

FREEDOM OF EXPRESSION AND RIGHT TO PRIVACY IN THE EUROPEAN UNION: THE RIGHT TO PHOTOGRAPHS PRIVATE PROPERTIES

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Abstract

The debate to make a balance between exercising the freedom of expression and the right to privacy has never reached a global consensus, even among the European Union member states. In relation to the copyright law, there are no prohibitions or limitations in taking photographs, but the right to privacy has to be taken into account. The problems between the act of taking photographs and its limitation regarding the right to privacy have been increased to a new level with the development of copyright law, called the freedom of panorama, which might allow taking photographs of private properties without having to gain prior consent.

Keywords: *Copyright law, European Union, freedom of expression, freedom of panorama, right to privacy.*

I. INTRODUCTION

The protection of the basic human rights has been internationally recognised and implemented within various national laws since the enactment of the Universal Declaration of Human Rights by the United Nations General Assembly on 10 December 1948. Although the declaration is only a guide in maintaining the protection of human rights, many countries have based their national legislations regarding human rights protection on this declaration. The Declaration includes the protection for the freedom of expression, as stated below:¹

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The freedom of expression is also known as freedom of speech that includes the freedom of press. The freedom of expression is the right to say what a person wants through any form of communication and media, as long as this does not mean to cause harm to another person's

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¹ Universal Declaration of Human Rights [adopted 10 Dec. 1948 UNGA Res 217 A(III)], art 12.

character or reputation by untruthful or misleading words.² As the freedom for press is becoming more extensive, there is also an exception for the press to photograph literary and artistic works for the purpose of reporting events, including private properties.³

Aside from the freedom of expression, there is also the right to privacy. The right to privacy is the right that is given to individuals to go their own ways and live their own lives that is free from interferences, invasion, and annoyances.⁴ The Declaration also includes the protection for the right to privacy, as stated below:⁵

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

The debate to make a balance between exercising the freedom of expression and the right to privacy has never reached a global consensus. In relation to the copyright law, there are no prohibitions or limitations in taking photographs, but the right to privacy has to be taken into account. The problems between the act of taking photographs and its limitation regarding the right to privacy have been increased to a new level with the development of copyright law, called the freedom of panorama which is the right to take photographs of copyright-protected works that are located or visible from public places.

The Copyright Directive which takes effect among the European Union member states does not have any provision related to taking photograph of private properties. This means that the European Union member states may have different provisions to one another regarding the same legal problem, while their citizens are regulated under the

² Bryan A. Garner and Henry Campbell Black Black's Law Dictionary (West Publishing, St. Paul, 2009).

³ Berne Convention for the Protection of Literary and Artistic Works (opened for signature 9 September 1886, last amended 28 September 1979, entry into force 19 November 1984), art 10bis.

⁴ Bryan A. Garner and Henry Campbell Black Black's Law Dictionary (West Publishing, St. Paul, 2009).

⁵ Universal Declaration of Human Rights [adopted 10 Dec. 1948 UNGA Res 217 A(III)], art 19.

same treaty regarding European Union citizenship⁶. Though the freedom to photograph private properties might violate the owner's right to privacy, limiting the act of taking a photograph would also mean limiting the freedom of expression and violating one of the fundamental rights. A unified regulation related to this problem would be a probable solution.

II. PROTECTION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION

The terminology of 'fundamental rights' is used by the European Union member states to regulate the protection of 'human rights' within the European Union internal context.⁷ This terminology was previously used in constitutional matters, whereas the term 'human rights' is used in international law context. These two terms refer to the similar substance as can be seen when comparing the content in the Charter of Fundamental Rights of the European Union with the protection concept within the European Convention on Human Rights and the European Social Charter.

A. HISTORY OF PROTECTION: CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

European Union law, which formerly called European Community law, consists of regional treaties and legislation. The Regulations and Directives within the European Union law are applicable through the direct effect or indirect effect to the national laws of European Union member states. Direct effect is the principle of European Union law according to which provisions of European Union law may give rights on

⁶ Citizenship of the European Union was introduced by the Maastricht Treaty (Treaty on European Union), which was signed in 1992, and has been in force since 1993, and later on Maastricht Treaty was amended by the Amsterdam Treaty, which was signed on 2 October 1997, and entered into force on 1 May 1999.

⁷ Gianluigi Palombella "From Human Rights to Fundamental Rights. Consequences of a conceptual distinction." (2006) 34 EUI Working Paper Law 5. See also "Frequently Asked Questions" European Union Agency for Fundamental Rights <<http://fra.europa.eu/>>.

individuals which the courts of member states of the European Union are bound to recognise and enforce, while indirect effect describes a situation where national courts are required to interpret national law in line with unimplemented directives or directives which are failed to be implemented, as opposed to ignoring national law in preference to the directive as occurs when direct effect is invoked.⁸

The three sources of European Union law are primary law, secondary law, and supplementary law.⁹ The main sources of primary law are the Treaties establishing the European Union, and these Treaties have direct effect upon the European Union member states. Secondary sources include Regulations and Directives which are based on the treaties, which some of them have direct effect and some others have indirect effect. The legislature of the European Union consists of the European Parliament and the Council of the European Union, which under the Treaties may establish secondary law to implement the objectives and purposes of the Treaties.¹⁰

In the original Treaties regarding the establishment of the European Union, there was no provision that mentioned the protection for fundamental rights. There was also no regulation for legislative and administrative actions by the European Union institutions to be subject to human rights. It was only concerned that the European Union member states should respect human rights and should not violate it in implementing their actions. This condition then led the European Union to the first attempt in protecting human rights within the European region. The protection was firstly introduced with the drafting of European Convention for the Protection of Human Rights and Fundamental Freedoms, which is now referred to as European Convention on Human Rights, in 1950 by the Council of Europe. European Convention on Human Rights entered into force on 3 September 1953. Based on the Convention, human rights are protected by the European Court of Human Rights although the European Court of Human Rights is not one of

⁸ John Fairhurst *Law of the European Union* (Pearson Education Ltd, Essex, 2007), at 264 and 280.

⁹ “The direct effect of European law” (22 September 2010) Europa <<http://europa.eu/>>.

¹⁰ P P Craig and G de Búrca *EU Law: Text, Cases, and Materials* (2nd ed, Oxford University Press, New York, 2011).

the European Union's institutions. All the member states of the European Union have to sign the European Convention on Human Rights in order to be bound by it, because the Convention does not have a direct or indirect effect towards the European Union member states.

The European Court of Justice then recognised fundamental rights as the general principle of European Union law. They felt that there is the need to ensure that European Union measures as a union and community are compatible with the human rights enshrined in European Union member states' constitution. In 1974, the European Court of Justice affirmed that the European Union must uphold fundamental rights. In 1997, art 6 of the Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts ("Treaty of Amsterdam") gave new powers to the Council of the European Union and the European Court of Justice to protect fundamental rights within the European Union. Finally, the decision to draw up a Charter of Fundamental Rights was taken by the European Council during the summit of the heads of state and government of the member states of the European Union in Cologne, Germany, on 3 and 4 June 1999.

The European Council then established a body which was assigned to draft a regional Charter of Human Rights, which could form the constitutional basis for the European Union and to have specific regulations to apply to the European Union and its institutions. This attempt then resulted in the drafting of the Charter of Fundamental Rights of the European Union, which derived the fundamental rights from the European Convention on Human Rights and Fundamental Freedoms, the Declaration on Fundamental Rights produced by the European Parliament in 1989, and European Union Treaties.¹¹ Finally, at the European Council meeting in Nice in December 2000, the European Commission, the European Parliament, and the heads of state and government of the European Union member states declared the Charter of Fundamental Rights of the European Union as part of the signing of the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts ("Treaty of Nice") in 2001. The Charter of Fundamental Rights was written as an annex

¹¹ "Primary law" (12 August 2010) Europa <<http://europa.eu/>>.

to the Treaty of Nice, and therefore it was not legally binding. National law courts of the European Union member states and the European Court of Justice could base their judgements in the Charter of Fundamental Rights, but they were not bound by its content as the Charter did not have direct effect.

The Charter was made legally binding for European Union member states when it was included in the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (“Treaty of Lisbon”) of 2007. The Charter therefore became a binding set of principles, which regulates all of the personal, civic, political, economic and social rights enjoyed by people within the European Union.¹² The Charter aimed at protection of the individual as against actions of the state. This Charter is a free standing instrument, with vertical direct effect¹³, that derives its authority from art 6(1) of the Treaty on European Union.¹⁴

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The scope of the Charter is circumscribed by the subsequent part of art 6(1) of the Treaty on European Union:¹⁵

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

The Charter of Fundamental Rights of the European Union has be-

¹² “Fundamental rights” (20 March 2013) European Commission <<http://ec.europa.eu/>>.

¹³ “The direct effect of European law” (22 September 2010) Europa <<http://europa.eu/>>.

¹⁴ Treaty on European Union (opened for signature 7 February 1992, entry into force on 1 November 1993, last amended 1 December 2009), art 6(1). Consolidated Version of the Treaty on European Union [2010] OJ C83/13.

¹⁵ Article 6(1).

come an integral part of European Union law, making a codified instrument of fundamental rights which were previously considered as general principles of European Union law. In effect, subsequent to the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights are now applicable in parallel under European Union law, though the Charter is enforced by the European Court of Justice in relation to European Union measures, and the Convention by the European Court of Human Rights in relation to measures by the Member States of the Convention.

The Charter of Fundamental Rights of the European Union does not operate in the same way as the European Convention on Human Rights. The Charter has direct effect in the United Kingdom, and therefore there is no need to adjust United Kingdom legislation to the Charter to enforce fundamental rights protection. However, the Charter only applies to European Union law and with vertical effect. Until this point, the European Court of Justice had been developing the fundamental principles of European Union law and its approach to human rights. By setting out which rights would be adopted by the European Union, the European Union member states were making clear not only to citizens of the European Union what their rights were, but also to the European Court of Justice how far they were prepared to accept development of these principles. The Charter therefore can only apply where the European Union member states have already agreed it will legislate, and where European Union member states have agreed it has competence.¹⁶ The Charter also provides the list of the rights and principles that the European Union member states agreed to be recognised by European Union law.

B. PROTECTION FOR THE FREEDOM OF EXPRESSION

The freedom of expression is also known as freedom of speech that includes the freedom of press. The freedom of expression is the right to say what a person wants through any form of communication and media, as long as this does not mean to cause harm to another person's

¹⁶ Jodie Blackstock "The EU Charter of Fundamental Rights Scope and Competence" (29 March 2012) The EU Charter of Fundamental Rights Conference.

character or reputation by untruthful or misleading words.¹⁷ The freedom of expression has been internationally protected since the enactment of Universal Declaration of Human Rights, as follows:¹⁸

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Though the member states of the United Nations, through declaring the Universal Declaration of Human Rights, have agreed to the above-mentioned protection, the nature of the United Nations General Assembly's resolution is to be a recommendation without the power of enforcement to the member states of the United Nations.¹⁹ This means that the Universal Declaration of Human Rights could only be seen as a soft law.²⁰ The hard law that bound the European states is art 10 para 1 of European Convention on Human Rights which protects the freedom of expression, as follows:²¹

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

It was stated that the freedom should not meet interference and frontiers. However, the protection of the freedom of expression in European Convention on Human Rights is balanced with the protection of right to privacy. Art 10 para 2 of the European Convention on Human Rights

¹⁷ Bryan A. Garner and Henry Campbell *Black Black's Law Dictionary* (West Publishing, St. Paul, 2009).

¹⁸ Universal Declaration of Human Rights [adopted 10 Dec. 1948 UNGA Res 217 A(III)], art 19.

¹⁹ The legal status of United Nations General Assembly resolutions and other international documents are unclear. See CM Chinkin "The Challenge of Soft Law: Development and Change in International Law" (1989). 38 *International and Comparative Law Quarterly* 850-851. See also Richard Marlin "The External Affairs Power and Environmental Protection in Australia" (1996) 24 *Fed L R* 71.

²⁰ Soft law is a source of international law which does not give rise to enforceable rights. See Tadensz Grnchalla-Wesierski "A Framework for Understanding "Soft Law"" (1984) 30 *McGill L J* 39-40.

²¹ European Convention on Human Rights (opened for signature 4 November 1950, entry into force on 3 September 1953), art 10(1).

stated as follows:²²

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law ... for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

For the European Union member states, the freedom of expression is given by the art 11 of the Charter of Fundamental Rights of the European Union, as follows:²³

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

In *Schmidberger*²⁴, the Court stated that “unlike other fundamental rights”, the freedom of expression and freedom of assembly are subject to certain limitations. In this case, the European Court of Justice engaged in an analysis of the relation between articles 10 and 11 of the European Convention on Human Rights related to the freedom of expression and freedom of assembly on one hand and the free movement of goods expressed by the EC Treaty on the other hand. The Court found that the restriction on the free movement of goods was justified and that the national authorities had been entitled to authorize the demonstration. This is the first case in which respect for and protection of fundamental rights has been used by a Member State as a justification for a restriction on a fundamental freedom. This is an implicit acknowledgement of the fact that in certain cases fundamental rights can be absolute. The existence of such rights is also confirmed by references to the constitutions of member States and to the European Convention on Human Rights.²⁵

²² Article 10(2).

²³ Charter of Fundamental Rights of the European Union (opened for signature 2 October 2000, entry into force on 1 December 2009), art 11.

²⁴ Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659.

²⁵ Giacomo Di Federico (ed) *The EU Charter of Fundamental Rights: From Declara-*

Progress has been made in recent years in terms of securing respect for the right to freedom of expression. Efforts have been made to implement this right through specially constructed regional mechanisms. New opportunities are emerging for greater freedom of expression with the internet and worldwide satellite broadcasting. New threats are emerging too, for example with global media monopolies and pressures on independent media outlets.²⁶ Although the freedom of press is recognised as a part of the freedom of expression, it is still not clear whether the freedom to make an artwork, such as a photograph, is also protected under the freedom of expression. Even if it is protected, another issue that would come up with this is whether the unauthorised photographs of private properties are protected as the other photographic works.

C. PROTECTION FOR THE RIGHT TO PRIVACY

The right of privacy is the right that is given to individuals to go their own ways and live their own lives that is free from interferences, invasion, and annoyances.²⁷ Art 12 of the Universal Declaration of Human Rights stated that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation”.²⁸

Although the Declaration is only a guide in maintaining the protection of human rights, the Declaration inspired the content of several conventions regarding the protection of human rights. For example, for the protection of right to privacy, art 8 of the European Convention on Human Rights stated as follows:²⁹

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

tion to Binding Instrument (Springer, 2011).

²⁶ “Freedom of Expression” Human Rights Education Associates <<http://www.hrea.org/>>. See also John D Zelezny *Communications Law: Liberties, Restraints, and the Modern Media* (4th ed, Wadworths Publishing Company, California, 1997), p 29.

²⁷ Bryan A. Garner and Henry Campbell *Black Black's Law Dictionary* (West Publishing, St. Paul, 2009).

²⁸ Universal Declaration of Human Rights [adopted 10 Dec. 1948 UNGA Res 217 A(III)], art 12

²⁹ Article 8.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The similar protection also appears in articles 6 and 7 of the Charter of Fundamental Rights of the European Union. Art 6 of the Charter of Fundamental Rights of the European Union provided that “everyone has the right to liberty and security of person” and art 7 of the Charter provided that “everyone has the right to respect for his or her private and family life, home and communications”.³⁰ Art 7 of the Charter clearly stated that a private property, or what it is called “home”, is placed under the right of privacy of a person. The act of trespassing is considered as breach of law, as this means that there is a person who stepped in to another person’s private property.

D. UNIFIED COPYRIGHT LAW IN THE EUROPEAN UNION

The Copyright Directive, or officially known as the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, is a directive of the European Union enacted to implement the WIPO Copyright Treaty³¹ and to harmonise aspects of copyright law across Europe, such as copyright exceptions.³² Though the Directive was meant to unify the copyright protection among European Union member states, in reality, the Directive gives its Member States significant freedom in regulating certain aspects of copyright protection.

European Union member states had until 22 December 2002 to implement the Directive into their national laws as stated in art 13 of

³⁰ Charter of Fundamental Rights of the European Union (opened for signature 2 October 2000, entry into force on 7 December 2000), art 6-7.

³¹ World Intellectual Property Organization Copyright Treaty (opened for signature 20 December 1996, entry into force 6 March 2002) [WIPO Copyright Treaty].

³² Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

the Copyright Directive. However, only Greece and Denmark met the deadline, while Italy³³, Austria, Germany³⁴, and the United Kingdom³⁵ implemented the Copyright Directive in 2003. The remaining eight European Union member states, namely Belgium, Spain, France, Luxembourg, The Netherlands, Portugal, Finland, and Sweden, were referred to the European Court of Justice for non-implementation.³⁶ For the purpose of differentiating between the discussion on the subject of all European Union member states and the European Union member states which implemented this Copyright Directive, the words “Member States” would refer to the latter.

Articles 2 to 4 of the Copyright Directive contain definitions of the exclusive rights granted to under copyright and related rights. The Copyright Directive distinguishes the “reproduction right” as stated in art 2 of the Copyright from the right of “communication to the public” or “making available to the public” in art 3 of the Copyright Directive, as reproduction right is specifically intended to cover publication and transmission on the internet. The two names for the right were derived from the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The related right for authors to authorise or prohibit any form of distribution to the public by sale or otherwise is provided for in art 4 of the Copyright Directive.

As it was mentioned above, the Copyright Directive provides exceptions and limitations for the Member States to certain aspects. Art 5 of the Copyright Directive lists the copyright exceptions which Member States may apply to copyright and related rights. In principle, Member States may only apply exceptions which are on the agreed list, although other exceptions which were already in national laws as of 22 June 2001 may remain in force.³⁷ The Copyright Directive makes only one

³³ Italy implemented the Copyright Directive on 9 April 2003.

³⁴ Germany implemented the Copyright Directive on 13 September 2003.

³⁵ United Kingdom implemented the Copyright Directive on 31 October 2003.

³⁶ “Implementation of the directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the Information Society” Association of European Performers’ Organisations <<http://www.aepo-artis.org/>>.

³⁷ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, art 5(3)(o).

exception obligatory, which is transient or incidental copying as part of a network transmission or legal use. Therefore, the internet service providers are not liable for the data they transmit, even if it infringed copyright. The other limitations are optional, and therefore the Member States may choose which of those they will give effect to in national laws. The exceptions that can be made by the Member State are set out in art 5(3) of the Copyright Directive, as follows:³⁸

... (c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible; ...

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places; ...

After several debates and considerations from the Parliament to apply the Directive within the Copyright Law in the United Kingdom, the Directive finally accepted in the United Kingdom national law by the enactment of Statutory Instrument SI 2003/2498 (“The Copyright and Related Rights Regulations 2003). Minor amendments also were made under the Performances Regulations 2006 (SI 2006/18). In Germany, the Copyright Directive is implemented by the enactment of Act amending the Law on Copyright and Related Rights 1965 of 10 September 2003. There are several new provisions in the German Copyright Law after the enactment of the Act, such as introduction of the new legal definition of “making available to the public” that applies mainly to online content, the changes in provisions concerning private copies, legal protection for technological copy protection mechanism, exceptions and limitations of copyright in favour of disabled persons and of news reporting, and the changes on how pictures from catalogues cannot be used for free any more, not even to illustrate an exhibition review.³⁹

In Italy, the implementation of the Directive is known as *Decreto*

³⁸ Article 5(3)(h).

³⁹ Ian Brown “Implementing the EU Copyright Directive” Foundation for Information Policy Research <<http://www.fipr.org>>, p. 71.

Legislativo 9 Aprile 2003, n. 68: Attuazione della direttiva 2001/29/CE sull'armonizzazione di taluni aspetti del diritto d'autore e dei diritti connessi nella societa' dell'informazione (GU n. 87 del 14-4-2003 - Suppl. Ordinario n.61), translated as Legislative Decree of April 9th, 2003, no. 68: Implementation of the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. There are similar changes with German Copyright Law that happens in Italy, for example the changes of exceptions and limitations of copyright protection, technological protection measure, interoperability and research, privacy, and enforcement and penalties in relation to copyright infringement.⁴⁰

E. FREEDOM OF EXPRESSION AND RIGHT TO PRIVACY WITHIN COPYRIGHT LAW IN THE EUROPEAN UNION

Copyright law is the last developed of the main intellectual property rights. Copyright protects art and literary works, such as photographs, music, and videos.⁴¹ The protection of copyright started with the British Statute of Anne in 1710 after the advent of printing press. The first international treaty regarding copyright law is the Berne Convention of 1886. The member states of the Berne Convention are called “a Union for the protection of the rights of authors in their literary and artistic works”.

Development of copyright law eventually met an issue related to copyright protection for the photographs of copyright-protected works. Newell refers to the freedom of panorama as the right to take photographs of public spaces.⁴² Copyright laws in some countries, such as the United Kingdom⁴³ and New Zealand⁴⁴, do not consider the freedom of panorama as copyright infringement to architectural works which are visible from public places. In the European Union, art 5(3)(h) of

⁴⁰ *Ibid.*, p. 87.

⁴¹ Berne Convention for the Protection of Literary and Artistic Works (opened for signature 9 September 1886, last amended 28 September 1979, entry into force on 19 November 1984), art 2(1).

⁴² Bryce Clayton Newell “Freedom of Panorama: A Comparative Look at International Restrictions on Public Photography” (2011) 44 CLR 407 p. 409.

⁴³ Copyright, Designs and Patents Act 1988 (UK), s 62(1).

⁴⁴ Copyright Act 1994, s 73.

the Copyright Directive states that the member states may provide for exceptions or limitations to the reproduction right in the use of works of architecture or sculpture, made to be located permanently in public places.⁴⁵ The act of making a photograph of such works may be referred to as an act of reproduction. Therefore, the Copyright Directive gives the power to the Member States to regulate the freedom of panorama in their own jurisdictions. However, there has not been any reference as to whether the freedom of panorama should be considered as the breach of right to privacy or a form to exercise the freedom of expression.

The freedom of panorama gives the right to photographers to publicise, reproduce, distribute, and even to commercialise their photographs without having to gain consent from the architect of a building or the sculptor of a sculpture. In *Radford v Hallenstein Bros Ltd*⁴⁶, it is stated that the copyright of sculptures is not infringed by the commercialisation of the photographs of the sculptures because the sculpture in this case was visible in the public place. Therefore, photographers may be protected by the freedom of panorama to gain both the moral right and economic right to photographs of buildings, including a house which is clearly a private property, just because the external appearance of the house is visible from a public place.

The issues regarding the use of photographs have been developing through the years, especially following the development of the internet. People are able to easily use photographs they have found on the internet for any purpose. In the meantime, the freedom of panorama is not recognised in the copyright law in every country, even among the European Union member states. There are some countries that remain silent as to this rule, while there is no international or regional treaty that regulates the application of freedom of panorama.

1. Freedom of Panorama in Several European Union Member States

Photographs are protected as artistic works under the copyright law. It is also a form of expressing a person's thoughts or feelings, and it should be considered to be protected under the freedom of expression.

⁴⁵ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, art 5(3)(h).

⁴⁶ *Radford v Hallenstein Bros Ltd* HC Auckland CIV 2006-404-004881, 22 February 2007.

There are no limitations as to what should or should not be photographs. However, as explained in the previous chapters, a person's freedom of expression has a limitation which is the right of privacy of other people.

The freedom of panorama is the freedom to photograph copyright-protected works without having to gain consent from the copyright owner. This freedom becomes an issue in intellectual property law because the copyright gives exclusive rights to the copyright owners and these rights may be limited by the availability of the freedom of panorama. However, as the works that already in the public domain are no longer protected by copyright, it is out of question if taking photographs of works in public domain is permissible.

Since the Copyright Directive does not regulate a unified provision related to the freedom of panorama, there are different provisions in the European Union member states' national laws. The second paragraph in art 87 of the Copyright Act in Italy stated that the Act protects copyright for photographs, but the protection does not cover the photographs of "writings, documents, business papers, material objects, technical drawings, and similar products". The Act does not mention the meaning of "material objects" and therefore, it can be referred to as "any form of works" except those that are mentioned in the first paragraph of art 87 of the Copyright Act. As the first paragraph⁴⁷ does not state the words "building" or "architectural works", therefore this Act does not protect copyright for photographs of copyright-protected buildings, including private properties.

On the other hand, based on art 59 of the Copyright Law in Germany⁴⁸, it is permissible in Germany to photograph copyright-protected

⁴⁷ "Pictures of persons, or of aspects, elements or features of natural or social life, obtained by photographic or analogous process, including reproductions of works of graphic art and stills of cinematographic films, shall be considered to be photographs for the purpose of the application of the provisions of this Chapter." *Protezione del diritto d'autore e di altridiritticonnessi al suo esercizio* [Law for the Protection of Copyright and Neighbouring Rights] (Italy), art 87.

⁴⁸ "It shall be permissible to reproduce, by painting, drawing, photography or cinematography, works which are permanently located on public ways, streets or places and to distribute and publicly communicate such copies. For works of architecture, this provision shall be applicable only to the external appearance." *Gesetz über Urheberrecht und verwandte Schutzrechte* [Act on Copyright and Related Rights] (Germany), art 59.

architectural works. This provision protects the photographs of copyright-protected works which are “permanently located on public ways, streets, or places”, although the protection for photograph of copyright-protected architectural works is only limited to the “external appearance” because reproductions may not be carried out on an architectural work.⁴⁹ The photographs of copyright-protected architectural works in Germany would fall into the category of reproduction and therefore is protected by Copyright Law in Germany.

At the same time, s 62 of the Copyright Law in the United Kingdom stated as follows:⁵⁰

- 1) This section applies to—
 - a) buildings, and
 - b) sculptures, models for buildings and works of artistic craftsmanship, if permanently situated in a public place or in premises open to the public.
- 2) The copyright in such a work is not infringed by—
 - a) making a graphic work representing it,
 - b) making a photograph or film of it, or
 - c) making a broadcast of a visual image of it.
- 3) Nor is the copyright infringed by the issue to the public of copies, or the communication to the public, of anything whose making was, by virtue of this section, not an infringement of the copyright.

This provision means that the Copyright Law in the United Kingdom allows the act of taking photograph of buildings, which it does not differentiate from private properties, and also provides copyright protection for the photographs.

Though the copyright laws in these countries are protecting the rights that are given to the authors of literary and artistic works and give them the freedom of expression, the laws are silent about the protection of right to privacy that might be violated by the making of artistic works, particularly photographic works of private properties. Right to privacy is also a part of fundamental rights which are protected by the Charter of Fundamental Rights, and therefore the European Union

⁴⁹ *Ibid.*, art. 59.

⁵⁰ Copyright, Designs and Patents Act 1988 (UK), s 62.

member states should also protect the right to privacy of the owners of private properties⁵¹.

2. The Debate: Should the freedom of panorama be protected as freedom of expression or should it be punished as breach of the right to privacy?

Legal issues that might arise from the absence of law regarding the protection of the freedom of expression and the right to privacy in relation to copyright law can be described based on a hypothetical case. As an example, A is a photographer and he photographed B's house because he thought it had an interesting external appearance. A took the photograph from the street which falls into the category of a public place and he displayed the photograph in his online gallery to get people order for the print version of the photograph, although B did not approve about any of this. B found out about it and he felt that his privacy was threatened as many people searched for his house to take photographs in front of it. At the same time, A has produced an artistic work, which is the photograph of the house, and he has copyright protection for the photograph to ensure his freedom of expression.

It is clearly provided in regional and international law that every person is entitled to the right to privacy. On the other hand, there is a freedom of expression. The balance between the freedom of expression and right to privacy is rarely achieved, even in the court judgments. An example for this problem can be found in *Axel Springer Ag v Germany*⁵².

Axel Springer AG is registered company in Germany. It is the publisher of the Bild, a national daily newspaper. The problem in this case started when, in September 2004, the Bild published a front-page article about X, a well-known television actor, being arrested in a tent at the Munich beer festival for possession of cocaine. The article was supplemented by a more detailed article on another page and was illustrated by three pictures of X. The article even mentioned a detail that X had previously been given a suspended prison sentence for possession of drugs in July 2000. The newspaper published a second article in July 2005, which reported on X being convicted and fined for illegal pos-

⁵¹ Bryan A. Garner and Henry Campbell *Black Black's Law Dictionary* (West Publishing, St. Paul, 2009).

⁵² *Axel Springer Ag v Germany*, ECHR, Grand Chamber (Feb. 7, 2012).

session of drugs after he had made a full confession. Immediately after the first article appeared, X brought injunction proceedings against Axel Springer AG with the Hamburg Regional Court, which granted his request and prohibited any further publication of the article and the photographs with court judgment in June 2005. The Court felt that there was the need to protect X's right to privacy.

In November 2005, Hamburg Regional Court prohibited any further publication of almost the entire article and even ordered Axel Springer AG to pay an agreed penalty. The court held in particular that X's right of privacy was violated by prevailing the details to the public. The judgment was upheld by the Hamburg Court of Appeal and, in December 2006, by the Federal Court of Justice. There was also another set of proceedings concerning the second article where the judgment was upheld by the Hamburg Court of Appeal and the Federal Court of Justice in the same ground as the previous proceedings related to the first article.

Despite protecting fundamental rights, in March 2008, the Federal Constitutional Court declined to consider constitutional appeals lodged by Axel Springer AG against the decisions. Axel Springer AG was complained, under art 10 of the European Convention on Human Rights, about the injunction prohibiting any further publication of the articles. It was clear that the German courts' decisions had constituted an interference with the company's right to freedom of expression under art 10 of the European Convention on Human Rights.

The European Court of Human Rights found that nothing suggested that Axel Springer AG had not undertaken a balancing exercise between its interest in publishing the information and the actor's right to respect for his private life. The Court also noted that the articles that were published by Axel Springer AG had not revealed details about the actor's private life, but had mainly concerned the circumstances of his arrest and the outcome of the criminal proceedings against him. Therefore the German Court had violated art 10 of the European Convention on Human Rights.

In relation to the problem about whether A has the right to take and publish the photograph or not, we can refer to the judgment of *Painer v Standard VerlagsGmbH and others*⁵³. This case is about Ms Painer who

⁵³ Case 145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011].

is a freelance photographer who took photograph of children in nurseries and day care centres. In the course of her work, she took several photographs of Natascha K., where she chose the background, deciding on the pose and facial expression, and producing and developing those photographs. After Natascha K., was abducted in 1998, the Austrian police launched a search appeal for Natascha K., in which Ms Painer's photographs were used. Apparently, five newspaper publishers, four German and one Austrian, published those photographs in certain newspapers and known websites without indicating the name of the photographer or, in this case, refer to Ms Painer as the photographer as the publishers claimed to have problem with discovering the author of those photographs.

As Ms Painer considered that the publishing of those photographs infringed her copyright, she applied to the Austrian courts for an order that the publishers immediately cease the reproduction and/or distribution of those photographs, without her consent and without indicating her as author. The *Handelsgericht Wien*, or the Vienna Commercial Court in Austria, before which the proceedings were brought, asks the Court of Justice whether European Union law confers inferior copyright protection on portrait photographs because they are realistic images and the degree of artistic freedom is limited. In addition, the Austrian court seeks to ascertain the conditions under which such photographs can be used by the media, without the photographer's consent, for the purposes of a criminal investigation. It also asks the Court to clarify the conditions in which a protected work can be quoted.

In the judgment, the Court notes that copyright protects only original subject matter, that is to say its author's own intellectual creation. A portrait photograph enjoys the same protection as that conferred by copyright on any other work. It is also stated that the photographers have the right to compose a photograph and there is no law that provided the limitations about objects to be photographed.⁵⁴ This is similar with the joint case of *Football Association Premier League and Others*⁵⁵, where it was provided the judgment that there is the freedom to

⁵⁴ "Judgment in Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and others*" Court of Justice of the European Union (2011) Press Release No 132/11.

⁵⁵ Joined Cases – Case 403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* [2011] and Case 429/08 *Karen Murphy v Media Protection*

take photographs:

In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. Then taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.

Based on these cases, a photographer can obtain copyright for photographs as the photographs are the medium of expression and there is no limitation as to what can or cannot be photographed. The photographer also has the exclusive right to reproduce, distribute, and even to make an adaptation of the photograph, including by the use of computer software. This could mean that the photographers' exclusive rights under copyright, which protects the freedom of expression, tends to override the rights of the subjects or the owners of the objects of the photographs to decide whether the photographs should be published or not, in regards to their right to privacy.

Another case that relates to taking photographs of private properties is *Bernstein of Leigh (Baron) v Skyviews & General Ltd*⁵⁶, where the defendants took an aerial photograph of the plaintiff's house. The plaintiff alleged that the defendants in taking the aerial photo, the defendants had trespassed in the plaintiff's airspace. The defendants admitted taking the photo but claimed that they had taken it whilst flying over an adjoining property. The defendants also argued that if they had flown over the plaintiff's land, then they had the plaintiff's implied permission. The Court found that the defendant was able to take such photograph because there are no limitations in regards to taking pictures. In Germany, *panoramafreiheit* is given to photographs of building that were taken on the public spaces and did not consider it as offending the architects' copyright or the right to privacy of the owner. However, there is a clause in regards to protection of property in the Protocol to the European Convention on Human Rights as follows:⁵⁷

Services Ltd [2011].

⁵⁶ *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] 1 QB 479 (QB).

⁵⁷ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Rights (opened for signature 4 November 1950, entry into force on 3 September 1953), art 1.

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

If a person photographed a private property and the owner feels that there was an intervention of the peaceful enjoyment of that private property, then the photographer may have breached the right of privacy of the owner. In relation with the hypothetical case that was mentioned earlier, A then should have taken sufficient measures to ensure that there was no violation to B's right to privacy. The freedom of expression that lies within the nature of the photographer cannot be used as a reason to defend the act, because it is clear that the limitation of this freedom is other people's right to privacy. However, this is only a theoretical thinking that has not yet had a legal basis in the European Union. The applicable Court should also take into account that the law does not give a higher value for right to privacy and it should be implemented in balance with the freedom of expression.

III. CONCLUSIONS

The protection of human rights in the European region, or fundamental rights as this terminology is used in the European Union law, has started since 1950 when the European Convention on Human Rights was opened for signature. As the European Community developed into the European Union, the protection for fundamental rights becomes tighter with the availability of the Charter of Fundamental Rights.

The protection of copyright was based on the respect towards the creators' freedom of expression that had been put on fixed mediums. The development of copyright protection for photographs does not yet include the freedom of panorama, but there is no restriction as to what kind of objects can or cannot be photographed. As the freedom of expression is a part of fundamental rights which are protected by the Charter of Fundamental Rights, the European Union member states should protect photographic works as a media to "say what a person wants"⁵⁸. This protection is in line with the purpose of copyright law,

⁵⁸ Bryan A. Garner and Henry Campbell *Black Black's Law Dictionary* (West Publishing, St. Paul, 2009).

which is to protect creations, and there are no limitations or exceptions for the making of literary and artistic works in the copyright laws of Italy, Germany, and the United Kingdom. This purpose should be considered as protecting the freedom of expression of the creators, which include the photographers.

The Copyright Directive allows the Member States to have different provisions related to the reproduction right in the use of works of architecture or sculpture, made to be located permanently in public places. This provision in the Copyright Directive may lead to legal issues as to photographers are allowed to photograph private properties that are visible from public places under the freedom of panorama, but it may possibly violate the right to privacy of the owners of the private properties. The protection for right to privacy should be enforced. However, the protection should be in balance with the protection for the freedom of expression, and the case of *Axel Springer Ag v Germany* should be a sufficient reason to put this thinking into action. If the freedom of expression is subject to certain limitations, as stated in *Schmidberger*⁵⁹, then the limitations should be clearly stated to provide legal certainty in the protection of fundamental rights. Thus, the European Union law should provide clear exceptions and limitations regarding the right to photograph private properties in a unified law which binds all the European Union member states, as this step will also lead to a more integrated European Union.

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⁵⁹ Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659.

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