

# PUBLIC ART, PUBLIC SPACE, AND THE PANORAMA RIGHT

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*When art is installed in public spaces in the United States, the public's right to capture and share images for commercial or non-commercial purposes is not clearly defined by federal copyright law. This has led to both actual and threatened litigation. In the absence of a specific copyright rule designed to address these disputes, they must be resolved under a patchwork of other doctrines that are uncertain in scope, including fair use, de minimis use, and the statutory exception for images of architectural works, but none of these provide predictable results. In contrast, many foreign jurisdictions have enacted "freedom of panorama" legislation. Although these laws address the issue more directly, they often have their own ambiguities, and due to a lack of international harmonization, they vary widely in their scope. This Article examines the current treatment of public art under federal copyright law, compares the approaches taken by a number of foreign jurisdictions, and considers the possible contours of a federal panorama right that would protect the interests of copyright owners as well as the public interest in enabling access to images of public art and the public spaces where it resides.*

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## I. INTRODUCTION

A city commissions a sculpture for a public garden. A mural graces the side of an urban building. Photographers and videographers—both amateur and professional—capture these images every day while recording their impressions of the city’s public spaces and the people who inhabit them. Their images may appear on the internet; in newspapers or magazines; in films; in advertisements; on T-shirts or calendars; or in posters, post cards, or books. But do these images infringe? In the United States, there is no single answer under current law.<sup>1</sup> In other countries, the answer varies widely, depending on the copyright laws of the jurisdiction.<sup>2</sup> And even if recording the image is permissible in the country where the photo is taken, reproducing, transmitting, or distributing that image in another country may violate the latter’s domestic copyright laws.<sup>3</sup>

While public displays of artistic works can bring significant social and cultural benefits to their communities, they also diminish the public domain.<sup>4</sup> Whereas the public could previously capture and disseminate images of these public spaces for the enjoyment of others who could not experience them in person, the installation of copyrighted artwork in these spaces can limit those rights, or curtail them completely.<sup>5</sup>

In many countries, including most of the European Union, copyright laws explicitly recognize the “freedom of panorama,” which generally encompasses the right to make and distribute copies of artwork located in public places.<sup>6</sup> However, there is considerable variation in the scope and content of the right.<sup>7</sup> The United States takes a narrow approach to panorama rights; except in the case of

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1. See *infra* notes 10–166 and accompanying text.

2. See *infra* notes 170–340 and accompanying text.

3. See *infra* note 205 and accompanying text.

4. See Mélanie Dulong de Rosnay & Pierre-Carl Langlais, *Public Artworks and the Freedom of Panorama Controversy: A Case of Wikimedia Influence*, 6 INTERNET POL’Y REV., Feb. 2017, at 1, 2.

5. See *id.*

6. See Anna Shtefan, *Freedom of Panorama: The EU Experience*, 2 EUR. J. LEGAL STUD., no. 2, 2019, at 13, 14–16.

7. See Dulong de Rosnay & Langlais, *supra* note 4, at 3.

architectural works, federal law does not recognize a panorama right at all, and generally applicable defenses such as *de minimis* use or fair use may succeed in some cases but not others.<sup>8</sup>

The importance of the internet as a means of communicating images of public spaces to those who might never have the opportunity to see those sights in person makes it important for every jurisdiction to consider whether and to what extent it will recognize panorama rights. Due to differences in the scope and content of panorama rights in different countries, disputes may arise when copies of a work located in one country are reproduced or distributed in another, or where they are made available across borders by broadcast or internet transmission.<sup>9</sup> Harmonization of panorama laws would reduce the potential for such conflicts. However, if the United States continues to provide no explicit recognition for this right, it is unlikely to participate in any such harmonization.

Part II of this Article examines the federal copyright doctrines that apply to unauthorized reproductions of public art and the case law interpreting these doctrines. Part III compares the freedom of panorama as it has been developed in a number of foreign jurisdictions. Part IV addresses potential conflicts between panorama rights and the rights of copyright owners that have not consented to public displays of tangible works that incorporate their copyrighted materials. Part V considers the merits and challenges of expanding the scope of the panorama right in the United States.

## II. PANORAMA RIGHTS IN THE UNITED STATES

The panorama right has received little attention in the United States.<sup>10</sup> Apart from architectural works, there is no specific legislation recognizing such a right for artwork, and legal disputes have instead been litigated on alternative theories.<sup>11</sup> As discussed below, these alternative theories do not provide clear guidance on the scope of the public's right to create, share, and exploit images of artwork located in public spaces.

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8. See Bryce Clayton Newell, *Freedom of Panorama: A Comparative Look at International Restrictions on Public Photography*, 44 CREIGHTON L. REV. 405, 406, 413–14 (2011).

9. See Shtefan, *supra* note 6; Coll. of Eur., *Replies to the Public Consultation on the 'Panorama Exception'*, EUR. COMM'N 6 (Oct. 20, 2017), <https://ec.europa.eu/digital-single-market/en/news/report-replies-public-consultation-panorama-exception>.

10. In the United States, there is a dearth of scholarship on the panorama right. Exceptions include: Andrew Inesi, *Images of Public Places: Extending the Copyright Exemption for Pictorial Representations of Architectural Works to Other Copyrighted Works*, 13 J. INTELL. PROP. L. 61, 62 (2005) (arguing for the extension of the architectural copyright exemption as a solution for the problem of copyright restraints on public photography); Newell, *supra* note 8, at 411–21 (providing an international comparison of freedom of panorama frameworks).

11. See *infra* notes 85–150 and accompanying text.

A. *Federal Copyright Principles Applicable to Panorama Rights*

The concept of panorama rights applies to copyrightable works in two of the broad statutory categories recognized by the Copyright Act of 1976: (1) pictorial, graphic, and sculptural works, and (2) architectural works.<sup>12</sup> Within these broad categories, panorama rights are relevant specifically to art which might loosely be termed “public art.”<sup>13</sup> As used here, in the context of domestic law, the term “public art” refers to artistic works that are affixed to, or visible from, public places.<sup>14</sup> As will be discussed in Part III, however, countries take different approaches to determining which works of art are subject to the panorama right.<sup>15</sup> Part of the challenge of defining a panorama right lies in defining which artwork will be subject to that right.<sup>16</sup>

Under federal law, the exclusive rights of reproduction,<sup>17</sup> adaptation,<sup>18</sup> public distribution,<sup>19</sup> and public display<sup>20</sup> recognized in section 106 of the Copyright Act generally apply to artistic and architectural works<sup>21</sup> regardless of their physical location, subject to a handful of exceptions. In the case of pictorial, graphic, and sculptural works, while the section 106 rights are subject to several exceptions,<sup>22</sup> the two that are most relevant to the copying, distribution, or public display of public art are fair use and de minimis use.<sup>23</sup> As discussed below, both exceptions are uncertain in scope, and

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12. 17 U.S.C. § 102(a) (recognizing these as copyrightable). *See also id.* § 101 (defining the category).

13. *See* Dulong de Rosnay & Langlais, *supra* note 4, at 2.

14. In this Article, “public places” refers generally to locations to which public access is unrestricted, such as public parks, sidewalks, and roadways. However, this is a working definition, purely for purposes of this discussion. Worldwide, the precise scope of artwork to which the panorama right applies varies considerably, and sometimes includes works located in the interior public areas of buildings. Thus, a broader concept of public places would include some interior spaces. *See, e.g.,* Barron Oda, *Mobile Devices, Public Spaces, and Freedom of Panorama*, SCI TECH LAW., Winter 2018, at 14, 15–16 (discussing various international conceptions of public spaces).

15. *See* discussion *infra* Part III.

16. *See* Shtefan, *supra* note 6, at 14–17.

17. 17 U.S.C. § 106(1).

18. *Id.* § 106(2).

19. *Id.* § 106(3).

20. *Id.* § 106(5).

21. As expressed in section 106, the exclusive rights of reproduction, public distribution, and adaptation apply to all categories of copyrightable works, *id.* §§ 106(1)–(3). The exclusive right of public display applies only to selected categories, including two categories relevant to panorama rights: pictorial, graphic, and sculptural works as well as architectural works. *Id.* § 106(5).

22. *Id.* § 108 (allowing limited archival reproduction by libraries and archives of published works contained in their collections); *id.* § 113(c) (allowing reproduction, distribution and display, in advertising, commentaries, or news reports, of pictures or photographs of useful articles incorporating copyrighted works).

23. *Id.* § 107.

one of them—de minimis use—is neither codified nor universally recognized.<sup>24</sup> In contrast, in the case of architectural works, section 120(a) of the Copyright Act creates an additional, category-specific exception that fits the general concept of a panorama right, by permitting two-dimensional reproductions of buildings visible from public spaces.<sup>25</sup> As explored in greater detail below, while section 120(a) does not expressly apply to pictorial, graphic, and sculptural works, several courts have given it an expansive interpretation.<sup>26</sup>

### 1. Fair Use

The fair use doctrine—which was judicially created, but eventually codified in section 107 of the 1976 Act<sup>27</sup>—can permit certain unauthorized uses of copyrighted works, including but not limited to artwork.<sup>28</sup> Whether a particular activity is considered fair use depends primarily on four factors: (1) the purpose and character of the use, including whether it is commercial or nonprofit; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work.<sup>29</sup> The fair use analysis tends to be highly fact-specific; accordingly, the outcome of litigation can be difficult to predict.<sup>30</sup>

Ordinarily, fair use should permit a tourist to photograph publicly visible artwork because the reproduction, while not transformative, is also noncommercial, and the unauthorized reproduction will not, without more, have a significant effect on the market for the artwork.<sup>31</sup> If the tourist posts the pictures on

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24. For example, in *Bridgeport Music v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005), the Sixth Circuit held that the concept of de minimis copying does not apply to the reproduction of sound recordings.

25. 17 U.S.C. § 120.

26. See *infra* notes 81–108 and accompanying text.

27. 17 U.S.C. § 107.

28. *Id.*

29. *Id.*

30. For example, in *Cariou v. Prince*, 714 F.3d 694, 710–11 (2d Cir. 2013), where the defendant artist modified a series of thirty photographs without the photographer's consent, the majority found that twenty-five of the images were fair use, but remanded to the district court to make determinations on the remaining five. There was a strong dissent, and the decision has been widely criticized. See, e.g., *TCA Television Corp. v. McCollum*, 839 F.3d 168, 181 (2d Cir. 2016) (dicta); *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014); see also 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[B][6], at 13.224.20 (“It would seem that the pendulum has swung too far in the direction of recognizing any alteration as transformative, such that this doctrine now threatens to swallow fair use. It is respectfully submitted that a correction is needed in the law.”).

31. Although the tourist who takes the snapshot will now have less incentive to purchase a postcard depicting the artwork, it is unlikely that a court would

Facebook, Instagram, or another publicly available platform, fair use should still apply, because the use is still noncommercial, even though this is a second act of reproduction as well as an unauthorized public display that enables other parties to download the images for purposes of further reproduction, distribution, display, or incorporation into derivative works. In contrast, if someone makes and distributes photographs for commercial gain, the fair use argument becomes weaker.<sup>32</sup> Thus, while fair use will almost certainly protect the typical tourist who snaps casual photos, it offers little certainty with respect to commercial acts of copying, distribution, or public display.<sup>33</sup>

## 2. *De Minimis Use*

The concept of de minimis use is not mentioned in the federal copyright statutes.<sup>34</sup> Instead, it is a judicially created doctrine.<sup>35</sup> Courts applying this doctrine have held that if the unauthorized use of a copyrighted work is de minimis, then the plaintiff fails to make out a prima facie case of infringement.<sup>36</sup> If the use is truly de minimis, these courts will reject an infringement claim without undertaking a fair use analysis.<sup>37</sup> Based on this case law, certain unauthorized depictions of public art could be considered de minimis, at least in some circuits—for example, if the artwork is not central to the image, appears out of focus, or is visible only fleetingly in an audiovisual work.<sup>38</sup> However, the concept of de minimis use has not been universally adopted by the federal courts.<sup>39</sup>

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consider this “market substitution” effect to be significant under the fair use analysis. *See* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994).

32. At one time, the Supreme Court stated in dicta that commercial uses were presumptively unfair, *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), but it later disavowed this position in *Campbell*, 510 U.S. at 583–84, clarifying that commerciality is just one factor in the fair use analysis. *Id.* at 585.

33. H.R. REP. NO. 94-1476, at 25–26 (1976).

34. *See Sony Corp.*, 464 U.S. at 481–82.

35. *See id.*

36. *See, e.g., Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998) (copying was “de minimis as a matter of law,” and therefore not actionable, where photographs used as set decoration for motion picture were not in focus, were seen at a distance, and were often obstructed by performers or objects in foreground); *Ringgold v. Black Ent. Television, Inc.*, 126 F.3d 70, 76 (2d Cir. 1997) (dicta) (noting that “quantitatively insubstantial use” may fall below threshold required for actionable copying).

37. *Sandoval*, 147 F.3d at 217 (citing *Ringgold*, 126 F.3d at 76).

38. *See id.* at 218.

39. Not every circuit has considered the concept of de minimis use. The Sixth Circuit expressly rejected it, but specifically in the context of infringing sound recordings, in *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005).

Even where the doctrine is accepted, many unauthorized depictions of public art will fail to qualify as *de minimis*.<sup>40</sup> Frequently, the public art will be the central focus of the unauthorized image, or at least a prominent feature thereof, thus negating any claim that the use is *de minimis*.<sup>41</sup>

### 3. *Architectural Works Copyright Protection Act*

In contrast to *de minimis* use, section 120(a) of the Architectural Works Copyright Protection Act (“AWCPA”) permits two-dimensional reproductions of architectural works regardless of how prominently they feature the copyrighted work.<sup>42</sup> Although copyright scholar Jane Ginsburg and Senator Robert Kastenmeier suggested during Congressional hearings that the exception should be limited to uses in which the architectural work was “not the primary subject of the two-dimensional reproduction,” the language of section 120(a) demonstrates that Congress chose not to circumscribe the exception.<sup>43</sup>

Section 120(a) is a true panorama right, but its application is extremely limited.<sup>44</sup> The literal text of the statute applies only to architectural works.<sup>45</sup> For purposes of federal copyright law, an architectural work is the “design of a building,” including “the overall form as well as the arrangement and composition of spaces and elements in the design.”<sup>46</sup> With respect to such works, section 120(a) expressly permits the “making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work,” provided that the work is “located in or ordinarily visible from a public place.”<sup>47</sup> Section 120(a) was added to the copyright statutes by the AWCPA in 1990.<sup>48</sup> Congress enacted the AWCPA to bring the United States into compliance with the Berne Convention for the Protection of Literary and Artistic Works, which required

40. Inesi, *supra* note 10, at 71, 74.

41. *Id.* at 76.

42. *Id.* at 62.

43. *Architectural Design Protection: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Admin. of Just. of the H. Comm. on the Judiciary on H.R. 3990 and 3991*, 101st Cong. 5, 125 (1990) (letter from David Perdue, Assoc. Gen. Couns. & Corp. Sec’y of Am. Inst. of Architects, to Hon. Robert Kastenmeier); *id.* at 187 (letter from Jane C. Ginsburg, Assoc. Professor, Columbia Univ. Sch. of Law, to Hon. Robert Kastenmeier); *Introduction of the Architectural Works Copyright Protection Act*, 136 CONG. REC. No. 10, E260 col. 3 (Feb. 7, 1990) (floor remarks of Hon. Robert Kastenmeier).

44. Newell, *supra* note 8, at 413–14.

45. 17 U.S.C. § 120(a) (referring to the “copyright in an architectural work”); Newell, *supra* note 8, at 413.

46. 17 U.S.C. § 101.

47. *Id.* § 120(a).

48. *Id.* § 120.

signatory nations to extend copyright protection to architectural works.<sup>49</sup>

Although the AWCPA did not define the term “building,” the legislative history makes clear that Congress intended it to encompass only those structures that serve on a regular basis as human shelters.<sup>50</sup> The House Report observes that “[a]rchitectural works are the only form of copyrightable work that is habitable.”<sup>51</sup> It notes that the definition of architectural works in a previous version of the bill included the phrase “or other three-dimensional structure,” in order to encompass “architectural works embodied in innovative structures that defy easy classification.”<sup>52</sup> That phrase was removed, however, because it “could also be interpreted as covering interstate highway bridges, cloverleaves, canals, dams, and pedestrian walkways”; Berne did not require protection for such works, and they were likely to be constructed even without the incentive of copyright protection.<sup>53</sup> Noting that this omission “raises more sharply the question of what is meant by the term ‘building,’” the Report adds:

Obviously, the term encompass[es] habitable structures such as houses and office buildings. It also covers structures that are used, but not inhabited, by human beings, such as churches, pergolas, gazebos, and garden pavilions.<sup>54</sup>

The meaning of a “building,” of course, is important in interpreting the scope of the section 120(a) exemption for pictorial representations of architectural works.<sup>55</sup>

The House Report explains the reasoning behind the exemption as follows:

Similar exceptions are found in many Berne member countries, and serve to balance the interests of authors and the public. Architecture is a public art form and is enjoyed as such.

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49. H.R. REP. NO. 101-735, at 10–11, 20 (1990). Although federal copyright law already protected architectural works when they took the form of drawings or models (because these fell within the definition of “pictorial, graphic and sculptural works” under 17 U.S.C. § 101), *id.* at 11, the AWCPA extended protection to architectural works as embodied in actual buildings:

An “architectural work” is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

17 U.S.C. § 101.

50. H.R. REP. NO. 101-735, at 20.

51. *Id.* at 13.

52. *Id.* at 19–20.

53. *Id.* at 20.

54. *Id.* The Copyright Office regulations essentially track this language. 37 C.F.R. § 202.11(b)(2) (2019).

55. *See* H.R. REP. NO. 101-735, at 3, 20.



Millions of people visit our cities every year and take back home photographs, posters, and other pictorial representations of prominent works of architecture as a memory of their trip. Additionally, many scholarly books on architecture are based on the ability to use photographs of architectural works.

These uses do not interfere with the normal exploitation of architectural works. Given the important public purpose served by these uses and the lack of harm to the copyright owner's market, the Committee chose to provide an exemption, rather than rely on the doctrine of fair use, which requires ad hoc determinations.<sup>56</sup>

While the legislative history references only uses that might be considered fair uses<sup>57</sup>—photographs for personal use and scholarly books—the statutory language is broad enough to encompass commercial uses, such as the sale of posters, postcards, or T-shirts.<sup>58</sup> This interpretation is consistent with the testimony of Register of Copyrights Ralph Oman, who suggested that permitting such uses would not undermine the economic incentives that copyright law provides to architects.<sup>59</sup>

Much of the reasoning expressed in the House Report would justify extending this exemption to pictorial, graphic, and sculptural works. However, it can be argued that the “normal exploitation” of such works differs from that of architectural works, since artists,

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56. *Id.* at 22.

57. *See id.* at 22 (Mr. Jack Brooks).

58. 17 U.S.C. § 120(a) (“other pictorial representations of works”); *see also Architectural Works Copyright Protection Act of 1990 and Unique Architectural Structures Copyright Act of 1990: Hearing on H.R. 3990 and H.R. 3991 Before the Subcomm. on Cts., Intell. Prop. & the Admin. of Just. of the H. Comm. on the Judiciary*, 101st Cong. 187 (1990) (Letter from Jane C. Ginsburg, Assoc. Professor, Columbia Univ. Sch. of Law, to Hon. Robert W. Kastenmeier).

59. Noting that a similar exception was found in many Berne countries, Oman attributed this to two factors:

[T]he economic incentive to be protected is that relating to the built three-dimensional structure, including the right to make derivative three-dimensional structures; [and] (2) two-dimensional reproductions of architectural works, such as photographs, postcards, and T-shirts are not a necessary component of that economic incentive, and serve a valuable public interest in promoting familiarity, appreciation and criticism of architectural works. Most architects readily provide photographs of their works for inclusion in books, and to my knowledge, they do not seek to obtain exclusive rights over two-dimensional reproductions.

*Architectural Works Copyright Protection Act of 1990 and Unique Architectural Structures Copyright Act of 1990: Hearing on H.R. 3990 and H.R. 3991 Before the Subcomm. on Cts., Intell. Prop. & the Admin. of Just. of the H. Comm. on the Judiciary*, 101st Cong. 70 n.32 (testimony of Ralph Oman) (noting that the exception did not apply to architectural plans and would violate Berne art. 9(2) if it did).

unlike architects, often expect to derive income from two-dimensional reproductions of their works.<sup>60</sup>

During the hearings on the AWCPA, Professor Jane Ginsburg expressed skepticism about the policy underlying the section 120(a) exception, suggesting that it was “irrational” to treat architectural works differently from “large or monumental sculptures in public places.”<sup>61</sup> If section 120(a) was retained in the proposed legislation, she proposed clarifying that if a building included any elements “separately protectable as pictorial, graphic or sculptural works (for example, a gargoyle), the unauthorized pictorial representation of that element may be an infringement of the pictorial, graphic or sculptural work (not of the work of architecture).”<sup>62</sup> However, section 120(a) makes no mention of pictorial, graphic, or sculptural works, and the legislative history suggests, in a cryptic footnote, that when such works are “embodied in” architectural works, they can be separately protected only if they have the same copyright owner as the architectural work.<sup>63</sup> Professor Ginsburg’s letter also specifically expressed concern that the proposed definition of an architectural work as “the design of a building or other three-dimensional structure” would subject sculptures to the section 120(a) exception.<sup>64</sup> As noted above, this language was omitted from the final version of section 120(a), although apparently for reasons unrelated to Professor Ginsburg’s critique.<sup>65</sup> As discussed in Subpart II.B below, case law has now extended section 120(a) to permit reproduction of pictorial, graphic, and sculptural works that are *physically or conceptually* connected to architectural works, even where the reproduction is for commercial gain.<sup>66</sup>

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60. H.R. REP. NO 101-735, at 22–23.

61. *Architectural Works Copyright Protection Act of 1990 and Unique Architectural Structures Copyright Act of 1990: Hearing on H.R. 3990 and H.R. 3991 Before the Subcomm. on Courts, Intell. Prop. & the Admin. of Just. of the H. Comm. on the Judiciary*, 101st Cong. 187 (1990) (Letter from Jane C. Ginsburg, Assoc. Professor, Columbia Univ. Sch. of Law, to Hon. Robert W. Kastenmeier).

62. *Id.* at 188; see also Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 Colum.-VLA J. L. & Arts 477, 495 (1990).

63. H.R. REP. NO 101-735, at 19 n.41 (giving the example of stained glass windows).

64. *Architectural Works Copyright Protection Act of 1990 and Unique Architectural Structures Copyright Act of 1990: Hearing on H.R. 3990 and H.R. 3991 Before the Subcomm. on Cts, Intell. Prop. & the Admin. of Just. of the H. Comm. on the Judiciary*, 101st Cong. 186 (1990) (Letter from Professor Jane C. Ginsburg, Assoc. Professor, Columbia Univ. Sch. of Law, to Hon. Robert W. Kastenmeier).

65. See *supra* notes 52–53 and accompanying text.

66. See, e.g., *Leicester v. Warner Bros. Co.*, 232 F.3d 1212 (9th Cir. 2000).

#### 4. *The Three Doctrines Compared*

As a proxy for panorama rights in public art, the *de minimis* doctrine has some utility, but its reach is limited.<sup>67</sup> The doctrine has no statutory foundation, is not universally accepted, and will generally not apply to images in which the copyrighted artwork is prominently featured.<sup>68</sup> If it were adopted more widely by the federal courts, however, the *de minimis* doctrine could offer some protection in situations where images use public art only as a background or as an incidental component of the overall composition.<sup>69</sup>

As applied to works of art, fair use is in some respects broader than the section 120(a) right; in contrast to the latter, nothing in the fair use doctrine forecloses its application to three-dimensional reproductions, and it applies regardless of whether the underlying work is located in or visible from public places.<sup>70</sup> In other important respects, however, the scope of permissible fair uses of artwork is much narrower than the scope of uses permitted by section 120(a).<sup>71</sup> Whereas section 120(a) by its terms applies equally to commercial and noncommercial activities, fair use case law tends to disfavor commercial uses.<sup>72</sup> Section 120(a) permits exact duplication of an architectural work, whether in whole or in part, albeit only in two dimensions;<sup>73</sup> fair use opinions generally disfavor (but do not disqualify) exact duplication<sup>74</sup> as well as copying works in their entirety.<sup>75</sup> Fair use also tends to disfavor activities that exploit derivative work markets that the copyright owner would reasonably

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67. See Richard Chused, *Sculpture, Industrial Design, Architecture, and the Right to Control Uses of Publicly Displayed Works*, 17 NW. J. TECH. & INTELL. PROP. 55, 74, 84 (2019).

68. See, e.g., *Gayle v. Home Box Off.*, 17-CV-5867, 2018 WL 2059657, at \*3 (S.D.N.Y. May 18, 2018) (“[W]here the use is *de minimis* as here, the copying will not be actionable even where the work was chosen to be in the background for some thematic relevance.”) (internal quotations and citations omitted).

69. *Id.*

70. See PATRICIA AUFDERHEIDE, ET AL., COPYRIGHT, PERMISSIONS, AND FAIR USE AMONG VISUAL ARTISTS AND THE ACADEMIC AND MUSEUM VISUAL ARTS COMMUNITIES: AN ISSUES REPORT 24 (2014) (stating that most artistic work, whether intended for public consumption or not, is copyright protected).

71. Robin Feingold, *When Fair is Foul: A Narrow Readings of the Fair Use Doctrine in Harper & Row Publishers Inc. v. Nation Enterprises*, 72 CORNELL L. REV. 218, 233 (1986).

72. Commercial use, while not dispositive, weighs against a finding of fair use. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994) (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)).

73. There is no right to prevent “making . . . pictorial representations of the work.” 17 U.S.C. § 120(a).

74. Because such copying (even in a different medium) is non-transformative and creates a market substitute for the copyrighted work (or for works derivative thereof), this tends to weigh against fair use. See *Campbell*, 510 U.S. at 589; *A&M Recs., Inc. v. Napster*, 239 F.3d 1004, 1015 (9th Cir. 2001).

75. *Napster*, 239 F.3d at 1016 (collecting cases).

have an interest in exploiting.<sup>76</sup> Section 120(a), in contrast, permits the depiction of architectural works in postcards, posters, calendars, T-shirts, and other two-dimensional reproductions that the owner of an architectural copyright might legitimately have an interest in exploiting.<sup>77</sup>

Thus, while fair use may in some cases permit uses of public art that are comparable to the freedom of panorama, the application of fair use to these activities turns on criteria different from those which identify a use permitted under section 120(a) and offers less predictability as well.<sup>78</sup>

### B. Federal Case Law

Federal courts have rarely had the opportunity to consider whether, and to what extent, existing principles of federal copyright law can accommodate a panorama right that extends beyond architectural works.<sup>79</sup> However, several cases have explored the scope of section 120(a) and fair use in a variety of relevant contexts.<sup>80</sup>

As noted earlier, section 120(a) amounts to a panorama right for architectural works embodied in buildings.<sup>81</sup> As discussed below, however, courts have reached conflicting conclusions as to the application of section 120(a) with respect to a pictorial, graphic, or sculptural work that is arguably a component of an architectural work.<sup>82</sup>

In *Leicester v. Warner Bros.*,<sup>83</sup> an artist sued the Warner Brothers film studio for incorporating parts of his sculpture garden in the background of a scene from *Batman Forever* that was filmed in downtown Los Angeles. The sculpture garden was adjacent to an office building on Figueroa Street called the 801 Tower.<sup>84</sup> Although the studio obtained filming permission from the owner/developer of the 801 Tower,<sup>85</sup> it did not request the consent of the artist who

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76. *Campbell*, 510 U.S. at 592–93.

77. *See supra* note 32 and accompanying text.

78. *Compare, e.g.*, 17 U.S.C. § 120, *with Campbell*, 510 U.S. at 569.

79. *E.g.*, *Campbell*, 510 U.S. at 569.

80. *See, e.g., id.*; *Napster*, 239 F.3d at 1004; *Leicester v. Warner Bros.*, 232 F.3d 1212, 1220 (9th Cir. 2000).

81. 17 U.S.C. § 120.

82. *Compare Leicester*, 232 F.3d at 1220, *with Gaylord v. United States*, 85 Fed. Cl. 59, 69 (2008), *aff'd in part and rev'd in part*, 595 F.3d 1364 (Fed. Cir. 2010).

83. 232 F.3d 1212 (9th Cir. 2000).

84. *Id.* at 1214.

85. The district court's opinion notes that Warner Brothers obtained this consent from the building's owner without consulting the architect. *Leicester v. Warner Bros.*, No. CV95-4058-HLH, 1998 WL 34016724, at \*2 (C.D. Cal. May 29, 1998). The opinion does not indicate whether the building owner had obtained these rights from the architect. *Id.*

designed the sculpture garden.<sup>86</sup> In addition to reproducing the building and some of the sculptures in footage filmed on location at the 801 Tower, Warner Brothers made sculptural models of the building and the sculpture garden, which may have been used in filming,<sup>87</sup> and also depicted the building and several of the sculptures in merchandise promoting the film, such as a comic book, posters, and T-shirts.<sup>88</sup> After registering his copyright in the sculpture garden as a “sculptural work,” the artist filed his infringement claim.<sup>89</sup>

The district court judge found that the film did not infringe the copyright in the sculpture garden, because the particular sculptures that were visible in the footage—a group of four towers—were not separate sculptural works, but part of the architectural work embodied in the 801 Tower.<sup>90</sup> Accordingly, pictorial representations were allowed by section 120(a) without the artist’s consent.<sup>91</sup> The Ninth Circuit agreed<sup>92</sup> and also held that the artist’s contract with the owner/developer of the Tower gave the latter a sublicensable exclusive right to reproduce the sculptural works in three dimensions in all sizes.<sup>93</sup> Neither the district court nor the Ninth Circuit found it necessary to consider whether Warner Brothers’ use of the image was a *de minimis* or fair use.<sup>94</sup> Nor did the courts expressly consider whether an audiovisual reproduction is a “pictorial representation” under section 120(a); the opinions implicitly assume that it is.<sup>95</sup>

A crucial factor in *Leicester* was the creative origin of the four towers in the sculpture garden.<sup>96</sup> In order to obtain a permit to develop the plot of land, the owner/developer of the 801 Tower was required to include public art and a streetwall.<sup>97</sup> The four sculptural towers in the garden comprised a significant part of the Tower’s streetwall and were thematically linked to the Tower.<sup>98</sup> Thus, the sculpture garden was not merely adjacent to the 801 Tower; it was linked to the Tower’s design both artistically and historically.<sup>99</sup>

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86. Although the artist had also given the owner/developer a license to make pictorial representations of the sculpture garden, these rights could not be sublicensed without the artist’s consent. *Id.* at \*4.

87. *Id.* at \*2.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at \*9.

92. *Leicester v. Warner Bros.*, 232 F.3d 1212, 1220 (9th Cir. 2000). The dissent argued that section 120(a) did not limit the sculptor’s rights. *Id.* at 1229–30 (citing footnote 41 of the House Report) (Fisher, C.J., dissenting); *see supra* note 63 and accompanying text.

93. *Id.*

94. *Id.*

95. While section 120(a) allows “photographs” and “other pictorial representations” of buildings, it is silent on audiovisual reproductions.

96. *See Leicester*, 232 F.3d at 1220.

97. *Id.* at 1214.

98. *Id.*

99. *Id.*

Without this linkage, the argument for applying section 120(a) would have been significantly weaker, and Warner Brothers would probably have been held liable for infringement unless it could persuade the court that its use of the sculptures as a scenic background was *de minimis* or constituted fair use.<sup>100</sup>

Section 120(a) has also been applied to murals painted on building exteriors, even where the murals were not part of the original design of the buildings.<sup>101</sup> In *Mercedes Benz USA, LLC v. Lewis*,<sup>102</sup> a group of Detroit muralists objected to the use of their works as backgrounds for images used in an advertising campaign; Mercedes Benz had photographed several of its vehicles in front of murals that the artists had lawfully painted on the exterior walls of buildings in downtown Detroit.<sup>103</sup> It then posted six of those images on Instagram.<sup>104</sup> When the artists objected, Mercedes removed the photos, but also sought a declaratory judgment of non-infringement under section 120(a).<sup>105</sup> Relying heavily on *Leicester*, the district court rejected the artists' motion to dismiss, concluding that section 120(a) applied because the murals were painted on publicly visible architectural works.<sup>106</sup> Under this expansive view of section 120(a), Mercedes' use of the murals was non-infringing even though it was commercial and almost certainly neither a fair use<sup>107</sup> nor a *de minimis* use.<sup>108</sup>

In contrast, other cases have taken a narrower view of section 120(a).<sup>109</sup> In *Gaylord v. United States*,<sup>110</sup> the Court of Federal Claims considered how to classify sculptures that were part of the Korean

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100. *Id.*

101. *See, e.g., Mercedes Benz, USA, LLC v. Lewis*, No. 19-10948, 2019 WL 4302769 (E.D. Mich. Sep. 11, 2019) (holding section 120(a) applied to mural on architectural works within public view).

102. No. 19-10948, 2019 WL 4302769 (E.D. Mich. Sep. 11, 2019).

103. The murals, located at Detroit's Eastern Market, were created as part of the city's Murals in the Market program, an annual city-sponsored art festival. *Id.* at \*2.

104. *Id.* at \*1-2.

105. Mercedes also argued fair use, but the court's opinion did not reach this argument. *Id.* at \*2.

106. *Id.* at \*7.

107. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994) ("The use, for example, of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry than the sale of a parody for its own sake.")

108. Even though they are in the background, the murals are a significant component of each image, both qualitatively and quantitatively. They are arguably much more striking than the vehicles parked in front of them. *Id.* at 577, 587. Mercedes Benz did not argue that the use was *de minimis*.

109. *Gaylord v. United States*, 85 Fed. Cl. 59, 71-72 (2008), *aff'd in part and rev'd in part*, 595 F.3d 1364 (Fed. Cir. 2010).

110. *Id.* at 62 (applying, on appeal, the "clearly erroneous" standard of review in upholding the lower court's determination that the memorial was not an architectural work).

War Veterans Memorial (“KWVM”) in Washington, D.C. The sculptures themselves depict individual soldiers, but the memorial also includes walkways and benches.<sup>111</sup> The United States Postal Service (“USPS”), which had reproduced an image of the sculptures on a postage stamp without the sculptor’s consent, argued that its pictorial representation was non-infringing because the memorial was an architectural work.<sup>112</sup> Based on the legislative history of section 120(a), the government argued that the memorial as a whole constituted an architectural work.<sup>113</sup> The court rejected this characterization, holding that the memorial was not a “building”:

The structures used in the definition of “building” by the Copyright Office are intended to house individuals; either for the sake of providing shelter or for another purpose such as religious services. In contrast, the KWVM was designed as a monument to honor the veterans of the Korean War. It is an artistic expression intended to convey a message rather than to be occupied by individuals. The fact that individuals may traverse through the KWVM does not detract from its intended purpose. Much like a walkway or bridge, the KWVM permits individuals to access through it, but is not intended for occupancy. Defendant’s argument that the KWVM is a building explicitly rests upon the fact that the monument contains walkways; a feature which the Copyright Office excludes from its definition of “building.”<sup>114</sup>

The government’s fair use argument failed on appeal because, even though the stamp would have little impact on the market for derivative works, the Federal Circuit found that the government’s use of the work was commercial and non-transformative, the underlying work was highly creative, and the stamp copied a substantial number of the sculptures.<sup>115</sup> Here, therefore, the limited scope of section 120(a) was outcome determinative.<sup>116</sup> Had section 120(a) applied to sculptural works, the government would have prevailed, despite the absence of fair use.<sup>117</sup>

*Gaylord* was not the Postal Service’s only brush with copyright infringement of public art. In December of 2010, the USPS issued a stamp depicting a close-up of the Statue of Liberty’s face.<sup>118</sup> Unfortunately, the photograph used by the agency depicted not the actual Statue of Liberty but a scale model located in front of the New

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111. *Id.*

112. *Id.* at 64.

113. *Id.* at 71.

114. *Id.*

115. *Gaylord v. United States*, 595 F.3d 1364, 1372–75 (Fed. Cir. 2010).

116. *Id.* at 1380–81.

117. *Id.* at 1381.

118. *Davidson v. United States*, 138 Fed. Cl. 159, 161 (2018).

York-New York casino on the Las Vegas Strip.<sup>119</sup> Moreover, the Las Vegas replica, created by sculptor Robert S. Davidson, is not an exact duplicate of the original statue.<sup>120</sup> The facial features, in particular, are easily distinguishable.<sup>121</sup> The USPS had licensed a Getty image of Davidson's sculpture, but failed to obtain rights to the underlying sculpture (initially failing to realize that it was not the actual Statue of Liberty).<sup>122</sup> Even after learning that the sculpture was Davidson's work rather than the public domain Statue of Liberty, the USPS continued to use the postage stamp for nearly three years.<sup>123</sup> In its defense, the federal government argued that (1) Davidson's work was part of an architectural work subject to section 120(a); (2) his work was not sufficiently original for copyright protection; and (3) reproducing the work in postage stamps constituted fair use.<sup>124</sup> The Court of Federal Claims rejected all three of these arguments and awarded Davidson \$3.55 million in damages.<sup>125</sup>

The Statue of Liberty replica presents a problem similar to that of the *Leicester* case: When is a sculptural element considered to be part of an architectural work for purposes of section 120(a)?<sup>126</sup> The different outcomes in the two cases present a stark and arguably irreconcilable contrast. Aesthetically and historically, there is no doubt that the statue is part of the overall exterior design of the New York-New York casino.<sup>127</sup> The casino's façade replicates several distinctive elements of the New York skyline, including the Empire State Building, the Chrysler Building, and Grand Central Terminal.<sup>128</sup> These replicas are physically integrated into the façade of the habitable building that houses the casino.<sup>129</sup> The Statue of Liberty sculpture is not physically integrated into the façade, but stands directly in front of the most prominent side of the buildings, making it an important conceptual component of the design.<sup>130</sup> Images of the casino on the internet (including the official artist's

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119. *Id.*

120. *Id.* at 164–65.

121. *Id.* at 165. This conclusion reflects both the author's opinion and that of the Court of Federal Claims. A different court could conceivably reach the opposite conclusion, especially if it focused not on the face of Lady Liberty (the only part that was reproduced in the postage stamp), but on the sculpture as a whole. See, e.g., *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 489, 491–92 (2d Cir. 1976) (holding that plastic model of public domain Uncle Sam bank was not copyrightable as a derivative work, despite small differences in the designs).

122. *Davidson*, 138 Fed. Cl. at 166.

123. *Id.* at 167, 169.

124. *Id.* at 170.

125. *Id.* at 170–74, 182.

126. *Id.*

127. Construction photos show the statue being installed in late 1996, while the entire casino was still under construction. See *NEW YORK NEW YORK HOTEL AND CASINO*, <http://www.pcap.com/newyork.htm> (last visited Sept. 15, 2020).

128. *Id.*

129. *Id.*

130. *Id.*



model) almost always include the sculpture.<sup>131</sup> Indeed, it is rare to find an internet image of the casino's distinctive façade that does not feature the statue. On the other hand, the statue is located in front of the buildings and is physically separated from them.<sup>132</sup>

In an unpublished opinion at the summary judgment phase, the Court of Federal Claims held that section 120(a) did not apply to Davidson's work.<sup>133</sup> The court conceded that:

[T]he hotel consists of several structures representing different New York landmarks that are connected to form a superstructure depicting the New York City skyline. The sculpture of the Statue of Liberty, although not directly connected to the buildings, is physically located as part of the same development on the same plot of land, was built at the same time, and was intentionally included to enhance the New York theme . . . . The statute matches the theme of the hotel and is cleverly located to enhance[] the visual effect of the hotel's design . . . .<sup>134</sup>

The court held, however, that the statue by itself was not a "building" under the applicable regulations defining the term as a "humanly habitable structure."<sup>135</sup> Instead, it was "a free standing work of sculpture" that was "not part of the façade of the hotel's superstructure nor . . . connected to the building in any physical sense."<sup>136</sup> The court stated that *Leicester* was distinguishable on its facts: while Davidson's statue was "free standing" and "serve[d] no functional purpose for the building,"<sup>137</sup> the streetwall in *Leicester* "was properly considered an element of the design of that building because it served artistically to extend the building visually to the street and because it served functionally to guide foot traffic into the building's courtyard."<sup>138</sup>

The main focus of the *Davidson* opinion, however, was the court's belief that section 120(a) simply should not apply to sculptural works.<sup>139</sup> The court noted, "[e]ven if the replica were viewed by the public as a design element of the casino,"<sup>140</sup> Congress could not have intended section 120(a) to override the preexisting rules granting copyright protection to sculptural works:

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131. *Id.*

132. *Id.*

133. *Davidson v. United States*, No. 13-942C, 2017 WL 3033774, at \*1 (Fed. Cl. July 18, 2017).

134. *Id.* at \*2-\*3 n.1.

135. *Id.* at \*3 (quoting 37 C.F.R. § 202.11(b)(2) (2019)).

136. *Id.*

137. *Id.*

138. *Id.* (citing *Leicester v. Warner Bros.*, 232 F.3d 1212, 1218 (9th Cir. 2000)). However, the function of guiding traffic into the courtyard was just one element of the *Leicester* court's lengthy analysis. *Leicester*, 232 F.3d at 1218.

139. *Davidson*, 2017 WL 3033774, at \*1.

140. *Id.* at \*3.

[D]eeming the statue to be one and the same as the buildings that constitute the casino itself is inconsistent with a common sense reading of the relevant statutory and regulatory provisions, and inconsistent as well with Congress' purpose in adopting the 1990 changes to protect architectural works, but not reduce protections afforded to other categories of protected works.<sup>141</sup>

This begs the question of how the court would have ruled if Davidson's work were more closely connected, either physically or functionally, to the hotel/casino building.

In the second phase of the litigation, the court rejected the government's fair use defense, primarily because the use was commercial.<sup>142</sup> Because the government would have prevailed if section 120(a) had applied to free-standing sculptural works, *Davidson* once again illustrates the different outcomes that can be expected in the same scenario under a panorama right compared to fair use.<sup>143</sup>

Davidson's Statue of Liberty replica is not the only element of the Las Vegas skyline that could present difficult issues under section 120(a). At the New York New York casino itself, for example, another sculptural element that is physically separated from the habitable structures is a replica of the Brooklyn Bridge.<sup>144</sup> Also located on the Strip, just up the road from the Statue of Liberty and the Brooklyn Bridge, is a scale model of the Eiffel Tower that stands in front of the Paris Hotel and Casino.<sup>145</sup> And the exterior of the Luxor hotel has a 110-foot tall replica of the Egyptian Sphinx, sculpted by Robert Davidson himself.<sup>146</sup> Whether these replicas present the same legal issues as the faux Statue of Liberty, however, depends initially on whether the replicas include any copyrightable elements that distinguish them from the public domain originals—an issue that was resolved in Davidson's favor with respect to the Statue of Liberty.<sup>147</sup> Only then would the application of section 120(a) become critical to determining whether unauthorized commercial photography is permissible. In contrast, most public art will not present such difficult questions of originality.<sup>148</sup> One has only to look across the street from the New York New York casino to see a fascinating

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141. *Id.*

142. The use was commercial, and the government did not argue that its use was transformative. *Davidson v. United States*, 138 Fed. Cl. 159, 173 (2018).

143. *Id.* at 162.

144. *N.Y. Stock Exch., Inc., v. N.Y., N.Y. Hotel, LLC*, 293 F.3d 550, 553 (2d Cir. 2002).

145. *See generally* *Reno-Tahoe Specialty, Inc., v. Mungchi, Inc.*, No. 2:12-cv-0151-GMN-VCF, 2014 WL 7336082 (D. Nev. Dec. 19, 2014) (describing the various landmarks on the Las Vegas Strip).

146. *Davidson*, 138 Fed. Cl. at 164.

147. *Id.* at 172.

148. *Davidson*, 138 Fed. Cl. at 170.

example—the 50-ton bronze lion sculpture that dominates and defines the entrance to the MGM Grand even though it was never part of that building’s original design or construction.<sup>149</sup>

### C. *The Need for Greater Clarity*

Some observers suggest that, in recent decades, artists have become more aggressive in asserting their copyrights in the United States.<sup>150</sup> Reports emerged in 2005 that several artists with sculptures located in public parks were enforcing, or threatening to enforce, their copyrights against professional photographers.<sup>151</sup> In Chicago’s Millennium Park, where Anish Kapoor’s *Cloud Gate* was installed in 2004, security guards allegedly approached photojournalist Warren Wimmer as he was setting up his tripod and

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149. Richard N. Velotta and Todd Prince, *MGM Grand Celebrates 25 Years on Las Vegas Strip*, *Las Vegas Rev. J.* (Dec. 18, 2018) (noting that the lion sculpture was a replacement for the original entrance, the design of which deterred Asian visitors).

150. Daniel Grant, *Photographs of Public Artwork by Anish Kapoor and Christo & Jeanne-Claude: Copyright Infringement?*, 24 *SCULPTURE*, no. 4 (May 2005), [https://www.sculpture.org/documents/scmag05/may\\_05/webspecs/grant.shtml](https://www.sculpture.org/documents/scmag05/may_05/webspecs/grant.shtml) (noting that artists’ newfound assertiveness in enforcing their copyrights in public art extends beyond unauthorized copying, encompassing a variety of moral rights claims as well); Note, *Accession on the Frontiers of Property*, 133 *HARV. L. REV.* 2381, 2388 (2020) (noting that the Second Circuit recently upheld a \$6.75 million damages award to New York graffiti artists whose work was whitewashed without notice.); see also *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 164, 173 (2d Cir. 2020) (finding that the graffiti art was of “recognized stature” under the Visual Artists Rights Act, 17 U.S.C. § 106A). Sculptor Arturo de Modica, who initially placed his famous *Charging Bull* sculpture in front of the New York Stock Exchange before it was seized by authorities and eventually relocated to nearby Bowling Green, threatened to bring a moral rights suit decades later, when Kristen Visbel’s *Fearless Girl* statue was positioned in a seemingly defiant pose directly facing the bull. Emma Barraclough, *Raging Bull and Fearless Girl – Moral Rights in Copyright*, *WIPO MAGAZINE* (Apr. 2018), [https://www.wipo.int/wipo\\_magazine/en/2018/02/article\\_0003.html](https://www.wipo.int/wipo_magazine/en/2018/02/article_0003.html). Although de Modica never actually filed the suit, *id.*, the two statues have since been separated. Victoria Bekiempis, *New York: Fearless Girl Who Faced Down Wall Street’s Bull Moved to a New Spot*, *THE GUARDIAN* (Nov. 28, 2018), <https://www.theguardian.com/us-news/2018/nov/28/new-york-fearless-girl-charging-bull-wall-street>. Ironically, they may be reunited, as *Fearless Girl* has been moved closer to the New York Stock Exchange, and there are plans to move *Charging Bull* as well, probably to the same vicinity. Assoc. Press, *Wall Street’s Charging Bull is Moving*, *FORTUNE* (Nov. 8, 2019), <https://fortune.com/2019/11/08/charging-bull-statue-wall-street-is-moving/>. More recently, the company that commissioned *Fearless Girl* brought breach of contract claims against Visbel for creating and distributing replicas and photographs of her sculpture. Robert J. Bernstein & Robert W. Clarida, *‘Fearless Girl’ Abroad and the Extraterritorial Limitation on U.S. Copyright Law*, *NEW YORK L.J.* (Jan. 29, 2020, 12:15 PM), <https://www.law.com/newyorklawjournal/2020/01/29/fearless-girl-abroad-and-the-extraterritorial-limitation-on-u-s-copyright-law/?slreturn=20200123005054>.

151. Grant, *supra* note 150.

demanded that he purchase a license.<sup>152</sup> When the sculpture *The Gates* by artists Christo and Jeanne-Claude was displayed for sixteen days in New York's Central Park, an attorney representing those artists confirmed sending cease-and-desist letters warning photographers not to sell photos of the work.<sup>153</sup> Such sales could compete with sales of photographs and posters of the work that were authorized by the artists.<sup>154</sup>

In Seattle, a single piece of public art has generated two lawsuits since its installation in 1982.<sup>155</sup> Jack Mackie's sculpture *Dance Steps on Broadway* includes eight sub-installations that depict dance steps for popular social dances.<sup>156</sup> Each sub-installation consists of bronze footprints and arrow diagrams, together with a "title block" that displays the title of the dance and a copyright notice.<sup>157</sup> These are embedded in public sidewalks adjacent to Broadway Avenue on Capitol Hill in Seattle.<sup>158</sup> Mackie's work was paid for with public funds.<sup>159</sup> In 2000, Mackie sued the Seattle Symphony for reproducing a photo of one sub-installation in a promotional brochure.<sup>160</sup> Because the work was unregistered when it was infringed, the court could award only actual damages, not statutory damages or attorney fees.<sup>161</sup> Although Mackie argued that he was entitled to at least \$185,000 in actual damages, the court awarded only \$1,000.<sup>162</sup> Had Mackie registered the work before the infringement, however, he could have received up to \$30,000 in statutory damages (\$150,000 if the infringement was willful), and attorneys' fees at the court's discretion.<sup>163</sup> In 2009, Mackie filed a second infringement suit, this time against a professional photographer who photographed a woman

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152. *Id.* (discussing that in true Chicago fashion, Wimmer claims that he bribed the guards to go away); see also Ben Joravsky, *The Bean Police*, CHI. READER (Jan. 27, 2005), <https://www.chicagoreader.com/chicago/the-bean-police/Content?oid=917867> (observing the difficulties of enforcing Anish Kapoor's copyright over *Cloud Gate* in Chicago's Millennium Park).

153. *Id.* (discussing that the letters stated that any commercial use, and any use other than a fair use, would require the artists' permission).

154. *Id.* (discussing that the authorized sales were for the benefit of a nonprofit urban ecology organization).

155. Justin Silverman, *Seattle: Photographer Falls Into Legal Soup with Photo of Public Art*, FIRST AMENDMENT COAL. (Feb. 21, 2010), <https://firstamendmentcoalition.org/2010/02/seattle-photographer-falls-into-legal-soup-with-photo-of-public-art/>.

156. *Mackie v. Rieser*, 296 F.3d 909, 912 (9th Cir. 2002).

157. Tamara Childress, *Weekly Art Hit: 'Dancers' Series: Steps' by Jack Mackie*, ART BEAT BLOG (May 23, 2013), <https://artbeat.seattle.gov/2013/05/23/weekly-art-hit-dancers-series-steps-by-jack-mackie/>.

158. Corrected Complaint for Infringement of Copyright, *Mackie v. Hipple*, No. 2:09-cv-00164-RSL, 2010 WL 3211952 (W.D. Wash. Aug. 9, 2009).

159. Childress, *supra* note 157.

160. *Mackie*, 296 F.3d at 912.

161. *Id.*

162. *Id.*

163. *Id.*

dancing on the public sidewalk, with a portion of Mackie's sculpture visible in the picture, and then sold the picture to stock photo companies for sale on the internet.<sup>164</sup> The parties settled this suit for an undisclosed amount in 2011.<sup>165</sup>

Threats of nuisance litigation, fueled by the increased activities of copyright trolls and the high cost of litigation, create uncertainty for parties that seek to capture and disseminate images of the public landscapes and cityscapes where art has been installed.<sup>166</sup> Whether the parties' goals are commercial or noncommercial, greater clarity would be helpful in providing them with notice as to whether and to what extent images of art-adorned public spaces can be reproduced and shared.<sup>167</sup> As discussed in Part III, much can be learned from examining the approaches taken by other nations in balancing the interests of copyright owners and public users.

### III. PANORAMA RIGHTS ABROAD

Panorama rights for public art present the unusual situation in which foreign countries recognize a copyright exception that does not exist in federal copyright law. The panorama right is well established outside of the United States, where it is more commonly referred to as the "freedom of panorama."<sup>168</sup> As described by the Supreme Court of Sweden, the right is "founded on the public interest to freely reproduce the town- or land-scape irrespective of the right to works of art that are included therein."<sup>169</sup>

The right is thought to have originated in the mid-nineteenth century German Confederation.<sup>170</sup> Whereas France and Italy already

164. Corrected Complaint for Infringement of Copyright at 2–3, *Mackie v. Hipple*, No. 2:09-cv-00164-RSL, 2010 WL 3211952 (W.D. Wash. Aug. 9, 2009).

165. Michael Zhang, 'Dance Steps on Broadway' Lawsuit Ends with Photographer Paying Settlement, *PETAPIXEL* (July 7, 2011), <https://petapixel.com/2011/07/07/dance-steps-on-broadway-lawsuit-ends-with-photographer-paying-settlement/>.

166. See, e.g., Shyamkrishna Balganes, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 727 (2013) (describing the first copyright troll who brought more than 275 cases of copyright infringement against defendants, "settling many of these cases or succeeding in obtaining statutory damages in courts").

167. See Eleonora Rosati, *Non-Commercial Quotation and Freedom of Panorama: Useful and Lawful?*, 8 J. INTELL. PROP., INFO. TECH. & ELEC. COM. L. 311, 315 (2017).

168. This term is derived from the German word *panoramafreiheit*, which translates literally as "panorama freedom." See, e.g., Nikolaj Nielsen, *Belgian and French Copyright Laws Ban Photos of EP Buildings*, *EU OBSERVER* (Nov. 4, 2014), <https://euobserver.com/justice/126375>. The term appears in Article 59 of Germany's Act on Copyright and Neighboring Rights. See *infra* notes 239–46 and accompanying text.

169. Högsta Domstolen [HD] [Supreme Court of Sweden] Apr. 4, 2016, 2016-04-04 Ö 849-15 (Swed.), <https://www.domstol.se/globalassets/filer/domstol/hogstadamstolen/avgoranden/2016/o-849-15.pdf>.

170. See Dulong de Rosnay & Langlais, *supra* note 4, at 4.

imposed restrictions on mechanical reproductions of various public scenes (apparently for reasons unrelated to copyright),<sup>171</sup> the enactment of Germany's first copyright law prompted several Confederation members to create an exception for works of art and architecture in public spaces, in order to preserve the public sphere as a "common good."<sup>172</sup> The German Parliament adopted the doctrine in 1876.<sup>173</sup>

While the panorama right is widely recognized, there are significant variations in the scope of the right.<sup>174</sup> In general, the right applies only to works of art that are visible in or from public places.<sup>175</sup> In most cases, this is restricted to outdoor displays, but some countries extend the right to public interior spaces as well.<sup>176</sup> While most panorama laws apply only to permanent installations, others include temporary displays as well.<sup>177</sup> Some countries allow reproduction only of three-dimensional works, while others extend their freedom of panorama to two-dimensional works such as paintings, murals, and mosaics.<sup>178</sup>

Some countries permit only static pictorial reproductions of publicly visible art, while others permit audiovisual reproductions as well.<sup>179</sup> In addition to permitting reproductions of artwork, some panorama laws allow the copies to be publicly distributed and even publicly performed (i.e., where an image of the artwork is captured in an audiovisual work).<sup>180</sup> Some panorama laws are ambiguous as to whether they permit broadcasting or internet transmission.<sup>181</sup> While some countries limit the panorama right to noncommercial activities, others extend it to commercial uses.<sup>182</sup>

Most panorama laws fail to address rights in underlying preparatory works, such as drawings or models, which are themselves copyrightable, and which are potentially infringed by reproductions

171. In France, reproduction of street scenes may have implicated privacy concerns. *Id.* In Italy, as early as the eighteenth century, cultural heritage protections prohibited reproduction of archaeological remains even when located in public spaces. *Id.*

172. *Id.* at 4–5.

173. *Id.* at 5.

174. *See* Oda, *supra* note 14, at 15.

175. *See id.* at 15–16 (discussing various freedom of panorama scopes).

176. *See id.* (comparing Germany's freedom of panorama, which excludes the interiors of buildings, with Estonia's, which includes indoor spaces such as museums or galleries).

177. Jonathan Barrett, *Putting Artists and Guardians of Indigenous Works First: Towards a Restricted Scope of Freedom of Panorama in the Asian Pacific Region*, in *MAKING COPYRIGHT WORK FOR THE ASIAN PACIFIC* 241 (Susan Corbett & Jessica C. Lai eds., 2018) (noting that China's freedom of panorama provision does not have an explicit permanence requirement).

178. *Id.*

179. Oda, *supra* note 14, at 16.

180. *Id.*

181. *See* Copyright Law, Law No. 7564, art. 12 (Alb.).

182. *Id.*

of the publicly visible artwork.<sup>183</sup> And when the owner of a tangible work of art chooses to place that work in a public space where it will become subject to the panorama right, only a few countries give the copyright owner the opportunity to prevent the public installation of his or her work.<sup>184</sup> And no country has yet addressed the rights of third party licensors when derivative works incorporating their copyrighted content are installed in public places.<sup>185</sup> Finally, many panorama laws do not expressly address the moral rights of the authors of public art, leaving open the possibility of claims arising from a user's alteration of the image or failure to identify the artist.<sup>186</sup> While this is not likely to be an issue in the United States, where moral rights are narrowly circumscribed,<sup>187</sup> it can present issues in other countries.<sup>188</sup>

None of the jurisdictions surveyed below have enacted a fair use provision comparable to that of federal copyright law.<sup>189</sup> Accordingly, the need for panorama legislation in such countries may be somewhat greater than it is in the United States. Nonetheless, federal copyright law is filled with exceptions and limitations that are more specific than fair use, and which provide greater certainty as to the respective rights of copyright owners and users.<sup>190</sup> As discussed in Part IV, there are valuable lessons to be drawn from the experience of other nations, and these can inform the discussion of whether and to what extent a panorama right is appropriate for the United States.

#### A. *European Union*

Until recently, little attention was focused on the freedom of panorama in the European Union ("EU"), where member states are free to adopt or reject the right and to impose limitations of their choosing.<sup>191</sup> In recent years, however, the topic has become more controversial,<sup>192</sup> with some observers calling for the right to be made

183. See 17 U.S.C. § 101; see also Jonathan Barrett, *Time to Look Again? Copyright and Freedom of Panorama*, 48 VICTORIA U. WELLINGTON L. REV. 261, 262 (2017) (discussing works not included in the Copyright Act).

184. See Barrett, *supra* note 183, at 262.

185. See, e.g., *id.* (discussing freedom of panorama in various countries).

186. See *infra* notes 208–09 and accompanying text.

187. The federal moral rights statute protects only the originals and certain limited editions of works of visual art, not reproductions thereof. 17 U.S.C. § 106A (referring to "works of visual art"); *id.* § 101 (defining "work of visual art").

188. For example, a New Zealand court held that the freedom of panorama statutes was not a defense to a moral rights claim. See *infra* note 284 and accompanying text.

189. See Barrett, *supra* note 183, at 262 (explaining that New Zealand has not enacted a fair use provision comparable to the United States, and the European Union has followed the lead of New Zealand).

190. See 17 U.S.C. §§ 108–122.

191. Barrett, *supra* note 183, at 263.

192. See Aura Bertoni & Maria Lilla Montagnani, *Public Art & Copyright Law: How the Public Nature of Architecture Changes Copyright Protection*, 12

mandatory throughout the EU,<sup>193</sup> and others seeking to impose EU-wide restrictions on the scope of the right.<sup>194</sup>

The Copyright Directive of 2001 permits, but does not require, EU countries to recognize “exceptions and limitations” to copyright liability for the “use of works, such as works of architecture or sculpture, made to be located permanently in public spaces.”<sup>195</sup> Although only sculptures and architectural works are specifically enumerated, the textual reference to “works” is broad enough to encompass two-dimensional works such as paintings, drawings, murals, and photographs.<sup>196</sup> Most EU members, however, have not adopted this broad interpretation.<sup>197</sup>

Responses to the 2001 Directive have varied widely.<sup>198</sup> While most EU countries have adopted some version of the panorama right,

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FUTURE ANTERIOR 46, 50 (2015); Dulong de Rosnay & Langlais, *supra* note 4, at 3; Anne-Catherine Lorrain & Julia Reda, *Freedom of Panorama: A Political “Selfie” in Brussels*, 37 EUR. INTEL. PROP. REV. 753, 753–55 (2015); Rosati, *supra* note 167, at 320.

193. Julia Reda, *Draft Report on the Implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society* (2014/2256 (INI)) (Jan. 15, 2015) (unpublished draft report) (recommending making the panorama right mandatory throughout the EU); Thomas Seymat, *The Bitter Fight for Freedom of Panorama*, EURONEWS (July 8, 2015), <https://www.euronews.com/2015/07/08/fight-for-freedom-of-panorama-savepos-wikipedia>.

194. In 2015, French Member of Parliament Jean-Marie Cavada proposed an EU-wide restriction prohibiting member states from applying the freedom of panorama to commercial uses. Owen Blacker, *Freedom of Panorama is Under Attack*, VANTAGE (June 21, 2015), <https://medium.com/vantage/freedom-of-panorama-is-under-attack-6cc5353b4f65>; Seymat, *supra* note 193. The proposal drew extensive criticism. The Royal Institute of British Architects publicly criticized the proposal, and more than 500,000 people signed a petition opposing it. Lizzie Porter, *Holiday Snaps Saved as UK Retains Freedom of Panorama*, TELEGRAPH (July 10, 2015, 12:00 AM), <https://www.telegraph.co.uk/travel/destinations/europe/united-kingdom/articles/Holiday-snaps-saved-as-UK-retains-Freedom-of-Panorama/>. Within a few weeks, the proposal was withdrawn. Owen Blacker, *Street Photography in Europe and Freedom of Panorama*, VANTAGE (July 6, 2015), <https://medium.com/vantage/street-photography-in-europe-an-update-on-freedom-of-panorama-9ed81d60bd5a>.

195. Directive 2001/29, 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, 2001 O.J. (L 167) 10 at art. 5, sec. 3(h).

196. *Id.*

197. Barrett, *supra* note 183, at 263–64, 275–77.

198. See generally Maria Boicova-Wynants, *Art in Public Space (3): Public Art and Freedom of Panorama*, ARTLAW (Jan. 13, 2020), <https://artlaw.club/en/artlaw/art-in-public-space-3-public-art-and-freedom-of-panorama>.



Greece,<sup>199</sup> Italy,<sup>200</sup> and Luxembourg<sup>201</sup> still have not done so. Two of the longtime holdouts, Belgium and France, waited fifteen years to adopt the right, doing so only in 2016.<sup>202</sup>

Due to the permissive rather than mandatory nature of the Directive, and the flexibility of interpretation, there has been no harmonization of panorama laws in the EU, creating the potential for transnational conflicts of law.<sup>203</sup> For example, several EU countries

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199. Greek law allows only the “occasional reproduction and communication by the mass media” of images works sited permanently in public spaces. Copyright, Related Rights and Cultural Matters, Law No. 2121/1993, art. 26 (Greece).

200. Because Italy has no formal panorama legislation, the public’s freedom to create and disseminate images of public art must be determined under existing principles of copyright law, moral rights law, and cultural heritage laws. Daniela De Pasquale & Giovanni De Gregorio, *Virtual Tours, Social Networks and the “Freedom of Panorama” Exception in Italy*, MEDIALAWS (Apr. 29, 2017), <http://www.medialaws.eu/virtual-tours-social-networks-and-the-freedom-of-panorama-exception-in-italy/>; Eleonora Rosati, *Freedom of Panorama in Italy: Does it Exist?* THE IPKAT (July 14, 2017), <http://lipkitten.blogspot.com/2017/07/freedom-of-panorama-in-italy-does-it.html>. Italy’s cultural heritage laws restrict the right to reproduce many works even after copyright expiration. See Sofia Barabino, *The Hidden Side of the Freedom of Panorama*, IPT ITALY (May 29, 2018), <https://blogs.dlapiper.com/iptitaly/2018/05/the-hidden-side-of-the-freedom-of-panorama/>. Under Articles 107 and 108 of the Italian Code on Cultural Heritage and Landscape (Legislative Decree No. 42/2004 – *Codice dei beni culturali e del paesaggio*), the government can even prohibit the reproduction of artwork and buildings that are no longer protected by copyright, including Michelangelo’s *David*, see Court of Florence, 26 Oct. 2017, No. 13758/2017, and the nineteenth century Teatro Massimo opera house in Palermo, see Court of Palermo, 21 Sept. 2017, No. 4901/2017. Maria Luigia Franceschelli, *Beware of Using Photographs of Italian (Cultural) Beauties!*, IPLens (Feb. 7, 2019), <https://iplens.org/2019/02/07/beware-of-using-photographs-of-italian-cultural-beauties/>.

201. Luxembourg permits only incidental reproductions of public art. Luxembourg Loi du 18 Avril 2001 sur les droits d'auteur, les droits voisins et les bases de données [Luxembourg Law of 18 April 2001 on copyright, neighboring rights and databases] art. 10(7).

202. The absence of a panorama right in Belgium and France meant, ironically, that photographs of the European Parliament buildings in Brussels and Strasbourg could not be published in those countries. Nielsen, *supra* note 168.

203. The EU’s most recent copyright directive, Directive 2019/790 of the European Parliament of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92, 93, was intended to harmonize the laws of member states regarding digital transmissions, but failed to address the freedom of panorama. See Communia Ass’n, *DSM Directive Adopted – Implementation in Member States Can Still Make a Difference* (Apr. 19, 2019), <https://www.communia-association.org/2019/04/19/dsm-directive-adopted-implementation-member-states-can-still-make-difference/>. This was despite numerous reports stating that the lack of harmonization presents a significant obstacle to the EU’s stated goal of creating a digital single market. See Working Group on IPR and Copyright Reform, *Working Document: Copyright Reform* 15, 17 (June 13, 2016); Coll. of Eur., *Support to the Commission’s Analysis of the Replies in View of the*

permit only noncommercial uses,<sup>204</sup> or uses that are not for the same purpose as the original work.<sup>205</sup> While most are silent on the application of moral rights,<sup>206</sup> some explicitly require attribution.<sup>207</sup> Some explicitly permit distribution and/or communication to the public,<sup>208</sup> while others permit reproduction without addressing dissemination at all.<sup>209</sup> While some statutes restrict the right to works located in exterior locations,<sup>210</sup> others apply it to all public spaces,<sup>211</sup> and still others leave the concept of a public space undefined<sup>212</sup> or ambiguous.<sup>213</sup> With respect to the *type* of works being

*Publication of the Public Consultation's "Synopsis Report"* (2016); *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a Modern, More European Copyright Framework*, COM (2015) 7 final (Dec. 9, 2015).

204. See, e.g., ZAKON ZA AVTORSKOTO PRAVO I SRODNITE MU PRAVA [COPYRIGHT AND NEIGHBORING RIGHTS LAW] art. 24(7) (Bulg.); TEKIJÄNOIKEUSLAKI [COPYRIGHT ACT] art. 25(a)(3) (Fin.); LEGE PRIVIND DREPTUL DE AUTOR SI DREPTURILE CONEXE [LAW ON COPYRIGHT AND NEIGHBORING RIGHTS] art. 33(f) (Rom.); ZAKON O AVTORSKI IN SRODNIH PRAVICAH [LAW ON COPYRIGHT AND NEIGHBORING RIGHTS] art. 55(2) (Slovn.).

205. See, e.g., LAW ON COPYRIGHT AND NEIGHBORING RIGHTS art. 55(2) (Slovn.).

206. See, e.g., Copyright and Related Rights Act 2000, art. 93 (Act No. 28/2000) (Ir.), <http://www.irishstatutebook.ie/eli/2000/act/28/enacted/en/pdf>.

207. See, e.g., ZAKON O AVTORSKOM PRAVU I SRODNIM PRAVIMA [COPYRIGHT AND RELATED RIGHTS ACT] art. 91(3) (Croat.); AUTORSKÝ ZÁKON [COPYRIGHT ACT], Zákon č. 121/2000 Sb. (Czech); LAW ON COPYRIGHT AND NEIGHBORING RIGHTS art. 55(3) (Slovn.); COPYRIGHT AND RELATED RIGHTS CODE art. 76(1)(a) (Port.).

208. See, e.g., BUNDESGESETZ ÜBER DAS URHEBERRECHT [URHEBERRECHTSGESETZ 1936] [FEDERAL LAW ON COPYRIGHTS] BUNDESGESETZBLATT [BGBl] No. 111/1936, as amended, § 54(1)(5), (Austria), <https://wipo.int/en/text/481825>; COPYRIGHT AND RELATED RIGHTS ACT arts. 91(1), 93(1) (Croat.); ZÁKON O PRÁVU AVTORSKÉM, O PRÁVECH SOUVISEJÍCÍCH S PRÁVEM AVTORSKÝM A O ZMĚNĚ NĚKTERÝCH ZÁKONŮ (AUTORSKÝ ZÁKON) [COPYRIGHT ACT, RIGHTS RELATED TO COPYRIGHT AND AMENDMENTS TO CERTAIN ACTS (COPYRIGHT ACT)] Zákon č. 121/2000 Sb. § 33(1) (Czech); Copyright and Related Rights Act 2000 § 93(1), (Act No. 28/2000) (Ir.), <http://www.irishstatutebook.ie/eli/2000/act/28/enacted/en/pdf>.

209. See, e.g., COPYRIGHT ACT (404/1961) § 25a(3) (Fin.); 2 ch. 24(1) § ACT ON COPYRIGHT IN LITERARY AND ARTISTIC WORKS (SFS 1960:729) (Swed.).

210. In Germany, the right applies only to “works located permanently in public roads and ways or public open spaces” as well as the facades of buildings. URHEBERRECHTSGESETZ [URHG] [ACT ON COPYRIGHT AND NEIGHBORING RIGHTS] § 59 (Ger.), [http://www.gesetze-im-internet.de/englisch\\_urhg/englisch\\_urhg.html](http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html). In Austria, the right applies to works “permanently located in a place used as a public thoroughfare.” COPYRIGHT LAW No. 111/1936 art. (1), (5) (Austria). In Sweden, the right applies to works “located outdoors on, or at, a public place.” LAG (1960:729) OM UPPHOVSRÄTT TILL LITTERÄRA OCH KONSTNÄRLIGA VERK [LAW ON COPYRIGHT IN LITERARY AND ARTISTIC WORKS] 2 ch. 24(1) § (Swed.).

211. See, e.g., Copyright Act § 93(1), (Act No. 28/2000) (Ir.) (“in a public place or in premises open to the public”).

212. COPYRIGHT ACT § 25a(3) (Fin.).

213. See, e.g., LAW ON COPYRIGHT AND NEIGHBORING RIGHTS art. 33(f) (Rom.). The Czech, Croatian, and Slovenian statutes imply but do not explicitly state that public places are limited to exteriors. See AUTORSKÝ ZÁKON [Copyright Act],

reproduced, some allow reproduction only of three-dimensional works,<sup>214</sup> while others do not include such a restriction.<sup>215</sup> In Denmark, the right applies only to buildings.<sup>216</sup> With respect to the *form* of reproduction that is permitted, most of the laws list the specific types of reproductions allowed.<sup>217</sup> Some of these lists are limited to two-dimensional reproductions,<sup>218</sup> sometimes including audiovisual works.<sup>219</sup> Reproductions of buildings are often limited to their façades.<sup>220</sup> Some laws explicitly prohibit three-dimensional reproductions of works.<sup>221</sup>

Belgium finally enacted its first legislation on the freedom of panorama in 2016.<sup>222</sup> The law is vague, permitting “reproduction and communication to the public of works of visual, graphic, and architectural art permanently situated in public places, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”<sup>223</sup> The proviso language, which is clearly modeled on the “exceptions and limitations” language (or “three-step test”) of the leading international copyright agreements,<sup>224</sup> leaves much to interpretation. The law does not expressly prohibit commercial activities, although in practice these are more likely to be found to conflict with the “normal exploitation” and “legitimate interests” of

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Zákon č 121/2000 Sb. § 33(1) (Czech) (referring to a work located “on a square, in a street, in a park, on a public route or in any other public space”); COPYRIGHT ACT art. 91(1) (Croat.) (similar list, concluding with “other places that are accessible to the public”); COPYRIGHT AND RELATED RIGHTS ACT art. 55(1) (Slovn.) (similar list, concluding with “other generally accessible premises”).

214. *See, e.g.*, Copyright Act § 93(1) (Ir.).

215. URHEBERRECHTSGESETZ 1936 No. 111/1936, art. 54(1)(5) (Austria); § 25a(3) (Fin.); art. 33(f) (Rom).

216. Art. 24(3) (Den.); *see Rosati, supra* note 167, at 315.

217. *See, e.g.*, Copyright Act § 93(1) (Ir.).

218. Copyright Act § 25a(3) (Fin); *see also id.* § 25a(4) (buildings may be reproduced in pictorial form); Copyright Act § 93(2) (Ir.); 2 ch. 24(1) (Swed).

219. AUTORSKÝ ZÁKON [COPYRIGHT ACT], Zákon č 121/2000 Sb. § 33 (Czech).

220. COPYRIGHT ACT art. 92 (Croat.) (allowing reproduction only of a building’s “outer appearance”); URHG, BGBL I § 59(2) (Ger.) (allowing reproduction only of the façade of a building).

221. *See, e.g.*, URHEBERRECHTSGESETZ [Copyright Law] 1936 No. 111/1936, art. 54(1)(5) (Austria); COPYRIGHT ACT art. 91(2) (Croat.); AUTORSKÝ ZÁKON [COPYRIGHT ACT], Zákon č 121/2000 Sb. § 33(2) (Czech); COPYRIGHT AND RELATED RIGHTS ACT art. 55(2) (Slovn.).

222. LOI MODIFIANT LE CODE DE DROIT ÉCONOMIQUE EN VUE DE L’INTRODUCTION DE LA LIBERTÉ DE PANORAMA [FREEDOM OF PANORAMA ACT], MONITEUR BELGE [M.B.] [Official Gazette of Belgium], 41011 (Belg.).

223. CODE DE DROIT ÉCONOMIQUE [CODE OF ECONOMIC LAW] art. 11.190 (Belg.).

224. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, 1869 U.N.T.S. 299; Berne Convention for the Protection of Literary and Artistic Works art. 9(2), July 24, 1971, 1161 U.N.T.S. 3; WIPO Copyright Treaty art. 10, Dec. 20, 1996, 2186 U.N.T.S. 203.

the author.<sup>225</sup> One of the most aggressive enforcers of copyright in public architecture, the Atomium, continues to assert on its website that images of its distinctive building (1) cannot be used for commercial purposes and (2) cannot alter the building's appearance, notwithstanding the new legislation.<sup>226</sup>

France also adopted its first freedom of panorama legislation in 2016.<sup>227</sup> The exception is narrow in scope, permitting reproductions and representations of architectural works and sculptures located permanently on public roads, and made by natural persons, but excluding all commercial uses.<sup>228</sup> It does not expressly permit distribution or communication to the public.<sup>229</sup> Thus, it is unclear whether the exception encompasses the digital transmission of images.<sup>230</sup>

Before 2016, copyright expiration permitted photographing the Eiffel Tower itself, but the installation of a lighting display on the Tower made nighttime photography infringing under French law.<sup>231</sup> It is unclear whether the new legislation encompasses lighting displays, since these might be neither sculptures nor architectural works.<sup>232</sup> Even if the new French law permits photographing the

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225. CODE OF ECONOMIC LAW art. 11.190 (Belg.); *see, e.g.*, Shtefan, *supra* note 6, at 22–26 (arguing that commercial uses of public works can hinder, and even harm, the legitimate interests of authors in a way that non-commercial uses rarely do).

226. *See Copyright, ATOMIUM*, <https://atomium.be/copyright> (last visited Sept. 15, 2020).

227. Loi 2016-1321 du 7 octobre 2016 pour une République numérique [Law 2016-1321 of October 7, 2016 for a Digital Republic], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 7, 2016, art. 39. The 2016 legislation added a new paragraph (11) to Article L. 122-5 of the Intellectual Property Code. Prior to this amendment, Article L. 122-5(9) allowed reproduction of graphic, sculptural and architectural works only for information purposes. CODE DE LA PROPRIÉTÉ INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] art. L122-5(9) (Fr.).

228. INTELLECTUAL PROPERTY CODE art. L122-5(11) (Fr.). It is not clear whether the limiting language “made by natural persons” refers to the sculptures and architectural works or to the reproductions and representations thereof. It is probably the former.

229. *Id.*

230. *See id.* art. L122-5(10) (including provisions for digital transmission which are notably absent from the freedom of panorama section).

231. While daytime views of the Eiffel Tower are rights-free, views of the nighttime illuminations are protected and subject to prior authorization and payment for use. *The Eiffel Tower Image Rights*, EIFFEL TOWER, <https://www.toureiffel.paris/en/business/use-image-of-eiffel-tower> (last visited Sept. 15, 2020); *see also* Nielsen, *supra* note 168.

232. INTELLECTUAL PROPERTY CODE art. L122-5(11) (Fr.); *see* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 3, 1992, 90-18.081 (Fr.) (unpublished) (complicating any attempt at classifying lighting displays by recognizing that the nighttime illumination of the Eiffel Tower constitutes an original “visual creation” without categorizing it more specifically).

Eiffel Tower's lighting, it will permit only noncommercial photography.<sup>233</sup>

In the past, French courts have been willing to apply a concept analogous to *de minimis* use; accordingly, if a publicly visible work of art is included in an image of a public space in a manner that is merely incidental, so that depicting the work of art is not the central purpose of the image, French courts have treated the reproduction as non-infringing.<sup>234</sup> It remains to be seen whether French courts will continue to recognize this exception if the reproduction is for commercial purposes.

Sweden allows reproduction of *any* work of fine art—not just public art—in film or television programs if the exploitation of the artwork is incidental to the contents of the program, and in pictures if the artwork is in the background or is otherwise an insignificant part of the picture.<sup>235</sup> In addition to reproduction, this statute allows distribution and communication to the public.<sup>236</sup> If the work of art is permanently located outdoors in a public place, Sweden allows reproduction without limitation.<sup>237</sup> However, the Swedish Supreme Court has significantly narrowed the reach of this provision, holding that it does not permit online distribution, even for noncommercial purposes.<sup>238</sup>

Germany, where the freedom of panorama is thought to have originated,<sup>239</sup> has adopted one of the broadest versions of the right.<sup>240</sup> It is permissible to reproduce, distribute, and make available to the

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233. INTELLECTUAL PROPERTY CODE art. L122-5(11) (Fr.).

234. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 15, 2005, Bull. civ. I, No. 134 (Fr.) (rejecting infringement suit by sculptors who created fountains visible in postcard images of Place des Terreaux); *see also* Lilla Montagnani, *Freedom of Panorama: What Copyright For Public Art and Architectural Works?*, KLUWER COPYRIGHT BLOG (July 12, 2015), [http://copyrightblog.kluweriplaw.com/2015/07/12/freedom-of-panorama-what-copyright-for-public-art-and-architectural-works/?doing\\_wp\\_cron=1591979293.1507658958435058593750](http://copyrightblog.kluweriplaw.com/2015/07/12/freedom-of-panorama-what-copyright-for-public-art-and-architectural-works/?doing_wp_cron=1591979293.1507658958435058593750) (discussing case); Ginsburg, *supra* note 62, at 496 n.74 (collecting cases). In some countries, this exception is statutory. *See, e.g.*, 25 § LAG OM UPPHOVSRÄTT TILL LITTERÄRA OCH KONSTNÄRLIGA VERK [LAW ON COPYRIGHT FOR LITERARY AND ARTISTIC WORKS] Regeringskansliets rättsdatabaser [Government Offices' Legal Database] 1960:729 (Swed.) (making the exception applicable to all copyrighted works).

235. 2 ch. 20a § (Swed.).

236. *Id.*

237. *Id.* 2 ch. 24(1) §.

238. Högsta Domstolens (HD) [Supreme Court], Bildupphovsrätt i Sverige (BUS) ek för v Wikimedia Sverige [The Visual Arts Copyright Society in Sweden v. Wikimedia Sweden] 2016-04-04 Ö 849-15 (Swed.), <https://www.domstol.se/globalassets/filer/domstol/hogstadomstolen/avgoranden/2016/o-849-15.pdf>. *See* Agence France-Presse, *Wikimedia's Free Photo Database of Artworks Violates Copyright, Court Rules*, THE GUARDIAN (Apr. 4, 2016), <https://www.theguardian.com/world/2016/apr/05/wikimedias-free-photo-database-of-artworks-violates-copyright-court-rules>.

239. *See* Dulong de Rosnay & Langlais, *supra* note 4, at 4.

240. Oda, *supra* note 14, at 15.

public two-dimensional copies of any works that are permanently located on public ways, streets, or places.<sup>241</sup> In the case of architecture, the law applies only to the external appearance of the building.<sup>242</sup> Germany's panorama right applies to both two- and three-dimensional works<sup>243</sup> and permits commercial uses.<sup>244</sup> The German courts have applied the right even to works that are not fixed in a stationary position.<sup>245</sup> In a unique twist, however, the German courts have held that the freedom of panorama does not apply to works located in public parks.<sup>246</sup>

In the Netherlands, the panorama right is limited to uses that would be considered transformative under U.S. law, but there is no express prohibition against commercial uses.<sup>247</sup> The right applies to drawings, paintings, architectural works, sculptures, lithographs, engravings "and the like," thus implicitly encompassing all types of fine and applied art.<sup>248</sup> With respect to location, the statute provides that the work must be "permanently displayed in a public thoroughfare."<sup>249</sup> When these conditions are satisfied, it is lawful to copy or publish copies of the work, provided that the work "does not constitute the main part of the reproduction, that the reproduction differs appreciably in size or process of manufacture from the original work," and that, in the case of architectural works, only the exterior is copied.<sup>250</sup>

Several European scholars have commented on the difficulty of distinguishing between commercial and noncommercial uses for purposes of the panorama right.<sup>251</sup> Because the concept of commercial

241. Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Act on Copyright and Related Rights], Sept. 9, 1965, BGBl §59 (Ger.), [http://www.gesetze-im-internet.de/englisch\\_urhg/englisch\\_urhg.html#p0417](http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0417).

242. *Id.*

243. *Id.*

244. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 19, 2017, I ZR 242/15 (Ger.) (allowing advertising use of photos of artwork painted on remains of Berlin Wall).

245. In the *AIDA Kussmund* (AIDA kissing lips) decision, the German Federal Supreme Court held that the freedom of panorama permitted the defendant to photograph an image painted on the hull of a cruise ship. BGH Apr. 27, 2017, I ZR 247/15 (Ger.).

246. Public parks in Germany are owned by foundations, leading German courts to conclude that they are not public spaces for purposes of the panorama right. See Domenico Piero Muscillo, *Freedom of Panorama (FOP) in France and Germany*, DANDI (May 1, 2017), <https://www.dandi.media/en/2017/05/freedom-panorama-france-germany/>.

247. Auteurswet [Copyright Act] 23 Sept. 1912, Stb. 1912, (Neth.) <https://wetten.overheid.nl/BWBR0001886/2012-01-01>.

248. *Id.* art. 10(1)(6).

249. *Id.* art. 18.

250. *Id.*

251. See, e.g., Rosati, *supra* note 167, at 315–21; Julia Reda, *Freedom of Panorama Under Threat* (June 22, 2015), <https://juliareda.eu/2015/06/fop-under-threat/>; Marie-Andree Weiss, *The New, But Narrow, French Freedom of*

use is not clearly defined under EU law or the laws of most member states,<sup>252</sup> there are vast areas of uncertainty, including social media, documentaries, and journalism.<sup>253</sup>

### B. *United Kingdom*<sup>254</sup>

In the United Kingdom, section 62 of the 1988 Copyright, Designs and Patents Act (“CDPA”) allows two-dimensional reproductions (specifically, photography, graphic representations, filming, and broadcasting) of (1) buildings regardless of location, and (2) sculptures, models for buildings, and “works of artistic craftsmanship,” if permanently situated in a public place or premises open to the public.<sup>255</sup> For this purpose, “buildings” include “any fixed structure” or parts thereof.<sup>256</sup> Reproductions that are non-infringing under section 62 can also be distributed or communicated to the public.<sup>257</sup> The statute makes no distinction between commercial and noncommercial activities.<sup>258</sup>

Because the statute does not define “works of artistic craftsmanship,” it is unclear whether the panorama right extends to two-dimensional works such as paintings, mosaics, murals, or graffiti.<sup>259</sup> Thus far, commentators have concluded that it does not.<sup>260</sup>

### C. *Australia*

Section 65 of Australia’s Copyright Act allows photographing, painting, drawing, and engraving of sculptures or “works of artistic craftsmanship” that are permanently situated in a public place or in premises open to the public.<sup>261</sup> It also allows them to be reproduced

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*Panorama Exception*, THE 1709 BLOG (Oct. 18, 2016), <https://the1709blog.blogspot.com/2016/10/the-new-but-narrow-french-freedom-of.html>.

252. Reda, *supra* note 251; *Working Document*, *supra* note 203, at 15.

253. Reda, *supra* note 251.

254. Because of Brexit, the United Kingdom is addressed here separately from the European Union.

255. Copyright, Designs and Patents Act 1988 §§ 62(1)–(2) (UK). For some interpretive issues arising from this provision, see *Sculpture and Works of Artistic Craftsmanship on Public Display*, THE DESIGN & ARTISTS COPYRIGHT SOC’Y, <http://www.dacs.org.uk/knowledge-base/factsheets/sculpture-and-works-of-artistic-craftsmanship-on-p> (last visited Sept. 15, 2020).

256. Copyright, Designs and Patents Act 1988 § 4(2) (UK).

257. *Id.* § 62(3).

258. *See generally id.* (describing panorama rights in the United Kingdom).

259. *See generally id.* (describing panorama rights in the United Kingdom).

260. *See, e.g.*, Enrico Bonadio, *Street Art, Graffiti and Copyright: A UK Perspective*, in THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI 171–72 (Enrico Bonadio, ed., 2019); MARTA ILJADICA, COPYRIGHT BEYOND LAW: REGULATING CREATIVITY IN THE GRAFFITI SUBCULTURE 275–77 (2016); *BAPLA Position on Freedom of Panorama*, BRITISH ASS’N OF PICTURE LIBRS. & AGENCIES (May 27, 2016), <https://bapla.org.uk/bapla-position-freedom-panorama/> (advocating for extending § 62 to murals and graffiti).

261. Copyright Act 1968 § 65 (UK).

in films and television broadcasts.<sup>262</sup> In the case of buildings, section 66 creates an even broader exception; the same reproduction rights apply without regard to the building's location.<sup>263</sup> Like the UK statute, Australia's law does not define a "work of artistic craftsmanship," other than to indicate that it is a type of "artistic work."<sup>264</sup> Commentators have assumed that the exception does not apply to two-dimensional works.<sup>265</sup>

A separate provision of the Copyright Act allows "incidental" reproduction of artistic works in films and television broadcasts.<sup>266</sup> Unlike the freedom of panorama, this privilege applies regardless of whether the work is located in a public space.<sup>267</sup> Because this provision applies to "artistic works" in general, it clearly encompasses two-dimensional works like murals and paintings.<sup>268</sup> Thus, if two-dimensional works located in public spaces are not subject to the panorama right under section 65, unauthorized reproductions are narrowly limited.

Where reproduction is allowed under any of these provisions, publication of the resulting images is also allowed.<sup>269</sup> However, it is unclear whether this "publication" privilege authorizes making the image available online.<sup>270</sup>

None of these provisions distinguish between commercial and noncommercial uses.<sup>271</sup> Indeed, several artists' organizations have called for the repeal or amendment of section 65, arguing that it should not extend to reproductions made for commercial purposes.<sup>272</sup>

#### D. *New Zealand*

Section 73 of New Zealand's 1994 Copyright Act applies the panorama right to buildings as well as "works (such as sculptures, models for buildings, or works of artistic craftsmanship)" that are "permanently situated in a public place or in premises open to the

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262. *Id.*

263. *Id.* § 66. This privilege is broader than section 120(a) in the U.S., since the latter applies only to buildings that are ordinarily visible from public spaces. *See supra* notes 24–36 and accompanying text.

264. Copyright Act 1968 § 10(1) (UK) ("artistic work" definition).

265. *See, e.g.*, Mark Davison, *Copyright in Street Art and Graffiti: An Australian Perspective*, in THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI, *supra* note 260, at 294.

266. Copyright Act 1968 § 67 (UK).

267. *Id.* (referring to "artistic works" without referencing their location).

268. *Id.* § 10(1) (defining "artistic works" to include two-dimensional works as well as buildings, models of buildings, and "works of artistic craftsmanship").

269. *Id.* § 68.

270. Daniela Simone & Ryan McConville, *Problematic Public Sculptures Provisions*, ARTS LAW CTR. OF AUSTL. (Dec. 31, 2006), <http://www.artslaw.com.au/articles/entry/problematic-public-sculptures-provisions>.

271. *Id.*

272. *Id.*



public.”<sup>273</sup> Thus, the statute extends to works located in interior spaces, as long as the public has access.<sup>274</sup> The use of the broad term “work” combined with the parenthetical illustrations creates a textual ambiguity as to whether the right applies to two-dimensional public art.<sup>275</sup> One commentator concluded that it does not, noting that an earlier version of the statute specifically mentioned murals.<sup>276</sup>

Permitted acts under section 73 include (1) copying in the form of graphic works, photographs, or films;<sup>277</sup> (2) public distribution of such copies;<sup>278</sup> (3) “communicating to the public a visual image of the work”;<sup>279</sup> and (4) communication to the public of “anything the making of which was, under this section, not an infringement.”<sup>280</sup> Thus, the statute seems to permit most forms of two-dimensional reproduction and dissemination, including online transmission.<sup>281</sup> The privilege applies even if the reproduction is for commercial purposes.<sup>282</sup> The Auckland High Court has held that section 73 is also a defense to claims that reproducing a publicly visible building or sculpture infringes the copyright in the underlying model or drawing.<sup>283</sup> It is not, however, a defense to moral rights claims.<sup>284</sup>

### E. Canada

Canada’s panorama right applies to three-dimensional works, including architectural works (like buildings and models), sculptural works, and works of artistic craftsmanship, that are “permanently situated in a public place or building.”<sup>285</sup>

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273. Copyright Act 1994, pt 3, s 73(1) (N.Z.). The freedom of panorama in New Zealand dates back to the nation’s first copyright legislation, the Copyright Act 1913. Jonathan Barrett, *Time to Look Again? Copyright and the Freedom of Panorama*, 48 VICTORIA U. OF WELLINGTON L. REV. 261, 265 (2017).

274. Copyright Act 1994, pt 3, s 73(1) (N.Z.).

275. *See id.*

276. Jonathan Barrett, *Copyright, Graffiti, and Street Art in Aotearoa New Zealand*, in THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI, *supra* note 260, at 306 (citing § 20(5) of the Copyright Act 1962 (repealed 1994)); *but see* Earl Gray & Raymond Scott, *Blowing the Whistle on Copyright in Public Sculptures*, 10 J. INTELL. PROP. L. & PRAC. 10, 11 (2015) (suggesting that murals and mosaics might be considered “works of artistic craftsmanship”).

277. Copyright Act 1994, pt 3, s 73(2)(a), (b) (N.Z.).

278. *Id.* pt 3, s 73(3).

279. *Id.* pt 3, s 73(2)(c).

280. *Id.* pt 3, s 73(3).

281. *See id.* pt 3, s 73(2), (3).

282. *Radford v. Hallenstein Bros. Ltd.* HC Auckland CIV 2006-404-4881, 22 February 2007 (N.Z.).

283. *Id.* However, Jonathan Barrett has advocated for restricting the panorama right to non-commercial uses. Barrett, *supra* note 276, at 282.

284. *Radford v. Hallenstein Bros. Ltd.* (2009) DCR 907 (N.Z.).

285. Canadian Copyright Act, *reprinted in* R.S.C. 1985, c. C-25 (Can.).

Such works may be reproduced in paintings, drawings, engravings, photographs, or cinematographic works.<sup>286</sup> The statute does not expressly distinguish between commercial and non-commercial uses,<sup>287</sup> although it is so ambiguous in this regard that one T-shirt maker received an infringement notice for a shirt with a small drawing of Montreal's Olympic Stadium (among other landmarks).<sup>288</sup> Because the privilege does not extend to two-dimensional public art,<sup>289</sup> graffiti artists have succeeded in blocking public exhibitions of unauthorized photographs of their work.<sup>290</sup>

#### F. *South Africa*

South Africa has enacted a very limited version of the panorama right, permitting reproduction of artistic works only in films, television broadcasts, and transmissions.<sup>291</sup> Such audiovisual reproductions are permitted either if the use of the artwork is incidental<sup>292</sup> or if the work is "permanently situated in a street, square or similar public place."<sup>293</sup> There is no distinction between commercial and noncommercial uses.<sup>294</sup>

In the absence of a broader national provision, however, the City of Johannesburg has enacted its own panorama right through a municipal Public Art Policy under which an artist who agrees to create artwork that will be permanently situated in a public place surrenders certain rights.<sup>295</sup> As a result, such works can be photographed as well as incorporated in audiovisual works, although

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286. *Id.* Implicitly, this list excludes three-dimensional reproductions. *Id.*

287. *Id.*

288. In 2016, the collecting society representing the architects who designed the stadium notified the T-shirt maker that he was infringing their copyright, apparently taking the position that the panorama right does not permit commercial uses. Morgan Lowrie, *Olympic Stadium T-Shirt Violates Copyright Law, Montreal Designer Told*, NAT'L OBSERVER (Sept. 25, 2016), <https://www.nationalobserver.com/2016/09/25/news/olympic-stadium-t-shirt-violates-copyright-law-montreal-designer-told>.

289. See Pascale Chapdelaine, *Graffiti, Street Art, Walls, and the Public in Canadian Copyright Law*, in THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI, *supra* note 260, at 139.

290. Teresa Scassa, *Public Art, Private Rights: The Case of Graffiti*, (Feb. 14 2013, 3:37 PM), [http://www.teresascassa.ca/index.php?option=com\\_k2&view=item&id=121:public-art-private-rights-the-case-of-graffiti](http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=121:public-art-private-rights-the-case-of-graffiti) (reporting two such incidents involving Canadian galleries, one of which involved photographs of graffiti located in Spain).

291. Copyright Act 98 of 1978 § 15 (S. Afr.).

292. *Id.* § 15(1).

293. *Id.* § 15(3).

294. *Id.*

295. *Copyright in Public Sculpture*, ARTIRIGHT, <https://web.archive.org/web/20161230070203/http://www.artright.co.za/artbusiness/legal/copyright/copyright-public-sculpture/> (last visited Sept. 15, 2020).

the artist's consent is still required for photographs that trade on the artwork itself for commercial gain.<sup>296</sup>

### G. China

Chinese law currently allows copying, drawing, photographing or video recording of any work of art that is located or displayed in an outdoor public place, provided that the work's title and the author's name are included, and that the other rights of the copyright owner are not impaired.<sup>297</sup> The art installation does not have to be permanent, and the law does not distinguish between commercial and noncommercial activities.<sup>298</sup>

Amendments proposed in June 2014 would have significantly altered China's panorama right.<sup>299</sup> In particular, they would have permitted the reproductions to be distributed or broadcast to the public.<sup>300</sup> These proposals disappeared, however, in the 2020 draft, which makes only one change, extending the panorama right to works displayed in any public space, not merely outdoor spaces.<sup>301</sup>

### H. Japan

In addition to a generally applicable exception for incidental reproductions,<sup>302</sup> Japan has enacted a particularly detailed panorama right.<sup>303</sup> Under section 46 of Japan's Copyright Act, it is lawful to "exploit" artistic works that are permanently located: (1) in open places accessible to the public, specifically including "streets and parks," or (2) at places "easily seen" by the public, specifically including the "outer walls" of buildings.<sup>304</sup> Section 46 does not, however, indicate whether the exception ever applies to interior

296. *Id.* For the full policy, see *Arts, Culture and Heritage Services, Public Art Policy*, URBANLEX, <https://urbanlex.unhabitat.org/law/505> (last visited Sept. 15, 2020).

297. Copyright Law of the People's Republic of China (promulgated by the Standing Comm. of the Nat'l People's Cong., Feb. 26, 2010, effective Apr. 1, 2010), art. 22, 10 Fagui Huiban 1, 8 (China).

298. *Id.*; see also Barrett, *supra* note 177, at 241.

299. *Copyright Law of the People's Republic of China (Revision Draft, Submission Version)*, CHINA COPYRIGHT & MEDIA, <https://chinacopyrightandmedia.wordpress.com/2014/06/06/copyright-law-of-the-peoples-republic-of-china-revision-draft-submission-version/> (last updated June 18, 2014).

300. *Id.* art. 43(10).

301. 2020 Draft Amendments to the Copyright Law of the People's Republic of China (translated by Jiarui Liu), <https://chinaipr2.files.wordpress.com/2020/06/the-draft-amendments-to-chinese-copyright-law-2020-liu-translation-3-1.pdf> (last visited Sept. 15, 2020).

302. Copyright Act, No. 39 of 1899, art. 30bis (Japan), *translated in* COPYRIGHT LAW OF JAPAN (Yukifusa OYAMA et.al trans., Copyright Research and Information Center).

303. COPYRIGHT LAW OF JAPAN §§ 45–46.

304. *Id.* § 46.

spaces, either those that are open to the public or those that are visible from public streets or sidewalks.<sup>305</sup>

Certain exploitations are expressly not permitted by section 46. These include reproducing a sculpture or architectural work and transferring ownership of the copies to the public, reproducing a work for the purpose of locating it permanently in an open place accessible to the public, reproducing an artistic work exclusively for the purpose of selling the copies, and selling such unlawfully made copies.<sup>306</sup> It is not clear, however, whether these prohibitions apply to both two- and three-dimensional reproductions.<sup>307</sup> The bans on reproducing sculptures and architectural works appear to apply equally to commercial and noncommercial reproductions.<sup>308</sup>

Japan's law is unusual in one respect. Unlike most other countries that recognize panorama rights, Japan allows copyright owners to prevent the placement of their works in public locations to which the panorama right applies.<sup>309</sup> Although any person that owns "the original" of a work of art has the right to display that physical object to the public,<sup>310</sup> only the *copyright owner* can authorize its permanent display in a location to which the panorama right applies—that is, an open place accessible to the public or a place easily seen by the public.<sup>311</sup> In the case of most artistic works, the copyright usually remains with the artist even after the sale of the physical object,<sup>312</sup> as it does in the United States.<sup>313</sup> Thus, in Japan, artists have the right to prevent the display of their works in locations where they would become subject to the panorama right.<sup>314</sup>

### I. Republic of Korea

South Korea's panorama right resembles Japan's in giving the copyright owner the right to prevent the work from being displayed in a way that would trigger the panorama right.<sup>315</sup> Under section 35,

305. *Id.*

306. *Id.*

307. *Id.* §§ 45–46.

308. *Id.* § 46.

309. Chosakukenhō [Copyright Act] Act No. 48 of 1970, art. 45, para. 2 (Japan), *translated in* Japanese Law Translation Database System in English [JLT DS], <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=2&dn=1&x=0&y=0&co=01&ia=03&ja=04&ky=copyright+law&page=11> (hereinafter Japan Copyright Law)

310. This right, embodied in article 45, paragraph 1 of Japan's Copyright Law, roughly corresponds to § 109(c) of the 1976 Act. *Id.*, art. 45, para. 1.

311. *Id.*, art. 45, para. 2.

312. *Id.*, art. 2(1)(i), 2(1)(ii), 26-2(1).

313. 17 U.S.C. § 202.

314. Japan Copyright Law, art. 45, para. 2.

315. Jeojaggwonbeob [Copyright Act], Act No. 8101, Dec. 28, 2006, *amended by* Act No. 15823, Oct. 16, 2018, art. 35(1) (S. Kor.), *translated in* Korea Legislation Research Institute online database, [https://elaw.klri.re.kr/eng\\_service/main.do](https://elaw.klri.re.kr/eng_service/main.do) (login and search required).

the owner of the original of a work of art generally has the right to display the original to the public, but must obtain the copyright owner's consent if the work will be permanently exhibited in a street or park, on the exterior of a building, or at other places open to the public.<sup>316</sup> A work exhibited in such a place can be reproduced or used by any means without the copyright owner's consent, except that: a building cannot be reproduced in another building; a sculpture or painting cannot be reproduced in another sculpture or painting; and the work cannot be reproduced for the purpose of exhibiting it in a place open to the public or for the purpose of selling copies.<sup>317</sup> Apart from the restriction on selling copies, the statute does not prohibit commercial uses.<sup>318</sup> The panorama right appears to apply to both two- and three-dimensional uses.<sup>319</sup>

#### IV. RIGHTS IN TANGIBLE PROPERTY VERSUS COPYRIGHT

With few exceptions, panorama rights laws leave copyright owners at the mercy of those who own the tangible embodiments of their copyrights. This is because they fail to address the distinction between ownership of the copyright and ownership of the tangible work itself.

In the case of buildings, this will rarely give rise to a dispute. It is safe to assume that architects know that their designs will be realized as buildings owned by other parties, and that most of these buildings will be publicly visible once constructed. Indeed, apart from those who design mass-produced, single-family homes, most architects probably know the exact site where their designs will be constructed.

When works of art are specifically commissioned for installation in a public space, or where the artist expressly consents to such installation, the contract normally distinguishes ownership of the rights in the tangible object from ownership of the copyright, vesting the latter in the artist, subject to a license allowing the commissioning party a limited right to make two-dimensional copies.<sup>320</sup> While the artist's waiver in such a contract does not typically permit the public to enjoy a broad panorama right,<sup>321</sup> there is no reason why such a waiver could not be negotiated.<sup>322</sup> If the jurisdiction adopts a

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316. *Id.*

317. *Id.* art. 35(2).

318. *See id.*, art. 35(2), 35(3).

319. *Id.* art. 35(2).

320. *See, e.g., Annotated Model Public Art Commission Agreement*, AMERICANS FOR THE ARTS Art. 7 (June 2005), <https://www.americansforthearts.org/by-program/reports-and-data/legislation-policy/naappd/annotated-model-public-art-commission-agreement>.

321. *See id.*

322. This could be accomplished by including a broadened version of the standard copyright license, allowing the entity commissioning or installing the

panorama right, of course, no such waiver will be necessary for commissions that are undertaken post enactment. Under either approach, the artist has either actual or constructive knowledge of the rules, and has the opportunity to refuse the commission or installation if he or she objects to the legal restrictions on enforcing the copyright. Thus, the artist has not unwittingly surrendered any rights.

Where the artist is a “guerrilla” street or graffiti artist like Banksy who deliberately chooses to install his or her art in public spaces without obtaining permission, arguably the act of installing the work could be considered an implied license permitting the public to exploit the work. Even if this were not the case, if the jurisdiction has adopted a panorama right, then here, too, the artist has constructive knowledge of the law at the time he or she installs the public art.

However, other artists may be unaware that their work is ultimately destined for installation or display in a manner that is subject to a panorama right. For example, an artist might sell a sculpture to a collector, who later authorizes its installation in a public space or donates it to a community or an organization that decides to place it on public view. In these situations, even under the first-sale rule in the United States, the artist has not consented, either expressly or implicitly, to relinquishing the right to prevent copying or distribution of the work, and has no constructive knowledge that these rights will be surrendered.<sup>323</sup> The artist never has the option to prevent the public installation.

Rarely do freedom of panorama laws give specific attention to this problem.<sup>324</sup> Two notable exceptions are Japan and Korea.<sup>325</sup> As described earlier,<sup>326</sup> both countries expressly require the consent of the copyright owner before art can be installed in a location that makes the work subject to the panorama right.<sup>327</sup>

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artwork to sublicense certain reproduction and distribution rights irrevocably to the public. The City of Johannesburg accomplished something similar through its Public Art Policy. *See supra* note 295 and accompanying text.

323. The first-sale rule allows public display of the tangible artwork in the place where members of the public are physically located, but it does not permit copying. 17 U.S.C. § 109(c).

324. *See, e.g.*, Barrett, *supra* note 177, at 229–31 (emphasizing that “many” jurisdictions in the Asian Pacific implement freedom of panorama laws that do not protect indigenous artists’ artwork, particularly when the artwork was not intended to be shared with the general public).

325. Copyright Act, Law No. 48 of 1970, art. 30bis., 45–46 (Japan); Copyright Act, Act No. 432, Jan. 28, 1957, *amended by* Act No. 15823, Oct. 16, 2018, art. 35(1) (S. Kor.), *translated in* Korea Legislation Research Institute online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=49128&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=49128&lang=ENG) (login and search required).

326. *See supra* notes 180–81 and accompanying text.

327. *See* Copyright Act, art. 18(1) (Japan); Copyright Act, art. 35(1) (S. Kor.).

Even Japan and Korea, however, fail to address the ownership of copyright in underlying works that are incorporated or adapted in the publicly installed artwork.<sup>328</sup> The Japanese and Korean statutes appear to implicitly assume that the same person owns the copyright in both the underlying works and the publicly installed work, and that the copyright owner's consent pertains to all of the relevant copyrights.<sup>329</sup> However, this may not always be the case.

For the most part, panorama laws throughout the world do not give specific attention to the rights in any underlying works that form the basis of, or are incorporated in, the works of art that have been publicly installed.<sup>330</sup> Yet any act of copying the publicly visible artwork usually involves copying the underlying works as well.<sup>331</sup> This raises the possibility that the owner of the underlying rights could prevent members of the public from exercising their panorama rights.

In the United Kingdom, scholars have raised this precise concern with respect to section 62 of the CDPA, which states that, with respect to a publicly installed building or sculpture, “copyright in such a work is not infringed” by copying, distribution, broadcast, or communication to the public.<sup>332</sup> The phrase “copyright in such a work,” they note, could be interpreted to exclude copyright in any underlying works incorporated in the finished artwork, thus leaving open the possibility that the owner of a copyright in an underlying drawing, design, or model could still bring suit for infringement.<sup>333</sup>

In contrast, the Auckland High Court held in *Radford v. Hallenstein Bros. Ltd.*<sup>334</sup> that the panorama right in section 73 of the New Zealand Copyright Act<sup>335</sup> encompassed not only the publicly installed artwork, but the underlying works as well,<sup>336</sup> even though the statutory language can easily be construed to the contrary.<sup>337</sup>

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328. See Copyright Act, art. 18(1) (Japan); Copyright Act, art. 35(1) (S. Kor.).

329. See Copyright Act, art. 18(1) (Japan); Copyright Act, art. 35(1) (S. Kor.).

330. See, e.g., Barrett, *supra* note 298, at 248–56 (compiling an appendix of Asian Pacific countries' approaches to panorama laws).

331. See Inesi, *supra* note 10, at 63–64 (noting that copyright issues are “unavoidable” for photographers in public places, as copyrightable works themselves are “unavoidable” in nearly all public places).

332. Copyright, Designs and Patents Act 1988, c. 48, § 62 (U.K.), <http://www.legislation.gov.uk/ukpga/1988/48/section/62>.

333. See COPINGER AND SKONE JAMES ON COPYRIGHT ¶¶ 9–169 (Kevin Garnett et al. eds., 15th ed. 2005); MICHAEL TAPPIN ET AL., LADDIE, PRESCOTT AND VITORIA: THE MODERN LAW OF COPYRIGHT ¶¶ 20–76 (5th ed. 2018).

334. *Radford v. Hallenstein Bros. Ltd.* HC Auckland CIV 2006-404-004881, 22 February 2007 (N.Z.).

335. Copyright Act 1994, s 73 (N.Z.).

336. *Radford*, CIV 2006-404-004881, at [38].

337. The statute states that copyright in “buildings” and “works . . . that are permanently situated in a public place or in premises open to the public” is not infringed by copying or communicating copies to the public. Copyright Act 1994, s 73 (N.Z.).

Even in these cases, the copyright owners of the underlying work and the publicly installed work were probably one and the same. Thus, the typical concern would be that a copyright owner who is frustrated by the loss of rights resulting from public installation of his or her artwork might instead resort to suing for infringement of preliminary drawings or models.<sup>338</sup> For a panorama right to achieve its public purpose, it must be drafted—or interpreted—to foreclose such an end run.

It makes good public policy sense to give copyright owners the opportunity to withhold their consent to events that will lead to a partial loss of their exclusive rights, as Japan and Korea have done.<sup>339</sup> When that consent is granted, it also makes sense that the consent should act as a bar to suits by the *same* copyright owner based on underlying preparatory works to the extent they are embodied in the public artwork.<sup>340</sup>

Despite its appeal, the approach adopted in Japan and Korea would not be compatible with the first-sale rule in the United States, which permits the owner of a lawfully made copy of a work of art (including the original) to install it in a place open to the public without the copyright owner's consent.<sup>341</sup>

Yet another problem can arise from separate ownership of the tangible art and the underlying copyrights. What happens if the tangible art incorporates copyrighted content owned by a third party—someone who owns neither the tangible art nor its copyright? This could arise where the public artwork is a derivative work that incorporates another party's copyrightable content, either with or without that party's consent.<sup>342</sup>

Although the artist who consents to a public installation of his or her artwork may have consented (or, where a panorama law is in

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338. See, e.g., David E. Shipley, *The Architectural Works Copyright Protection Act at Twenty: Has Full Protection Made a Difference?*, 18 J. INTELL. PROP. L. 1, 15–16 (2010) (citing *Attia v. Soc'y of the N.Y. Hosp.*, 201 F.3d 50, 55 (2d Cir. 1999)) (providing an example of a lawsuit brought by an architect claiming copyright infringement of his preliminary drawings of an addition to a hospital).

339. See Chojakkwonbop [Copyright Act], Law No. 432 (1957), translated in LAWS OF THE REPUBLIC OF KOREA 806, 806–13 (3d ed. 1975); see also Kyu Ho Youm, *Copyright Law in the Republic of Korea*, 17 PAC. BASIN L.J. 276, 295 (1999).

340. 3 NIMMER ON COPYRIGHT § 10.03 (2019) (“When a nonexclusive license exists, it functions as a bar on suit by the copyright owner for copyright infringement.”).

341. 17 U.S.C. § 109(c).

342. *Id.* § 101 (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted”); see Tyler T. Ochoa, *Copyright, Derivative Works and Fixation: Is Galoob a Mirage, or Does the Form(Gen) of the Alleged Derivative Work Matter*, 20 SANTA CLARA COMPUT. & HIGH TECH. L.J. 991, 1000 (2004) (“[T]he same statutory definition applies both to copyrightable (authorized) derivative works and infringing (unauthorized) derivative works . . .”).



place, may be deemed to have consented) to the public's exercise of panorama rights, when the artwork itself is a derivative work then the rights of the author of the underlying work must also be considered.<sup>343</sup> Assuming that the underlying work is still under copyright, then even if the derivative work was made under a license from the author of the underlying work, the latter may not have been aware that the derivative work would become a public installation. If so, then no implied consent or constructive knowledge of the applicable panorama law can be imputed to the author of the underlying work.<sup>344</sup> If the derivative work is an infringement, obviously no implied consent or constructive knowledge can be imputed under that circumstance either.<sup>345</sup> Implied consent can be imputed to the grantor of the derivative work license only if the latter was aware, when granting the license, that the derivative work would be publicly installed under circumstances where panorama rights apply.

Although no cases thus far have presented this problem specifically in the public art context, an analogous problem was presented in *Bouchat v. Baltimore Ravens Ltd. Partnership*,<sup>346</sup> where the Fourth Circuit considered the infringement claim of an artist whose drawing had been used without his consent as a logo for the Baltimore Ravens football team. Even after the team replaced the logo on their uniforms, images of the infringing logo persisted in historical photographs and footage of the team.<sup>347</sup> Applying a fair use analysis to these reproductions, the Fourth Circuit concluded that the

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343. See *Stewart v. Abend*, 495 U.S. 207, 235–36 (1990) (holding that incorporation of preexisting work into derivative work does not extinguish any rights that preexisting work's author might have in derivative use of preexisting work).

344. Although the original work can be publicly displayed, the derivative work cannot be publicly displayed without the permission of the copyright owner because the first-sale doctrine does not apply to the right to prepare derivative works. See 17 U.S.C. § 109(a) ("Notwithstanding the provisions of section 106(3) . . ."); *id.* § 109(c) ("Notwithstanding the provisions of section 106(5) . . .").

345. See *id.* § 103(a) (prohibiting the extension of protection to any part of work in which material has been used unlawfully); see *Tiffany Design, Inc., v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113, 1118 (D. Nev. 1999) ("A derivative work copyright can only be obtained when the author legally used the material on which the derivative work was based.") (quoting MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW § 2.9[C] (1989)).

346. 619 F.3d 301 (4th Cir. 2010). In a later case involving different videos, the Fourth Circuit viewed the fair use argument more favorably, largely because the infringing logo was visible only fleetingly. *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932, 942 (4th Cir. 2013).

347. *Bouchat*, 619 F.3d at 317–18 (4th Cir. 2010) (Niemeyer, J., dissenting) ("Although the Ravens and the NFL have not placed the Flying B Logo on any item since 1998, it remains visible in memorabilia, photographs, and video highlights from the Ravens' first three seasons, as part of the team's history then recorded.").

appearance of the logo on the team's uniforms in the highlight films, while merely incidental, was not a fair use, largely because the films were commercial and non-transformative.<sup>348</sup> However, the court reached a different conclusion with respect to the appearance of the same logo on team uniforms in photographs that were used in a historical display in the team's corporate lobby.<sup>349</sup> The court found that this constituted a fair use, primarily because it was both transformative and noncommercial.<sup>350</sup>

Unlike the sculptors in *Leicester, Mercedes Benz, Gaylord*, and *Davidson*,<sup>351</sup> the copyright owner in *Bouchat* had never consented to having his artwork displayed in a public location.<sup>352</sup> If he had consented to the use of his drawing on the team uniforms, then a film or photograph of the uniforms would almost certainly not infringe, under one of several theories. First, consent to the use of a copyrighted work on clothing to be worn in public could give rise to an implied license permitting photographs of the clothing.<sup>353</sup> Second, photography of clothing could be fair use of any image that is lawfully reproduced on the clothing.<sup>354</sup> Third, photography would, in many circumstances, be permitted under section 113(c) of the Copyright Act:

In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or display of pictures or photographs of such articles in connection with advertisements or commentaries

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348. *Id.* at 306, 313.

349. *Id.* at 313–16. The court determined that the defendant's display of the Flying B logo found on game tickets from the inaugural season and photos of the team's first ever first-round draft picks in the lobby were "museum-like" as listed under 17 U.S.C. § 107. *Id.* at 314.

350. *Id.*

351. *See supra* notes 83–144 and accompanying text.

352. *Bouchat* asked the Chairman of the Authority to send the sketch to the Ravens' president and requested that if the Ravens used the Shield Drawing, they send him a letter of recognition and an autographed helmet. *Bouchat v. Balt. Ravens Football Club, Inc.*, 346 F.3d 514, 516 (4th Cir. 2003). *Bouchat* had no knowledge that National Football League Properties was using his work. *Id.*

353. Similar reasoning has defeated copyright claims by tattoo artists when the likenesses of tattooed athletes appear in videogames. *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 16-CV-724-LTS-SDA, 2020 WL 1467394, at \*7 (S.D.N.Y. Mar. 26, 2020). *See generally* *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990) (noting that an implied license arises when one party creates a work at defendant's request and hands it over, intending for that party to copy and distribute it).

354. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550–51 (1985) ("[T]he fair use doctrine was predicated on the author's implied consent to 'reasonable and customary use' when he released his work for public consumption . . .").

related to the distribution or display of such articles, or in connection with news reports.<sup>355</sup>

The defendant's unauthorized use of Bouchat's design on the Ravens uniforms was, without doubt, both an infringing reproduction as well as an infringing public display.<sup>356</sup> Therefore, the Ravens' decision to reproduce images of the uniforms in highlight films and photographs was a *second* instance of unauthorized reproduction that would not readily be excused under the aforementioned theories. It is not surprising, therefore, that the court found the use in highlight films to be unfair; what is noteworthy is the court's decision to treat the historical display of infringing photographs as fair use.<sup>357</sup> Even under a broad application of the panorama right as recognized in other countries, it would be surprising for a court to interpret this doctrine to allow photography of publicly visible reproductions that are themselves infringing. Therefore, the court's application of fair use in *Bouchat* led to a result that is less protective of copyright owners than even the broadest foreign version of the panorama right.<sup>358</sup>

*Bouchat*, of course, dealt with an infringing derivative work.<sup>359</sup> If such a scenario arose in connection with public art, the installation should probably be removed if the consent of the underlying copyright owner could not be obtained. In the case of commissioned art, the artist would probably be in violation of the commissioning contract.<sup>360</sup>

However, even where the public art in question is an authorized derivative work, application of a panorama right could be problematic, especially where the art was on loan or donated rather than the result of a commission.<sup>361</sup> At the time the owner of the underlying copyright consented to the creation of this derivative work, he or she may have been unaware that the resulting artwork would later be installed in a public place and therefore become subject to the panorama right.<sup>362</sup> Thus, even if the creators of the public art itself are deemed to consent—or have no lawful right to object,

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355. 17 U.S.C. § 113(c).

356. The Fourth Circuit declined to overturn the jury's finding that the logo infringed Bouchat's design. *Bouchat v. Balt. Ravens, Inc.*, 241 F.3d 350, 357 (4th Cir. 2001).

357. *See Bouchat v. Balt. Ravens Ltd. P'ship*, 619 F.3d 301, 313–18 (4th Cir. 2010).

358. Panorama rights in Europe and several other jurisdictions are discussed in Part III *supra*.

359. *Bouchat*, 619 F.3d at 305–06 (4th Cir. 2010).

360. The standard commissioning contract includes the artist's representation and warranty that the work is completely original and non-infringing. *See supra* note 320 and accompanying text.

361. In such a case, there would be no commissioning contract, and thus no artist's representations and warranties as to originality and non-infringement. *See supra* note 320 and accompanying text.

362. 17 U.S.C. § 109(c) (copyright owner permission not needed to display copy).

pursuant to a panorama right—to certain uses of their work once it has been publicly installed, the creators of the underlying works may not themselves have had the opportunity to grant or withhold such consent at the time they consented to the creation of the derivative work.<sup>363</sup> Does the application of a panorama right strip such creators of their right to prevent unauthorized reproduction and distribution of their underlying works to the extent that they are embodied in the derivative public art?

In the city of St. Paul, for example, several public parks feature bronze sculptures of famous characters from the *Peanuts* comic strip.<sup>364</sup> These were created under licenses from the estate of the comic strip creator Charles Schulz.<sup>365</sup> In Japan, a series of gigantic *Gundam* statues on Odaiba have depicted robot characters, presumably under license, from a popular anime series.<sup>366</sup> If a panorama right were to permit commercial reproduction and distribution of images of these sculptures, should this also apply to the licensors of the underlying works?

In both of the above examples, it appears that the licensors granted the license with the understanding that the derivative sculptures would be publicly displayed.<sup>367</sup> It would seem reasonable, therefore, for the rights of the licensors to be subjugated to any panorama right that applies to the sculptures themselves.<sup>368</sup> However, in the hypothetical situation where a licensor merely granted permission to create a derivative sculpture without knowing that it would later be displayed in a public outdoor location, it is a closer question whether the licensor should have the right to object to the exercise of a panorama right to the extent that the licensed work is incorporated into the non-infringing derivative work. Although the first-sale rule under federal law gives the owner of the physical sculpture the right to display it publicly,<sup>369</sup> the first-sale rule does not

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363. *Id.*

364. *Peanuts Characters*, ST. PAUL MINN., <https://www.stpaul.gov/departments/parks-recreation/natural-resources/arts-gardens/public-art/peanuts-characters> (last visited Sept. 15, 2020).

365. *Id.*

366. Ignatius Koh, *Unicorn Gundam Statue in Odaiba*, JAPAN TRAVEL (Dec. 6, 2017), <https://en.japantravel.com/tokyo/unicorn-gundam-statue-in-odaiba/41317>.

367. *Peanuts Characters*, *supra* note 364; Koh, *supra* note 366.

368. The same conclusion should apply to the *Peanuts* character balloons featured in the Macy's Thanksgiving Day Parade, since the party licensing the creation of those balloons had to be aware that their only likely use was for outdoor display in a public place, where they were likely to be photographed or recorded. *Snoopy's Back: Snoopy, the World's Most Beloved Beagle and the Longest Flying Character in Macy's Thanksgiving Day Parade® History, Returns This November to Delight Millions of Fans*, BUS. WIRE (June 18, 2013, 8:00 AM), <https://www.businesswire.com/news/home/20130618005288/en/Snoopy's-Snoopy-World's-Beloved-Beagle-Longest-Flying>.

369. 17 U.S.C. § 109(c).

encompass the right to make copies of the work, to distribute or publicly display those copies, or to authorize others to do so.<sup>370</sup>

Under these circumstances, in order to protect the rights of the author of the underlying work who did not consent to public installation of the non-infringing derivative work, perhaps the panorama right should not apply to any component of the derivative work that embodies the underlying work. While such a rule is not difficult to draft, it would present serious implementation problems. Members of the public who encounter public art are unlikely to know whether it is completely original or a derivative work, or, in the latter case, which portions are original and which embody a copyrighted underlying work. While most people would recognize the *Peanuts* sculptures as copies or adaptations of the *Peanuts* characters simply because they are a familiar part of popular culture, in other situations the derivative nature of public art could be less obvious. Thus, there is a notice problem. For persons who encounter the work physically, signage could provide sufficient notice in some cases, but on many occasions the photographer will not be close enough to see the notice. In addition, those who encounter only photographs or audiovisual footage of the artwork—on the internet, for example—would not have access to the signage. For those parties, notice would have to be included in the copyright management information that accompanies the copies, but this would, in practice, be largely beyond the control of the person owning copyright in the public art as well as the party that authorized the installation.<sup>371</sup>

#### V. DESIGNING A PANORAMA RIGHT FOR THE UNITED STATES

Should we be concerned about the absence of a broad panorama right in the United States? Many public artists might object to the widespread or commercial distribution of copies of their works, and the emergence of copyright “trolls” demonstrates that some copyright owners will pursue even the most trivial of copyright infringements.<sup>372</sup> Under current law, parties facing infringement

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370. The first-sale statute authorizes public display of a physical copy only if the copy was “lawfully made.” *Id.* See generally Kurtis A. Kemper, Annotation, *Construction and Application of “First Sale Doctrine” in Copyright Law*, 75 A.L.R. Fed. 2d 387 (2013) (providing examples of cases where courts have found copy owner has no right to make copies without permission of underlying copyright owner).

371. Although referenced in this discussion as a “derivative works” problem, the same notice problem can arise if the public art is a licensed reproduction of another work rather than a derivative work. In granting permission to reproduce the work, the licensor may not have known that the copy would be publicly installed, and thus may not have implicitly consented to the public’s exercise of panorama rights. A member of the public encountering such a work may not know that it is a reproduction rather than an original, and thus may erroneously assume that the panorama right applies.

372. See Matthew Sag & Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV. 571, 573 (2018).

claims arising from their use of public art must take their chances under the doctrines of fair use<sup>373</sup> and de minimis use,<sup>374</sup> or if the facts warrant, attempt to persuade courts to adopt broad interpretations of section 120(a).<sup>375</sup> Any one of these options entails significant litigation costs and, as demonstrated in Part II, uncertain prospects for success.

Based on the experiences of other nations that have enacted panorama rights and an examination of federal case law, it should be possible to fashion a panorama right for the United States that would strike an appropriate balance between, on the one hand, the public interest in ensuring access to images of public spaces that include public art and, on the other hand, the public interest in encouraging copyright owners to consent to the installation of their works in public spaces for everyone to enjoy.

An extension of section 120(a) to incorporate certain uses of public art would create a safe harbor to protect defendants against overly aggressive copyright claims.<sup>376</sup> The key question is the proper scope of this broadened panorama right.

Because section 120(a) currently applies to both commercial and noncommercial uses, it can be argued that an expanded panorama right should be equally broad.<sup>377</sup> However, the copyright owners of architectural designs normally do not expect to exploit those designs extensively beyond authorizing their construction as buildings.<sup>378</sup> Therefore, the exploitation of images of those buildings in the form of postcards, calendars, T-shirts, movie backgrounds, or downloadable images would not compete with a market that the copyright owner would reasonably expect to monopolize.<sup>379</sup> In contrast, in order to incentivize artists to accept commissions to produce public art that will be subject to a panorama right, it will be necessary to afford them some degree of control over significant commercial exploitations of their work.

If a panorama right for art were adopted that was equal in scope to section 120(a), then, in order to be fair to the artists, the public installation should be done only with the consent of the copyright owner of the artwork itself, as well as any other parties that own copyright interests in the underlying works incorporated therein, if any.<sup>380</sup> Once the art has been installed, the public should be entitled

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373. See *supra* notes 27–33 and accompanying text.

374. See *supra* notes 34–41 and accompanying text.

375. See *supra* notes 42–66, 83–144 and accompanying text.

376. Newell, *supra* note 8, at 414 (recommending a “bright-line” rule).

377. *Id.* at 426.

378. Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 DUKE L.J. 1598, 1606 (1992).

379. Gregory B. Hancks, Comment, *Copyright Protection for Architectural Design: A Conceptual and Practical Criticism*, 71 WASH. L. REV. 177, 177 (1996).

380. As noted earlier, see *supra* notes 343–71 and accompanying text.

to assume that, in the absence of actual notice to the contrary, the appropriate consents have been obtained, so that that the panorama right applies. Any other approach would impose an unduly burdensome duty of inquiry on members of the public, who cannot be expected to know the intricacies of copyright law or to undertake a search for the relevant copyright owners, in order to avoid liability. If the artwork is installed without the copyright owners' consent, and without adequate notice to the public, then the copyright owners should have a remedy against the party that authorized the improper installation—which in most cases would be the owner of the tangible artwork or the commissioning party—rather than against the members of the public that reasonably believed the artwork was subject to the panorama right. Remedies could in most cases be limited to injunctive relief, requiring posting of adequate signage or removal of the work.

The difficulty with this approach is that it conflicts with the first-sale rule, which currently allows the owner of a lawfully made copy (including the original)<sup>381</sup> to display that physical copy publicly to persons present in the same location as the work.<sup>382</sup> In the absence of a broad panorama right, this display of the physical artwork does not unduly interfere with the copyright owner's right to prevent unauthorized copying. Under a panorama right comparable to section 120(a), however, the owner's exercise of the first-sale right to display the work could lead to widespread commercial copying, to the detriment of the copyright owner. Thus, there is a trade-off: for the public to enjoy a significantly broader privilege to copy the publicly displayed work, the freedom of the owner of the tangible artwork to display it publicly under the first-sale rule would have to be diminished. Otherwise, the copyright owner's rights would be seriously impaired. This conflict would be the single greatest obstacle to extending section 120(a) to artwork.<sup>383</sup> A narrower panorama right—one limited to noncommercial uses, and perhaps a narrow range of commercial uses—would present less of a conflict. Based on the considerations discussed here, therefore, a panorama right for

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381. In federal copyright law, the noun "copy" includes the original fixation of the work. 17 U.S.C. § 101 (defining "copies").

382. *Id.* § 109(c).

383. It would not be out of the question, of course, to amend the first-sale rule by repealing or limiting the owner's right to publicly display the work. The first-sale rule has been narrowed on several prior occasions, and quite substantially. *See* Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (repealing the right of the owner of a copy of software to offer commercial rentals of that copy); Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (repealing the right of the owner of a phonorecord to offer commercial rentals of that copy). Even in its most traditional application—allowing resales of lawfully copies under section 109(a)—the impact of the first-sale rule has diminished significantly, as copyright owners have chosen to license their works rather than sell copies. *See, e.g., Vernor v. Autodesk*, 621 F.3d 1102 (9th Cir. 2010) (setting forth test for distinguishing between sale and license).

artwork should be significantly narrower than the right that applies to buildings.

If section 120(a) is not to be extended wholesale to public art, then what types of uses should be selectively permitted under the panorama right? If a bright-line test is needed, as some have argued,<sup>384</sup> then the panorama right would almost certainly have to be limited to noncommercial uses. Even then, there would be the problem of defining what uses are considered commercial. Depending on that definition, a bright-line test could prevent application of the panorama right to some informational uses, such as news reporting, teaching, and commentary. Such activities can sometimes have a commercial component, but their value to the public would warrant encompassing them in the panorama right.<sup>385</sup>

One approach would be to permit most or all noncommercial uses, as well as uses that are informational, but to allow other commercial uses only where the public artwork is not the primary component of the image. The test applicable to such commercial uses could be whether the use is nothing more than a replication of the copyrighted work, or a significant portion thereof (for example, a close-up of a portion of the work). Under either of these tests, the Postal Service would not be permitted to use Gaylord's and Davidson's copyrighted sculptures as the featured images on postage stamps.<sup>386</sup> Thus, the outcomes of *Gaylord* and *Davidson* would remain the same.<sup>387</sup> However, depending on the composition of the scene, Mercedes-Benz could photograph its vehicles in front of a street mural as part of an advertising campaign, and the producers of *Batman* could film scenes in front of a public sculpture display.<sup>388</sup> If, as a policy matter, uses of the latter sort are deemed to be unfair commercial exploitations of the attention-getting qualities of the copyrighted artwork, a narrower approach would be to ask whether the artwork is a significant

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384. See, e.g., Newell, *supra* note 8, at 426.

385. The importance of such uses is illustrated by the high degree of protection they enjoy under the copyright and trademark regimes, including the fair use doctrine, 17 U.S.C. § 107 (specifically mentioning "criticism, comment, news reporting, teaching . . . scholarship, or research" as purposes that can support fair use), and the First Amendment, see, e.g., *VIP Prods. LLC v. Jack Daniel's Prods., Inc.*, 953 F.3d 1170 (9th Cir. 2020) (granting First Amendment protection to a commercial use of a trademark because it constituted parody, a form of criticism), although neither of these defenses provides absolute protection or a bright-line test.

386. See *Davidson v. United States*, 138 Fed. Cl. 159, 182 (2018); *Gaylord v. United States*, 112 Fed. Cl. 539, 542 (2013). See *supra* notes 110–17 (*Gaylord*), 118–49 (*Davidson*) and accompanying text.

387. See *Davidson*, 138 Fed. Cl. at 182; *Gaylord*, 112 Fed. Cl. at 542. See *supra* notes 110–17 (*Gaylord*), 118–49 (*Davidson*) and accompanying text.

388. See *Mercedes Benz USA LLC v. Bombardier*, No. 2:19-CV-10951-AC-EAS, 2019 WL 5063155, at \*8 (E.D. Mich. May 29, 2019); see also *Leicester v. Warner Bros.*, 232 F.3d 1212, 1219–20 (9th Cir. 2000). See *supra* notes 83–100 (*Leicester*), 101–08 (*Mercedes Benz*), and accompanying text.



component of the user's image, rather than the primary component or a mere replication.<sup>389</sup>

The panorama right should also be limited to reproduction in two-dimensional images. This would parallel the current rule for reproduction of architectural works under section 120(a).<sup>390</sup> The public interest in sharing images of public spaces and public art does not require anyone to have the unfettered right to create replicas of copyrighted sculptures.

Works created with public funds and located on public property present an especially strong equitable argument for panorama rights.<sup>391</sup> The Korean War Memorial at issue in *Gaylord*,<sup>392</sup> and Jack Mackie's *Dance Steps* installations,<sup>393</sup> are two examples. The public agencies funding these works, or the government entities permitting their installation on public property, could create panorama rights by contract by conditioning the funding or the use of public land on a partial surrender of copyright. However, public entities may be unable or unwilling to negotiate such concessions, or they may simply neglect to complete the appropriate paperwork. The public's right to record images of these works, and the surrounding landscape or cityscape, should not depend on a contractual arrangement between the government and the artist.<sup>394</sup>

Public art becomes part of the environment, and it can be argued that the public should have a privilege to record the presence of the art in the public space and distribute or display the image, even, in some cases, for commercial purposes.<sup>395</sup> The work of art may take up only a small amount of the previously open public space, or it may dominate or even obliterate the landscape.<sup>396</sup> Christo and Jeanne-Claude's *The Gates* consisted of 7,500 structures and fabric panels scattered over several acres of Central Park.<sup>397</sup> It would have been difficult or impossible to photograph Central Park without capturing

389. A somewhat similar test has been applied to the unauthorized use of a person's likeness in an expressive but commercial context. See, e.g., *Keller v. Elec. Arts, Inc. (In re NCAA Student-Athlete Name & Licensing Litig.)*, 724 F.3d 1268, 1274 (9th Cir. 2013).

390. 17 U.S.C. § 120(a); see *supra* note 42 and accompanying text.

391. See *Dulong de Rosnay & Langlais*, *supra* note 4 (endorsing this view).

392. See *supra* notes 110–17 and accompanying text.

393. See *supra* notes 155–65 and accompanying text.

394. One can draw an analogy to the rationale for mandating public access to the results of federally funded research. See, e.g., Request for Information: Public Access to Peer-Reviewed Scholarly Publications, Data and Code Resulting from Federally Funded Research, 85 Fed. Reg. 9488 (Feb. 19, 2020).

395. See Dimitar Dimitrov, *EU Copyright Should Protect Photography in Public Spaces*, COMMUNIA (Dec. 19, 2016), <https://www.communia-association.org/2016/12/19/eu-copyright-protect-photography-public-spaces/> (endorsing this view).

397. See, e.g., Grant, *supra* note 150 (describing Anish Kapoor's *Cloud Gate* installation in Chicago's Millennium Park and Christo and Jeanne-Claude's *The Gates* project stretching over acres in New York's Central Park).

397. *Id.*

a portion of this artwork. Outside the United States, Christo has wrapped historic exterior sculptures,<sup>398</sup> a Roman wall,<sup>399</sup> a Paris bridge,<sup>400</sup> and the Reichstag,<sup>401</sup> and his plan to wrap the Arc de Triomphe will go forward posthumously in 2021;<sup>402</sup> without a robust panorama right, such projects can put historic landmarks off-limits to photographers.

Even if the artistic display is brief, it may dominate the public space for the duration of the installation.<sup>403</sup> The brevity of the display may or may not be relevant, depending on the rationale for the panorama right.<sup>404</sup> If a major purpose of the right is to prevent copyright from interfering with the right to photograph landscapes, then the brevity of the display could be important, since only short-term visitors would find their rights impaired, and their use is likely to be noncommercial and well within the bounds of fair use.<sup>405</sup> In contrast, if the purpose of the right is to make public art more widely accessible, then the brevity of the display would argue in favor of allowing more photography in order to preserve the historical record.<sup>406</sup>

It is important to remember that any panorama right enacted will function simply as a safe harbor.<sup>407</sup> Thus, if a particular case presents an especially difficult question as to whether the use is

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398. See *Early Works, Paris 1963-1964*, NAT'L GALLERY OF ART <https://www.nga.gov/research/library/imagecollections/features/christo-jeanne-claude/early-works-paris.html> (last visited Sept. 15, 2020) (wrapped statute at Place du Trocadero in Paris); *Wrapped Objects, Statutes and Women*, CHRISTO & JEANNE CLAUDE, <https://christojeanneclaude.net/projects/wrapped-objects-statues-and-women> (last visited Sept. 15, 2020) (wrapped statue at the Villa Borghese in Rome).

399. See *The Wall-Wrapped Roman Wall*, CHRISTO & JEANNE CLAUDE, <https://christojeanneclaude.net/mobile/projects?p=the-wall---wrapped-roman-wall> (last visited Sept. 15, 2020) (wrapped Roman wall).

400. See *The Pont Neuf*, CHRISTO & JEANNE CLAUDE, <https://christojeanneclaude.net/projects/the-pont-neuf-wrapped> (last visited Sept. 15, 2020) (wrapped bridge in Paris).

401. See *Wrapped Reichstag*, CHRISTO & JEANNE CLAUDE, <https://christojeanneclaude.net/projects/wrapped-reichstag> (last visited Sept. 15, 2020) (wrapped Reichstag).

402. Agence France-Presse, *Arc de Triomphe to Get Posthumous Christo Wrap in 2021*, JAKARTA POST (June 3, 2020), <https://www.thejakartapost.com/life/2020/06/03/arc-de-triomphe-to-get-posthumous-christo-wrap-in-2021.html>.

403. Christo and Jeanne-Claude's art appeared in Central Park for only sixteen days. Grant, *supra* note 150.

404. See *id.* (comparing Anish Kapoor's *Cloud Gate* installation in Chicago to Christo and Jeanne-Claude's *The Gates* project in New York City).

405. See, e.g., *id.* (noting that Christo and Jeanne-Claude's *The Gates* project was on view for only sixteen days in New York's Central Park).

406. For example, Christo's Central Park installation *The Gates* was available for only sixteen days. See *The Gates*, CHRISTO & JEANNE CLAUDE, <https://christojeanneclaude.net/projects/the-gates?view=info> (last visited Sept. 15, 2020).

407. See discussion *supra* Subpart II.A.4.

commercial or noncommercial, whether it is informational, or whether it is merely incidental or so significant as to exceed the threshold for commercial uses, then the other defenses discussed earlier would still be available as backups.<sup>408</sup> Thus, a use that fails to qualify for the panorama right safe harbor could still be a fair use or a *de minimis* use, or could involve a work of art that is so closely related to a building that it should be encompassed by section 120(a).<sup>409</sup>

Based on the considerations discussed here, it should be possible to fashion a federal panorama right that will clarify the respective rights of copyright owners and members of the public with respect to art that is installed in public spaces, reducing the need to rely on alternative defenses that are not so narrowly tailored. Even if there is no bright-line test, or even if the right is limited to noncommercial uses, a panorama right could reduce threats of nuisance litigation, while appropriately balancing the interests of creators and users. At the same time, entities that commission public art—especially with public funds—can take the initiative to negotiate limited copyright waivers from their artists. The ultimate goal should be to encourage installation of artwork for the public to enjoy, while also encouraging dissemination of images of that artwork, in the context of its environment, so that these enhanced public spaces can be enjoyed by members of the public who do not have physical access to them, enabling the benefits of public art to be more widely and equitably shared.

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408. *See supra* notes 27–41 and accompanying text.

409. *Id.*