

Antonella De Robbio

antonella.derobbio@gmail.com

Coordinatore Gruppo di studio AIB Open Access e Pubblico Dominio (GOAPD)

Antonella De Robbio è coordinatore del Gruppo di Studio su Pubblico Dominio e l'Open Access dell'AIB Associazione italiana Biblioteche, oltre che membro dell'Osservatorio legislativo dell'AIB. Ha lavorato come bibliotecaria all'Università degli Studi di Padova per oltre 40 anni, negli ultimi 9 anni come coordinatore delle biblioteche del Polo Giuridico all'Università degli Studi Padova. Nel 2016-2018 ha coordinato il progetto di digitalizzazione delle opere di area giuridica LADAG. Da oltre un ventennio è attivamente impegnata a livello nazionale e internazionale in vari gruppi di lavoro sia per le questioni correlate al copyright e gestione dei diritti sia in ambito Open Access. Dal 2005 a tutt'oggi è membro del gruppo nazionale Open Access della Commissione biblioteche della CRUI. Intensa la sua attività di didattica anche e-learning sui temi legati al copyright, gestione dei diritti e accesso aperto alla ricerca.

<http://orcid.org/0000-0001-6617-444X>

<http://www.researcherid.com/rid/G-6496-2010>

<http://scholar.google.com/citations?user=c2NmN0cAAAAJ&hl=en>

Libertà di panorama in Europa in equilibrio tra diritti ed eccezioni

Abstract

La libertà di panorama - da non confondere con il diritto di panorama che riguarda la distanza necessaria tra edifici per avere luce, spazio e libertà di vedute sufficientemente adeguati - è il diritto di poter scattare fotografie o di effettuare riprese video di edifici, palazzi, monumenti, opere artistiche e architettoniche presenti in un luogo pubblico anche per fini commerciali. La libertà di panorama - da inquadrare entro i temi dell'Open Culture - è prevista in quei Paesi i cui sistemi normativi derogano a tutele per diritti di proprietà intellettuale o di proprietà fisica, come nel caso della tutela dei beni culturali. La sua ampiezza dipende perciò dall'equilibrio tra le varie e eventuali tutele sulle opere e le eccezioni accordate al fine di garantire una ragionevole libertà di scattare fotografie in spazi pubblici. Le opere di architettura sono un interessante campo di applicazione dove la soluzione dei complessi problemi è data dall'applicazione di norme diverse di diritto nazionale e internazionale: diritto d'autore, codice sulla proprietà industriale, norme sulla tutela dei Beni Culturali e disciplina sugli appalti pubblici e privati. La legislazione nel mondo varia da Paese a Paese con situazioni eterogenee. Stati Uniti, Argentina, Russia e Giappone hanno norme simili che consentono le riproduzioni di edifici situati in luoghi pubblici. In Africa vi sono numerose aree dove non si hanno informazioni e altre in cui manca totalmente la libertà di panorama. In SudAmerica, Cina, e Canada la situazione è abbastanza buona, mentre i Paesi con la situazione migliore in termini di ampia libertà di panorama sono Australia, India e Regno Unito. All'opposto troviamo il Medio Oriente con gravi restrizioni. In Europa la situazione non solo è eterogenea, ma è spaccata a metà tra Paesi dove non vi è libertà di panorama e quelli con una situazione abbastanza buona, anche se non ottimale. In alcuni Stati si possono fotografare solo gli edifici, in altri solo le opere d'arte, in altri non c'è nessuna restrizione. Appare curioso come tale restrizione sia presente in mezza Europa tra cui l'Italia e Francia e in mezza Africa oltretutto nella gran parte dei paesi mediorientali, tra cui Iran, Afghanistan, Arabia Saudita, ecc... L'Italia purtroppo non gode della libertà di panorama. Nel nostro Paese chi intenda utilizzare a fini di lucro immagini raffiguranti opere di interesse artistico-culturale e paesaggistico lo deve fare a seguito di autorizzazioni e pagando apposite fees all'ente pubblico che ha in gestione l'opera o il paesaggio. A livello comunitario europeo purtroppo l'occasione di avere una Direttiva europea con ampie eccezioni utili a una libertà di panorama a tutto campo è andata perduta per mancanza di una visione ampia che non ha consentito di uniformare questa libertà di sguardo su panorami e paesaggi tra i Paesi europei. Ora quindi servirà un meccanismo di tutela giuridica nazionale, con un serio dibattito politico sul concetto di libertà di panorama come bene comune e giuridicamente intesa come libertà positiva.

Freedom of panorama in Europe on balance between rights and exceptions

Antonella De Robbio

antonella.derobbio@gmail.com

Open Access and Public Domain Study Group Coordinator - AIB Italian Libraries Association

Antonella De Robbio is the coordinator Open Access and Public Domain study group of the AIB Italian Libraries Association, as well as a member of the AIB Legislative Observatory. She has working as librarian at the University of Padua for over 40 years, in the last 9 years as a coordinator of the libraries of the Law libraries at the University of Padua. In 2016-2018 she coordinated the digitization project LADAG for books of juridical area. For over twenty years she has been actively involved nationally and internationally in various working groups on both issues relating to copyright and rights management, as well as open access. Since 2005 she has been a member of the national Open Access Group of the CRUI (Italian Conference of Rectors) Libraries Commission. Intense her teaching activities, also on e-learning platforms on issues related to copyright, rights management and open access to research.

<http://orcid.org/0000-0001-6617-444X>

<http://www.researcherid.com/rid/G-6496-2010>

<http://scholar.google.com/citations?user=c2NmnOcAAAAJ&hl=en>

English Abstract Summary

The *freedom of panorama* - not to be confused with the panorama's right, which concerning the necessary distance between buildings to have adequate light, space and freedom of view - is the right to be able to take photographs or take video footage of buildings, palaces, monuments, artistic and architectural works present in a public place also for commercial purposes.

In other words freedom of Panorama is a copyright provision to allow the utilisation or reproduction of any type of multimedia of public artwork such as buildings, sculptures or any art installation which are permanently displayed in public spaces without infringing on the author's copyrights.

The freedom of the panorama can be placed within the themes of Open Culture and is allowed only in those countries whose regulatory systems expressly provide for derogations from more or less strong protections for intellectual property rights or physical property as in the case of protection of cultural heritage. It therefore depends on the balance between the various and possible protections on the works and the exceptions granted in order to guarantee a reasonable freedom to take photographs in public spaces.

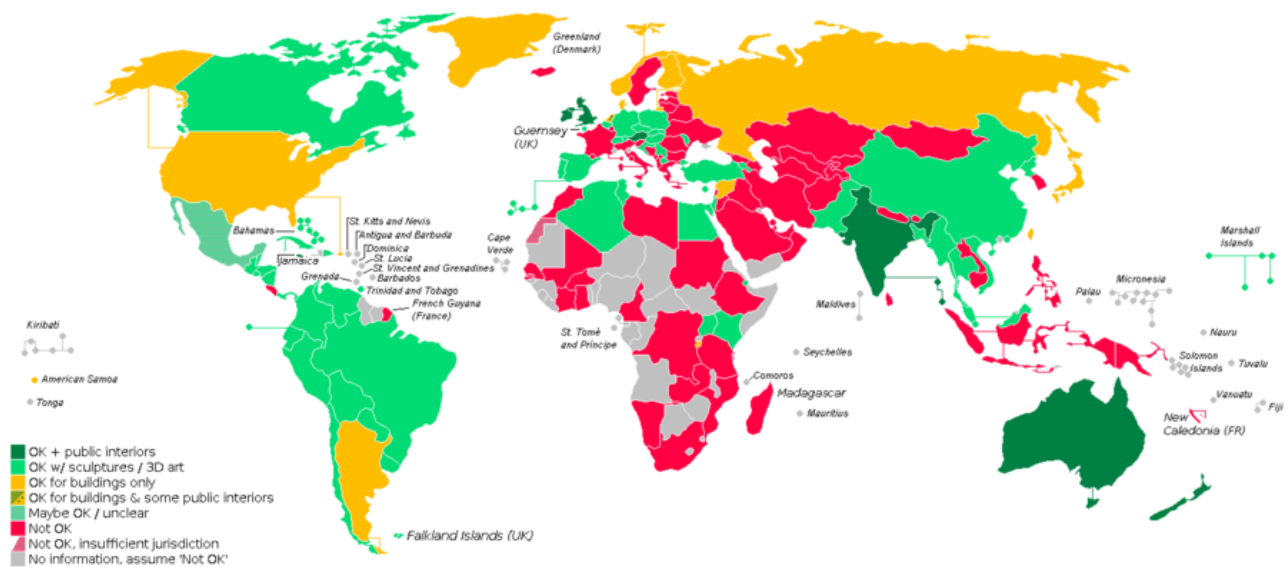
Architectural works is an interesting field of application of the law not only on copyright, where the solution of complex problems is given by the application of different rules: copyright, code on industrial property, international law, rules on protection of cultural assets and regulations of public and private tenders.

It is very difficult that a simple photograph of an engineering and architecture work to really constitute undue competition in the economic use of the work, but as every Country has different norms about protection rights (copyrights or protection as cultural heritage goods) and consequently freedom of panorama varies from a Country to another, it must be considered that in the legislation of the countries in which it is not provided a freedom of panorama must be taken into account a caution in

order to take photos in terms of reuse or publications. It is advisable to check carefully, country by country, which specific legislation to apply from time to time.

Among the exceptions that may or may not be provided for within the rules of the Member States, not only the exceptions or limitations to reproduction rights should be considered, but also their possible re-use in analog publications in print or on the Internet, either for non-profit purposes or for commercial purposes too.

In the world the legislation that protects the freedom of panorama varies from country to country with very heterogeneous situations. The United States, Argentina, Russia and Japan have similar rules that allow the reproduction of buildings located in public places. In Africa there are numerous areas where there is no information and others where freedom of view is totally lacking. In South America, China, and Canada the situation is quite good, while the countries with the best situation in terms of broad freedom of view are Australia, India and the United Kingdom. In contrast, the Middle East is severely restricted concerning freedom of panorama.



Freedom of panorama status around the world for images used for commercial purposes [Wikipedia map]

The central node of the restrictions on the freedom of the panorama is that a photograph of a work of art or architecture and the original physical work are not the same thing: a copy of the object is not the object. This statement is not new: the famous Belgian artist René Magritte with the work *La trahison des images* (the betrayal of images), was already aiming at highlighting the difference in tangibility and consistency that the world of reality has with that of signs. The well-known depiction of Magritte's pipe is not the pipe itself, but an image of it.

Interesting is the US example where federal law explicitly exempts photographs of buildings from copyright law, thus distinguishing copyright over buildings from photographs. The photographer holds the exclusive copyright on the image while the architect or building owner has no right to the image and can use the photograph for any purpose. The clause applies only to architectural works, not to other works of figurative art such as statues or sculptures.

In Europe the situation is not only heterogeneous, but it is split in half between countries where there is no freedom of panorama and those with a fairly good, though not optimal, situation. In some States only buildings can be photographed, in others only works of art, in others there is no restriction. It seems curious how this restriction is present in half of Europe, including Italy and half of Africa and in most Middle Eastern countries, including Iran, Afghanistan, Saudi Arabia, etc. ...



Wikimedia map of different status of Freedom of Panorama (FoP) in European Countries

Austria, Germany, Ireland, Poland, Portugal, Slovakia, Spain, Sweden, Hungary, Hungary are among the countries that recognize and guarantee freedom of panorama. In Switzerland in addition to the UK freedom of panorama is widely recognized for some time. Other countries such as Denmark, Finland, Estonia, Latvia, Lithuania, Luxembourg and Romania recognize the freedom of panorama if the the work does not represent the central element of reproduction. Kosovo and Serbia have different rules between them. Italy and France are the two countries that severely limit the possibility of reproducing works placed on public land for any purpose. As well as Bielorrussia and Ucraina. But also in Greece there is not freedom of panorama and even taking photos for public competitions of older monuments is a problem, because of the complex legislation regarding publishing rights for photos of monuments protected by the government.

Noteworthy is the Wiki Loves Monuments project which every year (since 2010) organized worldwide with Wikipedia community an international photographic competition with local help Wikimedia affiliates across the globe. One of the main goals of Wiki Loves Monuments is to collect images under free license. However, its organisation in some EU countries is difficult or even impossible because in many European countries, copyright and ancillary rights are designed to limit access to works that may be part of a country's cultural heritage. In Italy these limitations are particularly heavy and request a lot of authorization which WLM ask to several institution every year to get apposite liberatory. While sculptors and architects rightfully hold moral and economic rights on their creations, these rights can interfere with efforts to educate and share knowledge. The question is how to strike a fair and practically applicable balance between particular economic rights and the public interest.

Italy unfortunately does not enjoy the freedom of panorama, therefore we speak of restricted freedom due to strong protections. On the one hand, the rules on intellectual property impose protection on the works of authors, architects, or photographers or third parties, also enhanced by the articles of the Civil Code, on the other hand the protection of cultural assets requires that they be the custodians themselves of the asset to hold a sort of "physical" property rights, moreover on works in the public domain, confusing the protection with the safeguard - just and necessary - of physical assets with their exploitation in terms of reproduction rights and their distribution. In addition there are also unresolved problems related to the regulation of the reproduction of Italian goods and landscapes for commercial use.

The new Directive on Copyright in the Digital Single Market, also known (together with the Infosoc Directive) as the EU Copyright Directive, is a European Union (EU) directive which has been adopted, and on which there was a lot of hope in order to get a more wide exceptions. Approved in April 2019, but not yet entered into force to date into the national law of the Member States should have harmonized the exceptions, in some cases extending its scope; the original text envisaged extending freedom of panorama to the whole of Europe in a uniform way by liberalizing reproductions also for commercial purposes. Unfortunately, due to a lack of organic and open vision, after four years of discussion between different political views, there will be no uniform rules applicable without distinction throughout the Union, remaining in force an anachronistic and cumbersome system, especially in consideration of the new content dissemination technologies. At the European Community level, unfortunately, the occasion has been lost due to the lack of a broad vision that has not allowed us to harmonize this freedom of panorama between European countries.

Now, therefore, will be needed, at national level, a mechanism of legal protection which provides for a freedom of panorama legally understood as positive freedom. It is clear that this is a political issue: we must ask ourselves whether public space is to be considered as a common good or not, a collective resource that every individual can freely use. And if in this dimension of free collective use public places are configured as useful spaces also for commercial uses.