



Ref: Responses from EVA and GESAC to the Commission's questions on the management of rights of visual artists and implementation of exception for works permanently located in public places¹

INTRODUCTION

Exception for works permanently located in public places has not attracted the interest of legislators and the public until the end of 2014 when Wikimedia started campaigning for a broad EU wide exception mobilising people by using the sensationalist and biased “freedom of panorama” phrase. There are **very few conflicts and legal cases** and there is no European jurisdiction so far. In the list of Directive 2001/29 (Directive) the optional exception was included under article 5(3)(h) of the Directive. Member states could continue their national traditions.

Consequently the list of optional exceptions in article 5 Directive has led to some differences in the legislation, however, this result is perfectly in-line with the Directive and causes no particular problems since the Directive's adoption back in 2001. **Because the differences are not causing obstacles to the smooth functioning of the internal market there is no need for harmonisation.** The general rules for determination of the applicable copyright laws are functioning well.

The revenues generated for the use of works in public places are important sources of income for the artists. The great majority of artists cannot make a living of the income from the sale of their works and rely on additional income sources such as copyright revenues and even funding by family members and additional jobs. In 2011 a study was carried out on the earnings of UK artists and it was found that the median wage for a fine artist was £10,000. In the same year the national median wage was £21,320². A German study by the federal fine arts association (BBK) in the same year revealed that the average income from the primary

¹ EVA represents all 24 European CMO which are managing a visual art repertoire 7 are also GESAC members.

² Kretschmer, Martin; Bentley, Lionel et al *Copyright contracts and earnings of visual creators: A survey of 5,800 British designers, fine artists, illustrators and photographers* 2011 CIPPM Bournemouth UK and CIPIL Cambridge UK

sale of original art works was at 5.346 € per artist and the total investment by public institutions in commissioned and purchased art work for constructions by the public hand was at 1.634.620 € in 2010³.

At the same time images – in general not limited to works in public places - are increasingly used and their high value for internet services has been subject by a study published in 2015 on the value of public domain works,⁴ where the value of all images on the English language version of Wikipedia is estimated to lie between 208 and 232 million USD per year.

Taking into account these differences between the value of the creation and the reality of incomes of authors there is an urgent need for the legislator to introduce regulation for the transfer of value to the authors.

It would be obviously unfair to require further sacrifices from authors while multinational platforms that re-use visual works that were up-loaded in another context, either by private individuals on their personal accounts or on websites or by other hosts in the frame of non-commercial use are generating billions in profit from advertisements on social media and sharing platforms without paying anything to authors.

While the traditional uses of visual works in public places within the European Union do not require legislative modifications, **the usage by online intermediaries and in particular multi-national platforms should urgently be addressed.** Thus being a matter of protected works up-loaded on platforms, we advocate a solution covering the use of protected work and ensuring that the authors of the works are remunerated, while being managed by collective management and safeguarding the authors moral rights. The safe harbour for online intermediaries causes huge damage to our authors and needs to be addressed by the legislator urgently.

CIAGP the international representative body of CMOs under the roof of CISAC for the visual repertoire representing 100 000 visual artists gathered for its annual meeting on 18 and 19 May 2015 in Buenos Aires and adopted unanimously the following resolution:

- 1. Visual authors whose works are permanently situated in public places such as painters, architects, sculptors, street artists and other authors shall not be subject to discrimination just because their works are in public places.**
- 2. At least all direct and indirect commercial use of works permanently in public places shall be subject to prior authorisation.**
- 3. The question of private or non-commercial use is not only a question concerning works in public places but is equally pressing of all categories of visual works. It should therefore be addressed in the broader context of the liability of ISPs⁵.**

³ Marlies Hummel, Die wirtschaftliche und soziale Lage bildender Künstler und Künstlerinnen, im Auftrag des BBK, 2011

⁴ See fn 6, where the annual value of images on the EN language pages is estimated with 208- 232 million USD per year.

⁵ Online intermediaries

1. Membership:

What kind of visual artists are members of your CMO? Do they include architects?

*Our members and observer CMOs manage rights for all kinds of visual authors including painters and sculptors, photographers, designers, graphic artists, illustrators, cartoonists, video makers etc. Within the membership there are also **architects, street artists, mosaic artists, stained glass artists and sculptors** whose works are permanently located in public places. The International repertoire is the sum of all direct members and includes 100.000 artists, whose rights are managed by all our members through reciprocal representation agreement.*

ADAGP is categorising its membership in more detail: within their 10,800 direct members, they distinguish more than 30 disciplines:

- *Painters*
- *Sculptors*
- *Illustrators*
- *Photographers*
- *Installation / performance artists*
- *Poster artists*
- *Video makers*
- *Children books' illustrators*
- *Street art artists*
- *Comic strip artists*
- *Cartoonists*
- *Architects*
- *Designers*
- *Craft artists*
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- *Landscapists*
- *Stained glass's artists*
- *Mosaic artists*
- *Ironwork artists ...*

An important number of architects are represented by CMOs, (in the great majority in the countries without an exception): Jean Nouvel, Christian de Portzamparc, Le Corbusier, Robert Mallet-Stevens, Architecture-Studio, Aymeric Zublena, Franck Hammoutèn, Stéphane Beel, Philippe Samyn, Architecture Office Stéphane Beel, Architecture Office Assar⁶, Art &

⁶ <http://www.assar.com/>

*Build*⁷, Livia Cannella, Paul Chemetov, Xavier de Geyter, Catherine Mosbach, Jean Paul Viguier, Zaha Hadid, Vlado Milunič and many others.

But even in countries with exceptions architects become members of CMOs for instance in Austria where 26 of the 2813 direct members are architects.

What about street artists? As many MS provide for an exception for Freedom of Panorama, one could think that street artists do not have an interest in becoming members of CMOs. Is this assumption correct? Could you provide figures?

Believing that urban artists are not aware of their rights and do not care about the defence of their intellectual property rights is a misconception. Street art is becoming an increasingly attractive market; artists are paying more and more attention to the exploitation of their works, especially when it is made on a commercial scale⁸. But with the multiplication of modes and forms of uses, it has become extremely difficult for an isolated artist to individually manage his/her rights. That is the reason why the number of street artists joining CMOS is increasing from year to year.

*The great majority of our members do not categorise artists and works because in most cases it is not relevant in terms of collective management – although authors may inform about the more specific techniques they are working with. Therefore such figures are not available. Artists develop their style during their entire life, they change work methods try different work categories or create different work types in parallel. Often the creation of **a work for a public space is an investment** for the artists, useful to reach out to a broader public but **hardly cost-covering**.*

The primary market for authors of fine arts is the sale of original works where no authors' rights /copyrights are involved. These artists become members of collecting societies when they become aware of their authors' rights, often due to an infringement. If street artists were

⁷ <http://www.artbuild.eu/>

⁸ A few examples of actions brought to court by artists: the **French artist SPACE INVADER** won a case based on copyright infringement (TGI Paris, April 9th, 2008 n° 06/14761). According to the [Wall Street Journal](#), the **German artist CANTWO** sued a producer of suits for the reproduction without authorization of one of his paintings on the swimsuits of the Spanish synchronized swimmers team during the Olympic Games in Beijing: "the cartoon-style character was clearly taken from an artwork I sprayed on a wall legally in Muenster [Germany] in 2001". He also received damages from a music label which illegally used one of his pieces. More recently, in 2014, the **British artist STIK** reached a settlement with a company after discovering it was using his piece, Stick Thief [artwork painted on the door of his own art studio in London], in an advert without his permission, [according to BBC News](#). Last year too, **AHOL SNIFFS GLUE, American street-artist**, sued American Eagle for the reproduction one of his works - painted in Miami - in its last advertising campaign and in its shops without authorization ([the case is still pending](#)). 9 well-known taggers from New York, London and elsewhere filed a lawsuit on June 2015 in Brooklyn federal court, seeking unspecified damages from the owner who whitewashed away their artwork. The plaintiffs— said developer broke the law by covering up the graffiti without giving them time to retrieve their work. Another recent case is [Joseph Tierney](#) whose work was featured by Moschino and Jeremy Scott without his consent.

aware of their rights and the financial potential of their works they would clearly become members of CMOs in greater numbers.

*IVARO in Ireland has members who identify themselves as 'street artists', and therefore clearly they do have an interest in joining a CMO. They recently collected **remuneration from Denmark for an Irish street artist whose work was broadcast on Danish television.***

*HungArt in Hungary reports that a famous artist whose ceramic work⁹ received widespread notice in the street art world had his work removed, however, with photos available of his work, authorization is necessary if someone were to publish it for commercial purposes. **Hungart represents the [initial] copyright holder in this case.***

*ADAGP manages the rights of **thousands of street artists (with 600 direct members such as JonOne, Jef Areosol, Space Invader, Miss.Tic, Jérôme Mesnager, Darco, Ernest Pignon-Ernest, Speedy Graffito or, recently, Toxic).** As for the rest of its members, ADAGP manages all acknowledged rights held by artists, in France and abroad, for all modes of use: books, media, advertising, merchandising, television, websites, user sharing platforms and so on. ADAGP grants permission for the use of its members' works, collects the fees, obtains compensation in case of unauthorized exploitation, engages in legal proceedings when necessary etc.*

Street art is very fashionable and is increasingly used in many commercial ways: clothes, advertising, merchandising... Here are a few examples:



Converse's Campaign
(artist: Kashink)



Perrier's Campaign
(artist: JonOne)

⁹ <http://budapest.reblog.hu/oldal/10>



Phone case
(artist: Miss.tic)



Agnès B dress
(artist: Katre)

If applicable, what is the proportion of architects/ sculptors of works located in public places/ street artists with regard to the total amount of your members? Please provide numbers per category.

It is difficult to provide exact figures regarding the sculptors, whose works are often installed in public places but in very variable proportions: some sculptors only make monumental sculptures; others only produce smaller works aimed at collectors.

This difficulty is lower for architects and street artists, whose main works are - by definition - in public places.

*Even in a country with an exception for works in public places architects and other authors creating works which would fall under the exception may join a collective management society. These authors often create also other works. Besides, the CMO in a country with exception would still defend the moral rights of such author because in all countries with an exception the moral rights still apply. **In the NL for instance a use which infringes moral rights would not fall under the exception** but may become subject to a licence. This is the case for works which are used in a modified version for advertisement. The Dutch exception's remit does not include modified reproductions, for instance the mirroring of the work, cuttings, change of colour etc. If the modifications are agreeable with the authors the Dutch CMO issues licenses for such specific and highly commercial use. The income generated corresponds to approximately 1 % of the income with primary rights licencing in the Netherlands, which is **a remarkable amount clearly showing the huge potential incomes from adverts.***

In Austria BILDRECHT licensed a worldwide advertisement campaign after they tracked the use by an Austrian user. The matter was solved for the countries without exception by an amicable settlement and the author received a significant fee.

Further information by ADAGP on its membership (10,800 direct members):

Some authors relate to categories of works almost exclusively located in public places:

- *Street art (graffiti, frescos, stencils ...): 600 authors;*
- *Architecture: 315 authors;*
- *Stained Glass: 234 authors.*

In addition to that there are also 1149 authors whose artistic production is only partly permanently located in a public place:

- *Sculpture: 3280 authors;*
- *Mosaic: 208 authors;*
- *Ironwork: 94 authors;*
- *Decor / Scenography / Lighting design: 680 authors.*

It is difficult, regarding these 4262 authors, to know which ones have a significant part of their works in public places, as ADAGP manages globally the fees for each author. The “work by works” data might only be known after examining one by one the invoices of rights, which would be a particularly time consuming task given the volume of permissions issued annually. Nonetheless, this work has been done for advertising operations (see our reply on point 4).

*However, it can be estimated, from the above data, that the number of authors represented by ADAGP with all or part of their works located in public places is a minimum of 1149 and is more likely **between 2500 and 3500** (thus **between 20 and 30%** of the total amount of ADAGP’s members).*

2. Repertoire:

Could you provide any approximate figure (e.g. number of works, value, etc.) about your repertoire?

CMOs represent authors and catalogues of rights on all the works the members have created, and will create.. The number of creations varies according to the disciplines: a photographer will make tens of photos per month and tens of thousands of works in a career of 40 or 50 years. Similarly, most painters and drawers continually realize drawings throughout the day. But, conversely, sculpture or architecture which require more time usually result in a more limited number of works made by the author.

As artists keep creating and as all works are protected by the creation exact figures cannot be provided but the number of the managed works is estimated at over 500 million by the ADAGP.

As for the value of the original art works, it depends on the sales prices reached on the art market and is not relevant in terms of collective management of rights.

For example, ADAGP has no information about the number of protected buildings or graffiti in France or on the other Member States. But this is not unique for the visual sector: It is impossible for instance to quantify the total number of literary works in a Member State (as it would be necessary to consider, in addition to books, the writings of individuals, firms, schools etc.; it is the same here: to keep a record of the number of houses, barns, graffiti or bridges is not possible.

*In reality, the only statistic that could make sense would be to determine the part of the works from the repertoire, among buildings or graffiti whose image is actually exploited (reproduction in books or in the press, uses in advertising media, merchandising etc.). In this respect, if a CMO is naturally unable to quantify what it does not manage, CMOs can testify **that the works of its repertoire are subject to dozens of permissions granted weekly (Press, TV, publishing, advertising, etc.) and that such permissions generate substantial fees.***

The analysis of the amounts collected by ADAGP between 2010 and 2014, under reproduction right and the right of communication, gives an idea of the weight of the works located in public places. Regarding street artists and architects only (whose works are almost exclusively located in public places), without even taking into account the other categories mentioned above (including sculptors, stained glasses, mosaic,...), here are the figures obtained:



*Works located in public places thus represent **at least 14% of primary rights (reproduction right and right of communication)**. But this figure, as mentioned above, **notably does not integrate the sculptures installed in public places**, which number is significant. According to Médiamétrie (audience measurement and survey company), which carries out studies that are the basis for the distribution of private copying levies in France, pictures of works located in*

public places represent more than 10% of the images copied on a digital media (in 2014: 5.75% for architecture, 2.98% for sculpture and 1.58% for stained glass and ceramics).

In other members countries the annual revenues perceived in 2014 for the visual art repertoire range between 2 and 4.9 million € in Germany (where works in public places are not included).

The concept of "works made to be located permanently in public places" in the EU/ in a given MS is likely to refer to very high numbers (any building, sculpture located in squares or parks, graffiti, etc). Do you have estimations on these figures? Do you have estimations on the extent to which your repertoire covers these works (e.g. percentage of the total amount of these works which are included in your repertoire)?

The member countries might be able to provide the Commission with more information about the works belonging to the national patrimony. In any case there are member countries where regulations oblige or recommend the public builders to contribute a certain percentage of their budgets for the acquisition of contemporary art work. The amounts vary between 0- 1 % in Germany¹⁰ for Federal building projects and 1% in Spain¹¹ and France¹². There are likely to be inventories of the works acquired, however, these include indoor works and sculptures in public places.

For those architects or street artists who are not members of your CMO. Do you have information on how/ whether they license the use of their works made to be located permanently in a public place?

It is difficult to know how the artists (architects and street artists for example) who are not members of CMOS manage the use of their works made to be located permanently in a public space. Indeed, due to the confidentiality of those kinds of contracts, there are very few data and studies on this subject.

Nevertheless some contracts are communicated to CMOs by their members, before or after their signature.

Basically, in France there are three situations:

¹⁰ See fn 2, the total amount spent in 2010 on commissioning works (1.1 mio €) and purchasing works at 1,6 million €

¹¹ the Law 16/1975 of June 25 Spanish Historical Heritage "Article 68 1. In the budget of every public, financed total work or partially for the State, an equivalent item will be included at least to the 1 by 100 of the funds that are of state contribution with destination to finance works of conservation or enrichment of the Historical Spanish Heritage or of promotion of the artistic creativity, with preference in the own work or in his immediate environment."

¹² <http://www.artquest.org.uk/articles/view/percentage-for-art>

- *Copyright assignment contracts only cover materials (such as plans, drawings ...): there is no transfer of the rights relating to the image of the work and the author (or its CMO) can thus continue to manage them;*
- *Copyright assignment contracts cover the image of the work: the rights holder can therefore control the use of the work (such as a building or a street art piece), which is important since the work is frequently associated to the brand image of the firm which ordered it;*
- *Copyright assignment contracts provide a sharing of rights between the artist and the entity which ordered the work: ADAGP manages the rights on this type of works, whose both authors and assignees have joined ADAGP (for instance the Stade de France or the Bibliothèque nationale de France).*

3. Licences:

Could you provide an overview of existing licensing arrangements and practices concerning works made to be located permanently in public places? Please provide specific examples.

For instance:

Licences for non-commercial uses: do you grant this kind of licences in those countries where no exception has been adopted so far? What are usually the applicable conditions? Are they any different from licences of other works of visual arts? Who are the users/ licensees? Please provide examples.

*Collective management societies license primary uses based on published and approved tariffs which are applied equally to all authorisations they are issuing (see for example: <http://www.bildkunst.de/en/vg-bild-kunst/tariffs.html>.) Distinctions are regularly made for the different print media, number of copies made per edition, size and placing of the reproduction of a work, for instance on the cover of a book or inside and also whether the use is commercial or non-commercial. For non-commercial uses there are regularly reductions from the normal tariff granted and even, the use-for-free. The exclusive rights always apply unless an exception or limitation covers a special case of use. For works in public places **any other exception from the list in article 5 (2) and 5 (3) Directive 29/2001 may apply as well and therefore already reduces the application field of the exclusive rights considerably; such as quotation, illustration for teaching, reporting on current event, accessory or incidental inclusion etc.***

Therefore many rights of others are taken into account because these specific exceptions apply already; for instance in France or Belgium a work of art permanently located in a public place may be used by the press without prior authorisation when being subject to a report on a current event. It is therefore a misunderstanding when it is believed that the lack

of an exception for the Panorama would limit the freedom of the press or make the work of press photographers difficult.

In fact the application of exceptions on the primary use has another effect which may cause the subsequent good faith user difficulties. As there is no licence issued by the CMO or directly by the author there is no prior communication and no occasion to provide the first user with information about the correct use safeguarding moral rights and the inclusion of a correct copyright line with all essential information on the work, the indication of the authors' name and the person or entity holding rights which need to be cleared for subsequent uses.

In fact the press will not necessarily include these data and might not even have received them by the picture agency or the photographer, the latter regularly struggling herself to make a living from her work.

The prevention of additional costs for rights enforcement which would occur for all parties is achieved best by a culture of partnership with users and frame contracts which are ensuring a constant flow of necessary information between the CMO and users. In our facility study for ARROW Plus¹³ EVA has provided insight to the visual art sector – one important recommendation to the legislator is to prevent the creation of future orphan works by policies and legislation that ensures that there is no separation of the rights information, the most sustainable being the author's name, from the work itself and each of its reproductions and acts of communication to the public.

A general free use for non-commercial purposes would be unjustified and discriminatory to authors of visual works. Non-commercial cultural institutions are paying for all services and staff they need to providing their services and products. There is no justification to expect from artists to contribute to the public wealth without being remunerated at all. Authors' rights are an important additional source of income because many authors cannot generate sufficient income from the sale of works and the production of works commissioned by the public hand.¹⁴

A clear distinction needs to be made between the non-commercial use of works and the private and personal use of individuals of the public who up-load contents on their personal websites and/or entries on sharing and social media platforms where the service providers generate profits which they are not sharing with the authors. While the platforms shift the burden of responsibility on the shoulders of the private users the only appropriate approach would be that the online-intermediaries have to regulate this situation with the authors and their CMOs of the contents up-loaded.

The public debate of the very recent few months clearly misses the point. In some cases the distinction between commercial and non-commercial uses might have become blurred. This is caused by the regularly two or many-fold business models of platforms which are on one side offering a service for free to any private or professional user and on the other side by

¹³ http://www.arrow-net.eu/sites/default/files/D6.2_Feasibility_study_images_0.pdf

¹⁴ See fn 1) and 2)

recuperating the profitable parts from the content thus up-loaded – a service granted to platforms as well for free by numerous private individuals. The questions surrounding this complex area are by no means answered when – as the supporters of a free access community want to make us believe – authors of works in public places lose their right. The same question occurs for all other categories of copyright protected works and products. A compulsory Panorama exception would create a precedent for all other work categories. Many people up-load on twitter and Facebook photographs of paintings taken in galleries or museums exhibition. The European legislator would open a gate for the free access community to demand further exceptions for works which are in one way or other accessible to the public be it art in exhibitions, music in concerts, performed literature, films or any work anywhere on the world-wide web as those platforms even ask for immunity from any type of content including the professional works and thus become the main route to access or the main way to commercialise creative content for their own purpose;

CIAGP, the world wide umbrella of CMOs for the visual work repertoire gathered under the roof of CISAC asked in its annual meeting taking place on 18/19 May in Argentina that this matter is addressed within the broader frame of online-intermediaries responsibility. The guiding principle shall be that the authors have to be remunerated whenever third parties gain profit by the use of their works.

Non-commercial use by cultural and educational institutions is subject to existing solutions and collective management schemes by our members. Our members have entered into agreements with libraries following the orphan works directive and the MoU or collective management based on legislation applies. Most of these purposes are in relation to books and other print media and addressed jointly with the CMOs active in the text field.

In Belgium SABAM grants annually about 100 licenses for primary use of works permanently located in public places. 98% of the licenses are issued for professional and commercial uses.

ADAGP in France informs that uses, unless subject to an exception other than for works in public places, are licensed mainly for books, press, merchandising, internet, advertisement and tv broadcasting. Also some uses in relation with cultural events and without generating profits are often subject to free licenses. However the remainder is subject to licenses based on ADAGP's tariffs, several dozen's each week.

In Italy the majority of licences by SIAE is issued to publishers based on their approved tariffs which are not making any distinction between works permanently in public places or works not falling under this category.

In Sweden BUS has granted blanket licenses to municipalities and regions concerning their extensive use of public art works (situated in- and outdoors) online on websites – via our multi-territory licensing tool OnLineArt – and in image databases. The lump sum may be calculated from the population in the region, number of works or any other relevant factor.

Our Danish member CopyDan informed us that they are providing the Danish national broadcasting company, Danmark Radio, with an ECL (Extended collective license) based general license to show works of art in their TV broadcasting. This is considered professional use and thus works in public places are not covered by the exception. This means effectively that all authors of works in public places including street artists' etc. receive remuneration on equal terms with other visual artists when their works are shown on TV.

In Norway: As mentioned above, BONO has an ECL-based agreement with the Norwegian Public Broadcasting Corporation (NRK) that allows NRK to broadcast works of art. If works in public places are broadcast in such a way that it constitutes the main motif/element, then the artists, whether he is a street artist, a sculptor or other, will receive remuneration on equal terms as other visual artists when their works are broadcasted.

In UK, DACS has licensed uses which are not covered by the exception of section 62 UK Copyright act. This covers for instance subsequent uses of works in public places, which have been primarily used under the exception. For example DACS licensed the subsequent use in a book publication of Marc Chagall's stained glass windows at Chichester Cathedral. DACS also licenses uses of street art and murals because they do not fall within the remit of the exception. DACS is representing already a number of street artists and expects a rise in membership because the works of these artists are increasingly used for advertisement and merchandising products.

Licences with platforms (e.g. Facebook, Instagram and also Wikipedia): We understand that there have been some negotiations with some of these platforms (e.g. with Wikipedia). Could you provide an overview of these negotiations? Please provide examples.

The case law in several Member States and the existing provisions of the InfoSoc Directive has been prohibitive for our members to start lengthy and costly legal proceedings, whose results are uncertain. These multinational users are notorious for rejecting requests for licensing and do not recognise any responsibility for the contents private individuals up load on their platforms because of the safe harbour rules pursuant the ecommerce Directive. (2 recent judgements of the German Regional Courts on 1 July 2015 clearly indicate that the current state of EU law does not create a licensing obligation and remuneration for the use of their works on such platforms, although it is obvious that they are providing services that can be considered in competition with other commercial services in the market)¹⁵.

ADAGP has negotiated in several informal meetings with Wikimedia France within the last months and has offered a license for non-commercial use of the entire image repertoire (not limited to works in public places) provided that the authors are indicated and more generally the moral rights are safeguarded. Wikimedia France did not approve the offer. For no specific reasons they were demanding rights for any purpose including commercial, the right

¹⁵ <http://justiz.hamburg.de/oberlandesgericht/4542880/pressemeldung-2015-07-01-olg-01/>

*to modify, cut and remix works unlimited and thus disregard moral rights and the right to use high resolution images. The explanation given was that the founders' community of the Wikis decided so in 2001 in order to provide an open to all and for all purposes source of content. **Moreover, it is not comprehensible, that creators should accept the commercial use of their works by any company that use the images on Wikipedia, just because founders of the Wikis decided like that.** It is also not excluded that Wikimedia Foundation can change its own business model.*

This license would undoubtedly be too large and cannot be accepted:

- *The requirement to supply HD files would make the **works extremely vulnerable to internet piracy**, especially with the possibility to copy and redistribute the material in any medium;*
- *The possibility to remix and transform the works could be a clear breach of the **artists' moral rights**¹⁶, which is a primary concern for ADAGP's members.*
- *The possibility of a commercial use of the works is **incomprehensible for a non-commercial service like Wikipedia.***

***Why, despite of being a not-for-profit organisation, the Wikimedia Foundation places so much emphasis on the possibility to use works commercially requires further information. Is it for trade companies to benefit from this exception, which is not acceptable? Also a change in the Wikimedia Foundation own business model cannot be excluded.** It is not uncommon in the field of multinational platforms. When in December Yahoo extended to sale of Flickr photos from private users for poster downloads, many private users who had uploaded their photos were appalled. Most users had trusted into the earlier business model and did not realise the need to safeguard their copyrights. (<http://www.spiegel.de/netzwelt/web/yahoo-verkauft-creative-commons-fotos-von-flickr-nutzern-a-1006166.html>)*

It would be totally unfair and unjustified to exclude authors of works located in public places from copyright, just to allow these companies to make money with their works through online services, advertising or merchandising.

ADAGP concluded several contracts with Platforms like Youtube and Dailymotion for the entire visual repertoire on uploaded visual material based on a lump sum payment.

¹⁶ Examples of breaches of moral rights recognized by French case law: the colorization without authorization of a black and white film, (Cass., civ 1., May 28th, 1991, Asphalt Jungle), the superimposition of a logo during the broadcast of a work (CA Paris, October 25th, 1989, the incorporation of a musical composition in an advertising associated with an erotic program (CA Paris, April 7th, 1994), the use of photographs of works of art in the context of an election campaign (CA Versailles, December 20th, 2001), the reproduction of a work in a condensed version infringes copyright (CA Paris, February 20th, 2008).

It is also interesting to mention: ADAGP licensed the use of art works on the platform WhoArtYou.com, which is a platform with the aim to disseminate works of art. The platform is responsible for paying the fees relevant to clearing the images and the users can upload various pictures from public places, museums, etc. using their app for iOS and Android. Several protection measures are taken by the site: 1) right-click -> save as... is disabled for the images, with a set of different protections 2) the images are only stored on the platform – any sharing on Facebook or Twitter (which have prohibiting TOS) are only treated as links to the actual website, thus they can't be used according to the other platforms' Terms of Service (many of which have NERF provisions regarding users' content).

With VEGAP in Spain negotiations are in place for filmin.es – a platform to see movies, series and short web for the visual works included in the platform service.

BUS Sweden approached Wikimedia Sweden for a discussion about the licensing terms concerning a mammoth project carried out by WMF, aimed at creating an image database with all of Sweden's publicly displayed artworks - <http://offentligkonst.se/#5/62.964/17.600>. The talks were rejected by WMF which led BUS to file suit on this issue; the case is now pending in the Supreme Court regarding the interpretation of the scope of the limitation allowing reproduction of artworks located in public places.

From Germany and the UK there are reports of a small number of cases of cultural and research institutions which created a network to exchange image material or purchased a license for adding works on their internet websites, and in both cases permission for the re-use on their accounts on social media were required. In both cases permission was given, in one case under the condition that images from the permanent collection were not up-loaded to the social media platform due to the platforms policy to select content for advertisement usage. Instead the institute was advised to set a hyperlink to its authorised internet website.

*The experience shows that due to the current legal framework, it is at the discretion of such platforms to decide on whether or not entering into an agreement or how to frame such agreements, since they can always challenge the requests of right holders based on safe harbour privileges. **Therefore the aim of the forthcoming EU legislation on copyright should be to restore the rights of European creators vis-à-vis such internet giants, instead of giving them further privileges at the expense of European creators and creative industry.***

Licences for commercial uses: what are the main uses covered? What are the applicable conditions? Who are the users/ licensees? Please provide examples.

Commercial uses are: print and digital books, brochures, posters and post cards, merchandising, audiovisual professionals (TV, DVD, public showing, VOD), online medias (websites, applications, networks), advertisers, firms (corporate communication) ...

In Spain and in Portugal licenses are issued and revenues collected for commercial uses. These concern for example in Spain works in public places by Chillida and the Segrada Familia in Barcelona where all revenues from merchandising products are flowing into the

continued construction of the famous cathedral by Gaudí, and in Portugal likewise all kind of protected works in public places used commercially are subject to licensing.

The applicable conditions depend on the media involved and vary according to the needs of the users. Each request is examined specifically in order to offer the most appropriate legal and financial response.

In those MS where commercial uses are covered by the exception (e.g. Germany), is there any space for certain licences (e.g. in the context of advertising, 3D printing, etc.)?

*In the Netherlands licenses are issued for advertisement uses where regularly the works are used in a modified version, thus not falling under the exception. If a work by an architect is used in an advertising campaign, where the use is not meeting the conditions of the Dutch exception, the user will most likely be a large corporation (**automobile industry, financial services**). The license conditions, including the remuneration, will vary with the duration of the campaign and the span of the use. This is for instance the case for adverts using the image of the Rotterdam bridge.*

Besides, doubts are justified that today's mass uses, online uses and advertisement are in line with the three-step-test which is applicable beyond Article 9 II Berne Convention on all exceptions and limitations listed in article 5.(2) and (3) due to article 5(5) Directive 2001/29.

Also a view on the historical background should be taken into consideration. The first exceptions were granted in Germany about a century ago where less art works were placed in public spaces and the possible usage was limited to the reproductions on post cards and travel guides. Today's mass communication, the business opportunities for merchandising products and for top advertisement were unknown and not imaginable.

*There is **no doubt on the non-compliance with the three-step test** of a panorama exception that would cover commercial uses.*

*The very broad scope of the exception, which concerns all the works of some authors (architects, street artists), already seems hardly compatible with the first condition of the three-step test. Indeed, an exception shall apply to a **special case**, which requires that it should be **narrow in its scope and reach**¹⁷. Moreover if all the exploitation operations were covered, this would purely and simply exclude from copyright certain categories of creators. Such a **general exclusion** neither can be seen as compatible with the three-step test.*

But it is mainly the second condition of the three-step test which, in the most obvious way, impedes a wide panorama exception including commercial uses. The data above clearly show that the works situated in public places are constantly subject to licenses and generate

¹⁷ Criterion notably posed in the WTO Report of the Panel on "United States – Section 110(5) of the US Copyright Act", WT / DS160 / R, 15 June 2000, § 6.112. CJEU has also continuously ruled on this directions in its jurisprudence regarding exceptions, last of which was Case C-463/12 CopyDan Bandkopi v Nokia Denmark

*substantial revenues (publishing, advertising, merchandising etc.). **An exception extended to commercial uses would obviously affect the “normal exploitation” of the works**¹⁸ “because normal exploitation would be equated with full use of exclusive rights”¹⁹. A specific legal analysis for art 5 (3) h Directive will lead to this conclusion. ²⁰The authors’ losses are substantial and significant which has been showcased by the ADAGP figures of the percentage of incomes flowing from licensing the works in question.*

*Finally, although the non-compliance with the second step is totally prohibitive, it should also be noted that the absence of any compensation for the concerned authors - while there is a clearly identified prejudice - also excludes that the third condition is satisfied²¹. **The damage created is unjustified.***

These considerations naturally impede to expand the scope of the exception provided under article 5.3 h) of Directive 2001/29 which, at that time/ in this state and read in conjunction with article 5.5 of the same text, should already lead national legislators to exclude, to a very large extent, the possibilities for commercial uses.

4. Revenues:

Could you provide figures on existing revenues stemming from licences for the use of works made to be located permanently in public places? Which licences give rise to the most significant revenues?

Our members had difficulties to differentiate the incomes stemming from works in public places in comparison with other works because such data is not registered. Also, CMOs manage rights based on published tariffs applicable on all works which take different aspects of the use into account. For instance uses for cultural purposes are regularly subject to rebates and licenses for advertisement campaigns are more costly.

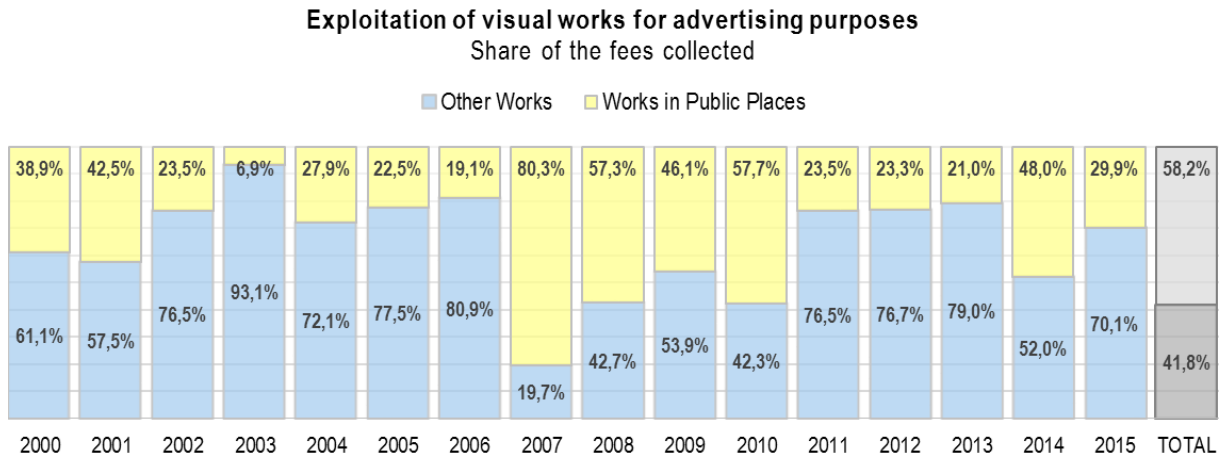
*The number of licenses granted for **advertising uses** being fairly limited (around 150 per year), so ADAGP has been able to establish statistics. Royalties collected on the past 15 years attest to the important weight works located in public places, with an average of **58.2% of fees collected as for the advertising uses** (with some exceptional years, as in 2007, when works located in public places represented 80.3% of the fees collected):*

¹⁸ The 3D printing case mentioned in the question is naturally no subject to exception: ADAGP currently sets up licenses with several economic actors in the art publishing sector and expects a strong growth of licenses in the coming years.

¹⁹ See the WTO Report, § 6.183.

²⁰ Same conclusion for step 3 for 5.(3) h Directive: Martin Senftleben, Copyright, Limitations and the three-step test, 2006, page 272;

²¹ See the WTO Report, § 6.229.



These significant figures are explained by the fact that architectural works are very frequently used in the field of fashion, luxury and automobile, in order to promote the products. The works of street art are also frequently used by brands and sports clothing.

Some examples of advertising campaigns using works located in public places of ADAGP's repertoire give a more concrete idea:



*Renault's advertising
(artwork : C. Portzamparc, Tripode)*



*Orange's advertising
(artwork : D. Buren, Les Anneaux)*



*Longchamp's advertising
(artwork : Le Corbusier, Cité Radieuse)*



*Etihad Airways's advertising
(artwork : J. Nouvel, Louvre Abu Dabhi)*



*Adidas's advertising
(artwork : Sure/Mysta)*

Some landmark works may generate significant revenues (e.g. night lights in the Eiffel Tower, Atomium). For other works, how important are these revenues for visual artists? For what uses?

Many other works less well known are indeed used every day for advertising, fashion shows and so on for the simple reason that they are nice settings, like buildings and frescos.

The generated revenues depend of course of the works, the uses and the renown of the author. But the above-mentioned figures give a picture.

*We do not know the fees that SETE charges for the commercial use photography and video coverage of the night illumination of the Eiffel Tower. However, the website of SETE is highly transparent and gives detailed information about the purpose of SETE which is owned by the town of Paris and has the task to manage the needs for the **annual 7 million tourists visiting the tower.***

*Taking due account of the partly quite polemic reporting during the European Parliament's preparation of its report on Directive 29/2001(Reda-Report) it should be reminded that **SETE does not pursue any private person making personal use of pictures taken of the Eiffel Tower be it by day or night.** The SETE webpage is easy to find and to consult in different languages providing this very clear information:*



DAYLIGHT VIEWS OF THE TOWER

Free use

The image of the Eiffel Tower by day falls within the public domain: its use is rights-free, and may therefore be reproduced without prior authorisation by the SETE, the managing company of the image of the Eiffel Tower on behalf of the Mairie de Paris.



THE TOWER ILLUMINATED

Controlled use

The various illuminations of the Eiffel Tower (golden illumination, twinkling, beacon and events lighting) are protected. The use of the image of the Eiffel Tower at night is therefore subject to prior authorisation by the SETE. This use is subject to payment of rights, the amount of which is determined by the intended use, the media plan, etc.

Views of the Eiffel Tower taken by private individuals for private use do not require prior agreement. However, professionals must contact our teams, who will inform them of the conditions of use governing images.



<http://www.tou Eiffel.paris/utiliser-limage-de-la-tour-eiffel/turner-a-la-tour-eiffel.html>

Those of our members who are licensing such uses all explained that these are important income sources. In the UK for instance, where architecture and sculptors, but not street art does falls under the exception of s.62 of the Copyrights Designs and Patents Act 1988, iconic works of street artists are increasingly used for merchandising products such as mugs, t-shirts, shopping bags etc. without the artist's consent.

In the Netherlands those uses, which do not fall under the exception are subject to licensing. Mostly the advertisement with landmark buildings is concerned and 3D merchandising products. The annual amount is estimated with 1 % of the annual income for primary rights management for visual works or approximately 25.000 EUR/p.a.

However the amounts reached in these countries would be higher if the rights were not mainly subject to an exception.

The value of images which are at the time being made available on the English language version of Wikipedia was estimated at between 208 and 232 million USD a year. This figure was calculated in a study published by CREATE in early 2015 in order to praise the benefits of the public domain. It was considered that all 1,8 million images which formed the basis of this estimate, are in public domain. The total number of images on Wikipedia pages was estimated with 4 times as many images.²²

²² Kristopher Erickson and others, Copyrights and the value of public domain, 2015, page 78

Do you have data on revenues obtained by architects/ sculptors when they are paid a fee for the creation of their work (e.g. in the context of a work commissioned by public authorities)? Do CMOs play any role in this context?

We can only give information on the rights and uses that our members manage. The majority of our members informed us that the artists creating commissioned works to be located in public places are hardly paid to sufficiently cover their own costs. In general commissioned works are designed, produced, transported and installed on the accounts of the author. Some CMOs have the following practices based on an agreement between the creator and the owner of the building or Work:

- *The person (public authority or not) who commissioned the work, is most often allowed for non-commercial uses, in order to communicate freely about its image.*
- *Third part uses are managed by the CMO which share the amount between the creator and the owner*

More over, Metal works have to be prepared in specialised foundries and expensive materials have to be purchased, the size and weight of sculptures requires special transports and equipment for the installation, from the remainder the author has to pay taxes, social insurances – members informed us that regularly no profit remains.

In Germany a survey was prepared in 2014 by the federal artists association (BBK) with a focus on commissioned works in public places. This study was not available during the short delay available for replying to this questionnaire and will be sent when available.

Several member countries apply regulations, which recommend or oblige authorities to spend a certain percentage of budgets for public building projects on commissioning or purchase of contemporary art works. The BBK in Germany reported in its survey about the social situation of artists that the total amount in 2010 as reported by the 1750 artists participating in the survey was 1.634.620 € .²³

Therefore, the possibility to lose any additional revenue that would be earned through CMOs and through commercial use of their works for other purposes based on a compulsory panorama exception is extremely worrying and even frustrating for many artists. Every day, CMOs receive questions and remarks from artists which are preoccupied with this possibility.

Brussels,
31 August 2015

²³ Marlies Hummel, die wirtschaftliche und soziale Situation der bildenden Künstler, August 2010, page 13