

INFORMATIVE GUIDE ON RECORDING AND EXPLOITING BUILDINGS AND WORKS SITUATED PERMANENTLY ON PUBLIC STREETS

(<http://www.bcncatfilmcommission.com/ca/l/%E2%80%99audiovisual-catalunva>)

Shooting films on public streets may lead to conflicts with the owners of the buildings and works liable to appear in the filming.

By means of the following information, we endeavour to clarify the legal framework which governs shooting carried out on public streets.

IMAGE RIGHTS:

Buildings and works are not subject to image rights; only people are (Organic Law 1/1982, of 5 May, on civil protection of the right to honour, personal and family privacy and one's own image <https://www.boe.es/buscar/act.php?id=BOE-A-1982-11196>). This does not mean that buildings and works do not receive any kind of legal protection, but under no circumstance may we talk about the image rights of a building or a work (not to be confused with the possibility that image rights of people were used during the process of creation and construction/production of the building/work).

Notwithstanding this, on recording a building it may be possible that this cannot be done directly from public streets and that it is necessary to apply for a licence to occupy another space from which to shoot, or that it is necessary to access the interior of the building. **The owners of the space and providers of the services may request payment of a fee for this "occupation" or access, and for other types of associated services or provisions.**

The images of the interior of a building, even if technically speaking they can be captured from public streets or from a third-party space, from a legal point of view are not liable to be captured or exploited under the same conditions as the exterior part. For this type of exploitation, we recommend that specific legal advice be requested.

SCOPE OF THE RIGHT TO RECORD BUILDINGS AND WORKS SITUATED PERMANENTLY ON PUBLIC STREETS:

Works protected by the Intellectual Property Law which are situated permanently on public streets may be reproduced, distributed and communicated freely by means of paintings, drawings, photographs and audiovisual procedures (Art. 35.2 of the consolidated text of the Intellectual Property Law).

In relation to buildings, their consideration as works protected by intellectual property legislation is not without controversy since, on the one hand, the work constructed is not expressly mentioned on the list of works protected by the Intellectual Property Law indicated in Article 10 of the consolidated text of this law (http://portaliuridic.gencat.cat/ca/pjur_ocults/pjur_resultats_fitxa/?documentId=555968&action=fitxa) (while it does expressly mentioned the projects, plans, models and designs of the building) and, on the other hand, there is jurisprudence which considers that buildings should be considered as works protected by the Intellectual Property Law when they are of an "original" nature.

It should be stressed that the list of protected works indicated in the aforementioned Article 10 is not exhaustive and, therefore, it allows for others which are not mentioned.

Therefore, when it is a question of buildings, it is necessary to analyze, case by case, whether the requirement of originality exists in order to determine whether or not they are protected by the Intellectual Property Law.

If this originality does not exist, it should be understood that the building is liable to be recorded from the outside (without intruding inside the same), and that the limitations which the Intellectual Property Law may establish do not intervene in the exploitation of these images, without prejudice to other limits which are indicated below.

If the requirement of originality exists and it is considered that for this reason the building is protected by the Intellectual Property Law, the provisions of article 35 that we mentioned above are automatically applicable to it (the building is liable to be reproduced, distributed and communicated freely by means of paintings, drawings, photographs and audiovisual procedures), **provided that this exploitation does not cause unjustified prejudice to the legitimate interests of the author of the building and that it is not in detriment to the normal exploitation of the work (building) - Art. 40 bis of the consolidated text of the Intellectual Property Law -**. The limits established by this article also apply to the works situated permanently on public streets.

Consequently, the owners of the buildings - whether or not original - may not prevent, a priori, the outside part of the buildings from being photographed or recorded, unless they can demonstrate a priori that their exploitation will cause unjustified prejudice to the legitimate interests of the author or will be to the detriment of the normal exploitation of the work. Furthermore, they may not prevent the images captured from being exploited by means of their distribution and public communication, unless they can demonstrate that this causes the aforementioned prejudice or detriment to the author.

The freedom to photograph and record the outside part of the building must, however, be understood as being without prejudice to the possibility that there are rules which restrict or impose a levy on physical access to a space from which these images can be obtained (such as the licences that it is necessary to obtain to make recordings on public streets) or laws which preserve the privacy of people and of their private spaces (Organic Law 1/1982, of 5 May, on civil protection of the right to honour, personal and family privacy and one's own image http://portaliuridic.gencat.cat/ca/piur_ocults/piur_resultats_fitxa/?documentId=555967&action=fitxa), or other rules which, for reasons of security, prevent the external image of specific buildings from being captured.

In relation to the exploitation of the images already captured, the restrictions should also be taken into account which may arise from the fact that the image of the building has been registered as a trademark (Art. 4 of Law 17/2001, of 7 December, on trademarks http://portaliuridic.gencat.cat/ca/piur_ocults/piur_resultats_fitxa/?action=fitxa&documentId=555990). This registration shall not prevent the exterior image of the building from being captured (photographed/recorded), but shall entail restrictions when it comes to exploiting the images captured. These restrictions are regulated in Article 34 of the Trademark Law (see link above) and consist of the owner of the trademark being able to forbid third parties from being able to use, in the course of trade, without their consent, the images captured to identify products or services which are identical or similar to those for which the trademark was registered, in such a way that the public may be confused in relation to the identity of each of them; or when this use indicates that there is a connection between the goods or services in relation to which the images captured are being used and the owner of the trademark, or, in general, when this use may imply taking unfair advantage of or being detrimental to the distinctive character or to the repute or renown of the aforementioned registered trademark.

When it comes to exploiting these images, the fact that the image of the building has been registered as a trademark only forbids the uses which are indicated above, but shall not prevent, for example, them from being used in the framework of a film or, even, an advertising spot, if this confusion, connection, unfair advantage or detriment does not occur. Professionals are therefore recommended to analyze in depth the restrictions of Art. 34 of the Trademark Law before exploiting the images.

Consequently, **and in so far as the licences to occupy public streets are obtained, when applicable, and other rules are not infringed, such as those which affect the personal and family privacy of people, the owner of a building or of a work situated permanently on public streets may not forbid the exterior part of the building or the work from being photographed or recorded audiovisually.**

COMPETENT AUTHORITY TO CONFISCATE FILMING MATERIAL:

In the event of a dispute, only a judge is competent to order that the images captured be confiscated, destroyed, or not exploited (this order must have been issued even if its enforcement is carried out by other competent authorities, such as the judicial police, etc.). Therefore, **only a judge is entitled to “seize” a memory card or film from a camera.**

It is important to recall that the explanation of the previous section refers exclusively to the capture of the exterior part of buildings situated on public streets and that it does not apply to the capture of images of people or of the interior of buildings.

In any case, this note is a guide for professionals from the audiovisual sector and is not of a regulatory nature. In the event of doubt or dispute in the specific exploitation that it is intended to undertake of a work, it is recommended to consult specialized legal advisers.