

14<sup>th</sup> June 2016

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Director,  
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Dear Ros,

### **Possible 'Panorama Exception'**

The British Copyright Council does not intend responding to the European Commission's public consultation on the role of publishers in the copyright value chain and on the 'panorama exception', firstly because the questions and survey format do not encourage the type of contribution that a representative body, such as the BCC, can make, but secondly, there is a lack of clarity around the issues being addressed by the consultation, making it difficult for the BCC to present a consensus view. Nevertheless, the BCC has identified some points arising from the consultation and thought it would be helpful to submit these to IPO.

The BCC understands that IPO will not submit comments to the consultation until after 23<sup>rd</sup> June (despite the formal date for expiry of the Consultation period). However, the British Copyright Council wanted to provide its response before the consultation deadline.

The BCC sees the 'role of publishers in the copyright value chain' and the 'panorama exception' as two quite separate and distinct subjects. The BCC has therefore written to IPO separately about each. This letter relates only to the 'panorama exception'.

#### **1. Concern about the political nature of arguments for a 'panorama exception'**

While the introduction of a proposal for a 'panorama exception' will have an impact on a relatively small part of the BCC's membership, all our members without exception are concerned about the possible introduction of a Europe-wide mandatory exception at a high level, for what is a specific issue, addressing what appears to be a very limited problem and on the basis of very little need or evidence.

Furthermore, given that Article 5.3(h) of the InfoSoc Directive already allows Member States of the European Union to introduce an exception for this purpose, the BCC feels that there is a danger that political arguments for such an exception are being used to support the proposal to introduce an exception for this purpose, to undermine copyright and to distract policymakers and politicians from the more serious issues which the European Commission is addressing in its Digital Single Market Strategy. The widespread campaigns that refer to a 'Freedom of Panorama' not only lack evidence but create a myth that the InfoSoc Directive has disturbed the balance struck by international law when this is not the case.

#### **2. Existing Position**

The UK has long had an exception to copyright for certain works of art permanently displayed in a public place (CDPA s.62) and it has worked well in ensuring that the commercial use of such works is licensable. Moreover, where moral rights are breached and/or there is a risk of a passing off claim, and here the BCC notes the recent misuse of images of Antony Gormley's "Angel of the North" statue, it does not prevent the copy of the work from being taken down. The lack of case law in relation to the exception is indicative of its success in practice.

Indications from other countries in Europe, which already have an exception along the UK lines, are that it works well in practice. The BCC also understands that elsewhere in Europe, where no exception exists (for example in France), commercial use is licensed and cases of infringement are dealt with in the normal way.

With or without an exception, members of the public are not being pursued for use of such works in the private photographs that they post on social media (and this is what is being presented by the consultation and the media as the heart of the problem).

There is a problem, however, with certain online platforms that host such material and which:-

- do not discriminate between lawful or infringing content uploaded to their sites;
- benefit from advertising revenue that accompanies content uploaded by users but do not share this revenue stream with relevant right holders;
- apply terms and conditions to material uploaded by users which permits the platform to use and re-use it for any purpose.

This is quite a different issue, which will not be solved by a proposal for a 'panorama exception' and which sits more properly under the Online Platforms strand of the European Commission's Digital Single Market Strategy.

In this context, the BCC notes the recent helpful decision in the case brought by Bildkonst Upphovsrätt i Sverige in which the Swedish Supreme Court was happy to accept that the exception allowed the general public to take photographs and "selfies" in front of public artwork as well as posting them on their Facebook page, but that Wikimedia Sweden's digital database use, which had significant commercial value, was not covered by the exception.

### **3. UK perspective**

From a UK perspective, the BCC asks what a panorama exception would do to change the UK position, given that a permitted act already exists under CDPA s.62 and there is no relevant case law.

I hope our response is helpful and look forward to hearing from you in due course. Please do not hesitate to contact me should you need anything further.

Kind regards.

Yours sincerely,



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