provide examples indicating in particular the Member State and the type of work concerned.

This question is aimed at individual users of the copyright protected content and doesn’t take into account the rights of the creator whose works are being used.

DACS is a UK based rights management organisation representing visual artists. DACS supports maintaining the status quo in respect of exceptions relating to certain works situated on permanent public display.

In the UK there is an exception that covers the use of certain works that are permanently situated on public display, and as such users responding from the UK should not experience problems uploading images online where their use falls within the exception. Where a use of a work is outside of the exception or outside of the scope of the three step test, DACS will license the use of the work. This has been the case in terms of book publishing and commercial opportunities where the three step test cannot be met.

DACS is also aware that collective management organisations (CMOs) in other Member States with no such exception have expressed the fact that they do not limit activities such as individuals taking photographs of those works or selfies in front of those works, who then post these photographs on their social media accounts. However it is important to recognise that irrespective of exceptions applying, copyright in these works does exist and rightsholders have other rights including a right to be remunerated for an infringement of copyright.

Overall we do not think that users experience problems in uploading their own images of works on permanent public display for personal use and despite a far reaching campaign for an all-encompassing, harmonised exception, there is little existing evidence that it will have any change or impact on users.

However, social media platforms support the campaign on the basis that their users should comply with terms and conditions allowing the platform to use the images the user posts. We do not consider it is correct that EU legislation should be made or changed to suit the terms and conditions of social media platforms.

If an all-encompassing, harmonised exception was introduced, creators of sculptures and architectural works, who rely on the licensing remuneration they receive from the commercial uses of their work in the same way as other rightsholders would be negatively impacted. DACS considers that it is unfair to discriminate against creators of certain works that are on display in public places and deprive them of rights that commercial entities such as publishers benefit from.

2. When providing online access to images of works, such as works of architecture or sculpture, made to be located permanently in public places, have you faced problems related to the fact that such works were protected by copyright?

- ○ Yes, often
- ○ Yes, occasionally
- ○ Hardly ever
- ○ Never
- ○ No opinion
- ◉ Not relevant

If so, please explain what problems and provide examples indicating in particular the Member State and the type of work concerned

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This question is designed with social media platforms and their users in mind,
however rightsholders experience a number of problems when users provide
access to works on social media.

Platforms such as Google Images, Wikipedia/Wikimedia and Facebook allow for
access to images in a number of ways, including by hosting content on servers
and/or on databases which are made available to users under terms and
conditions that allow any commercial use or modification of the works without
prior authorisation.

However, these platforms claim they have no liability to remunerate creators
of the works as they believe that their acts are protected by the safe harbour
provisions of the e-Commerce Directive. The platforms are unbending to hear
any other argument, to accept licensing terms or to even facilitate
discussions. Currently, EU law lacks clarity on whether the platforms are
correct in their claim that they have no such liabilities.
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3. Have you been using images of works, such as works of architecture or sculpture, made to be located permanently in public places, in the context of your business/activity, such as publications, audiovisual works or advertising?

- ◉ Yes, on the basis of a licence
- ○ Yes, on the basis of an exception
- ○ Never
- ○ Not relevant

If so, please explain, indicating in particular the Member State and what business/activity, and provide examples.

This question is designed for commercial users, who DACS regularly licenses for use of works that are on permanent public display, including for uses such as film, broadcast and merchandising.

Works of architecture and sculpture permanently situated in public places are commonly used in highly commercial ways including publicity and advertising as they are identifiable and recognisable by the audience. Examples of uses are very varied – from luxury goods to merchandising; corporate communications to political campaigns – but each time it is clear that the works of art or architecture are important vehicles for messages and chosen specifically to represent something to an audience.

Recently Jaguar advertised their high-end car in front of the EU Parliament building particularly because the building is recognisable to Jaguar's intended clientele. Equally, the artwork Angel of the North by Antony Gormley has significant ties with its local community in Gateshead where it is situated. A political campaign for the UK's 'Brexit' was projected onto the work to encourage people identifying with the work and with the area to vote in a certain way. It is without a doubt that the importance of the art work itself was a driving force behind these messages and therefore that the rightsholder should be involved in the commerciality. Just because the work is situated on permanent public display does not mean that the rightsholder should relinquish all their rights.

4. Do you license/offer licences for the use of works, such as works of architecture or sculpture, made to be located permanently in public places?

- (●) Yes
- ( ) No
- ( ) Not relevant

If so, please provide information about your licensing agreements (Member State, licensees, type of uses covered, revenues generated, etc.).

The exception for the use of certain works on permanent public display is contained under UK law in s.62 of the Copyright Designs and Patents Act 1988 (CDPA). Section 62 CDPA is nevertheless subject to the three-step test of the Copyright Directive 2001/29/EC, which establishes that exceptions have to be limited to certain special cases. DACS considers that the point of the s.62 CDPA exception is that it recognises the impracticality for people who are taking photographs of cityscapes and/or making graphic representations of certain works, to establish which works in the cityscape are copyright protected, who the copyright owner is and to seek a licence from the copyright owner before taking the photograph or alternatively omit them from the photograph/graphic representation, which seems impossible if they are permanently situated on public display.

However, there is no notion of commercial and mass media use in this exception. The working of s.62(2) CDPA is very restricted in respect of communicating copies to the public to “anything whose making was by virtue of this section not an infringement of the copyright”, which DACS does not consider to be a commercial or a publication containing such works.

Put simply, the exception under s.62 CDPA does not exist to allow an advertiser or publisher who deliberately chose the work to be the feature of their advert or their publication to circumvent the need for a licence. Why should a sculptor or architect not have a right to remuneration from a book about them containing reproductions of their works when the publisher of that book does?

5. What would be the impact on you/your activity of introducing an exception at the EU level covering non-commercial uses of works, such as works of architecture or sculpture, made to be located permanently in public places?

- ○ strong positive impact
- ○ modest positive impact
- ○ no impact
- ○ modest negative impact
- ◉ strong negative impact
- ○ no opinion

Please explain

DACS considers that there is very little evidence that a new exception or a compulsory exception would benefit non-commercial users in any meaningful way, however the harm it would cause would be very keenly felt by rightsholders for a number of reasons.

Changes to the status quo risk going beyond the remit of the current UK exception and the safeguards of restrictive wording will fall away. A pan-EU exception would risk opening up the UK's exception under s.62 CDPA even further where there is no evidence that this will be positive to rightsholders or to users of social media platforms. Instead, commercial users and social media platforms will benefit from opportunities to use content without any liability to ensure fair remuneration to the rightsholder whose work they are using.

There has been a very substantial lobby from online platforms who have engaged their audience on a number of incorrect premises, such as misinterpreting the reasoning of the judiciary in the Swedish case between Bildkonst Upphovsratt I Sverige (BUS) against Wikimedia Foundation Sweden. The judge's ruling on 4 April 2016 was made in favour of the artists' rights to remuneration and found that the open database made by Wikimedia had commercial value and thus falls outside of the exception, however Wikimedia Sweden's official press release does not communicate this fact and alludes to the public being restricted in the photographs they can take and upload of public art.

The term 'freedom of panorama' is another device used to give the impression to everyday users of the internet that they have certain rights and that these rights are being diminished, where it is clear from the Copyright Directive 2001/29/EC and implementing national laws that rights are only conferred to those creating the works protected by copyright and not the users. DACS considers this to be a very worrying approach where copyright is turned on its head and the intention of a legal framework that protects and rewards creativity and invention is being dragged into disrepute through convoluted messages and fear-mongering.

An extensive lobby from online platforms to change the law rather than their own terms and conditions carries substantial risk, particularly as other exceptions are sought and rights of creators will be diminished further in other ways.

6. What would be the impact on you/your activity introducing an exception at the EU level covering both commercial and non-commercial uses of works, such as works of architecture or sculpture, made to be located permanently in public places?

- ○ strong positive impact
- ○ modest positive impact
- ○ no impact
- ○ modest negative impact
- ◉ strong negative impact
- ○ no opinion

Please explain

DACS reiterates the comments to the previous question on non-commercial exception alone. However, there would be an even stronger negative impact if all commercial uses of works were covered by an EU-wide exception, as rightsholders would lose significant remuneration.

The UK's exception is limited in scope, however this does not prevent a number of instances where works are used beyond the exception but the exception is argued nonetheless by a commercial entity. This leads to rightsholders having to fight to exert their rights, despite their very weak bargaining position against the users, who are commercial entities seeking to undertake commercial activities. A rightsholder has at least a chance to receive remuneration where the exception does not apply, i.e. outside of the UK and so an EU-wide right would make negotiation even more difficult for the rightsholder.

As stated in the response to question 4, it seems entirely farfetched that the law should exclude the rights of creators of particular types of works just to facilitate commercial entities reaping further profits on the back of the creative work deliberately chosen to draw a particular audience to a product just because it is on permanent public display and easily accessible, even though creators such as sculptors may not know when creating their work whether or not it would be permanently situated on public display.

7. Is there any other issue that should be considered as regards the 'panorama exception' and the copyright framework applicable to the use of works, such as works of architecture or sculpture, made to be permanently located in public places?

- ◉ Yes
- ○ No

If so, please explain and whenever possible, please back up your replies with market data and other economic evidence.

DACS also takes this opportunity to restate that we consider to preserve the status quo and not to make changes to the exception regime. Nevertheless, there are further issues to be considered.

Firstly, there is no evidence of a market failure that would require a substantial legislative change. A keen argument from the Wikimedia Foundation for an EU-wide exception predicates itself on the notion of access to content for all. It remains to be seen exactly what content a user cannot legitimately access already.

Secondly, the strong voice of online platforms in this debate is a serious risk as the online platforms will seek to implement more and more compulsory EU-wide exceptions. The way in which many platforms proliferate incorrect or partial information to their audience amounts to fear-mongering - for example it is highly unlikely an individual will face significant legal action for posting holiday photos online. Nevertheless, individuals are mobilised to perpetuate such myths, undermining copyright and the protection of authors.

Finally, an EU-wide exception will also risk being incompatible with EU law where it may result in a circumvention of the three-step text under Article 5(5) of the Copyright Directive 2001/29/EC.

Submission of questionnaire

End of survey. Please submit your contribution below.

Useful links

Webtext EN (https://ec.europa.eu/digital-agenda/news-redirect/29674)

Background Documents

Privacy Statement DE (/eusurvey/files/08c163a2-8983-4d3b-ae3e-21f69b5957cd)

Privacy Statement EN (/eusurvey/files/217d6300-2bbe-4a51-aba4-0371c246dc9d)

Privacy Statement FR (/eusurvey/files/43cedbae-8123-4596-94ce-b526019329e5)

Webtext DE (/eusurvey/files/3abc4c0f-c0e6-4ece-99a3-2bebba8c65d3)

Webtext FR (/eusurvey/files/df02a573-838f-45e7-912d-8231ee8cdbcd)

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