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When Copyright Meets Digital Cultural Heritage: Picturing an EU Right to Culture in Freedom of Panorama and Reproduction of Public Domain Art

Giulia Dore, Pelin Turan | October / 2024

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ABSTRACT

Over the years, there has been an increasing interest in the cultural heritage, particularly within the digital context. This has brought to light numerous opportunities and challenges that however require a careful consideration of fundamental rights, such as the public's entitlement to participation in cultural life, i.e. the right to culture. Preserving the communal aspect of the cultural heritage is pivotal in unlocking the full potential of the right to engage in cultural activities. Within the intricate landscape of norms and policies encompassing diverse and often competing interests, the primary focus of analysis is on the copyright acquis, which may be optimised for the public's enjoyment of digital culture. This article aims to establish connections between two EU copyright provisions: the Freedom of Panorama (FoP), a discretionary exception under Art. 5(3)(h) of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc), allowing the reproduction of cultural goods visible from public places, and the reproduction of visual artworks in the public domain under Art. 14 of the Directive on copyright in the digital single market (CDSMD). Through a comparative analysis of how certain Member States have implemented these provisions, the article proposes potential paths for a balanced and thoughtful assessment of the interests related to digital cultural heritage that should lead to advancing the right to culture. While it would be wise to consider a supra-national legislative intervention that mandates the FoP exception, Member States should at the same time uphold the scope of Art. 14 of CDSMD, especially when it might be pre-empted by other regulations, such as those governing cultural heritage. By examining the foundations of these two provisions and seeking their nuanced interpretation, the authors anticipate the coexistence of a vital component of the EU right to culture, while acknowledging that the journey toward its comprehensive realization is far from over.

CONTENTS

KEYWORDS

Cultural heritage – Digital culture – Copyright – Exceptions and limitations – Freedom of panorama – Reproduction of public domain art – Right to culture

ABOUT THE AUTHORS

Giulia Dore (email: giulia.dore@unitn.it; personal web page: https://webapps.unitn.it/du/it/Persona/PER0011086/Didattica) holds a Ph.D. in European and Comparative Legal Studies (Doctor Europaeus) from the University of Trento and she is currently Researcher at the University of Trento –Department of Economics and Management. She teaches Copyright law and Art and Business Contract law. Her research interests include the interplay of social and legal norms in the context of intellectual property, the legal framework of art, IP and managerial implications on the protection and enhancement of cultural heritage, and the broader development of Open Science. Among others, she is a member of Associazione Italiana di Diritto Comparato (AIDC), Società Italiana per la Ricerca nel Diritto Comparato (SIRD), Associazione Italiana per la promozione della Scienza Aperta (AISA), Società Italiana Esperti di Diritto delle Arti e dello Spettacolo (SIEDAS), International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) and International Council of Museums (ICOM).

Pelin Turan (email: pelin.turan@santannapisa.it) is a postdoctoral research fellow at Scuola Superiore Sant'Anna; Institute of Law, Politics and Development (DIRPOLIS) and LIDER-Lab since January 2022. She contributes to several EU projects, including reCreating Europe (Horizon 2020), REBOOT and OpenMusE (Horizon Europe), BRIEF (NextGenerationEU), SoBigData RI PPP (Horizon Europe). Pelin holds an SJD (Doctor of Juridical Science) degree in International Business Law from Central European University (CEU). Drafting her doctoral dissertation by employing critical lenses to copyright and trademark laws, Pelin conducted part of her doctoral research at Columbia Law School as a visiting scholar. She obtained her LL.M. degree in Intellectual Property Law from the University of Edinburgh, where her studies were funded by the UK Government's Chevening Scholarship programme. Pelin was certified as a trademark and patent attorney by the Turkish Patent Institute in 2014, and she has been a member of the Izmir Bar and Association of Turkish Bars since 2012.

When Copyright Meets Digital Cultural Heritage: Picturing an EU Right to Culture in Freedom of Panorama and Reproduction of Public Domain Art [1]

Giulia Dore and Pelin Turan

1. Introduction

Cultural heritage (CH) permeates our life. It plays a significant role in revealing and protecting objects, natural and cultural spaces, history and values, and more broadly, the identity of individuals and communities. It also influences economic and social innovation patterns, thus becoming a key topic of scholarly debate and policymaking. Overall, its public and universal nature is beyond doubt, and the need to safeguard this special public dimension should be similarly uncontested.[2] Within this framework, it is imperative to acknowledge the extraordinary role of cultural heritage institutions (CHIs) in safeguarding and enhancing access to, enjoyment and use of cultural materials by all.[3] Such awareness is crucial to achieving the full potential of the right to participate in cultural life, encompassing "participation", "access" and "contribution" to cultural life,[4] as framed

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Giulia Dore authored Sections 2 and 5, Pelin Turan authored Sections 3 and 4. They both authored the introduction and conclusions. All findings, interpretations, and conclusions herein represent the authors' views. All errors are their own. The work is based on research funded by the European Union under the H2020 project ReCreating Europe (GA No. 870626) and the NextGenerationEU project ECS000043 - Innovation Ecosystem Program "Interconnected Northeast Innovation Ecosystem (iNEST)" The authors are especially grateful to Marta Arisi, Magali Contardi, Roberto Caso, Caterina Sganga and Maria Della Lucia for their insightful comments, and also to all colleagues contributing to the discussion, including Péter Mezei, Cristiana Sappa and Pınar Oruç. They also wish to thank the experts for providing the data on which part of the analysis was made, especially Philipp Homar and Yannos Paramythiotis.
[2] See, *inter alia*, McLean 2006, pp. 3–7, and Harvey 2001, pp. 319–338 (who insists on the development of heritage as a process to produce identity, power and authority).
[3] Cf., *inter alia*, Stamatoudi 2022; Elgar and Sappa 2022; Elgar 2022, p. 233; Borowiecki et al. 2016; Porsdam 2015; Derclaye (ed.) 2010.
[4] The multipart scope of the right is addressed by many, including Donders 2020, pp. 379–398 and Blake 2015, p. 299,

by Art. 27 Universal Declaration of Human Rights (UDHR) and Art. 15 International Covenant on Economic, Social and Cultural Rights (ICESCR).[5]

Nevertheless, CH is not an easy concept to address or define. There is copious literature that endeavours to bestow on it as a static contextualisation and portray it as constant as possible.[6] This interest may not yet be a prerogative of scholars[7] but is often found in the increased attention of policymakers. In the latter context, CH has indeed been attributed many meanings and classifications. Beginning with the broad definitions by UNESCO in its landmark conventions,[8] CH has been variously classified as natural or cultural, tangible (material) or intangible (immaterial), with each of these distinctions trying to enclose and exhaustively depict one of its many nuances.

A notion of a "common heritage of Europe" is mooted by the Council of Europe in the most recent Framework Convention on the Value of Cultural Heritage for Society (Faro Convention),[9] which also introduces the concept of heritage community.[10] Prompting a shared social responsibility towards heritage on the part of the European Union (EU), the notion embraces the broadest scope of CH, with a dynamic and interactive nature intertwined with history and the environment. Within its wide scope, the Faro Convention foresees limitations to the exercise of private rights that may be justified in the public interest. The Convention also promotes a right to CH that includes engagement with the enrichment and enjoyment of heritage, a signal of the health of society and a better quality of life in the community.[11]

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[5] UN. General Assembly 1948; UN. General Assembly, 1966, UN. Committee on Economic, Social and Cultural Rights (CESCR) 2009; UN CESCR 2020.

[6] *See* Yu 2022, p. 294; Blake 2000, pp. 61, 67–68; Prott and O'Keefe1992, pp. 307–320.

[7] Among the most recent contributions, Macmillan 2021, acknowledging the delicate and often distressed relationship between CH and intellectual property, advocates a dynamic notion of CH, where the role of the community is important to overcome that of the market.

[8] UNESCO 1954; UNESCO 1970; UNESCO 1972; UNESCO 2003.

[9] Council of Europe 2005.

[10] Meant as a variable geometry avoiding reference to any specific community, the concept of heritage communities indicates that there can be no cultural life without a community (*cf*. Art. 27 UDHR). *See* Explanatory Report to the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, CETS No. 199, 4–8; Zagato 2015, pp. 141–168.

[11] Explanatory Report to the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, cit., 6.

Regardless of the specificity of these definitions and classifications,[12] in the attempt to adopt a more holistic approach to the subject[13] and despite the variability that still characterises each given local context,[14] in this paper digital CH shall be understood as the digital representation of analogue tangible and intangible cultural content, as well as the process of applying digital technology and media to preserve and promote analogue CH, thus leaving the born-digital elements of CH out of the immediate scope.[15] It is true that the normative context in which cultural heritage lives and functions is the result of a complex intersection of different rules and policies, which are all to be considered if we are to understand the breadth and scope of CH's protection and valorisation - not only CH-specific laws, but also copyright or other intellectual property rights provisions that apply to CH, data protection, and the broader human rights framework. All of these bear different concurrent and often competing or conflicting interests.[16]

However, the in-depth appreciation of all the above elements is beyond the scope of this paper. For the present study, the foremost focus of the analysis is therefore on one aspect, namely the copyright *acquis*, seen as either the major obstacle to or enabler of the ideally open-oriented dimension of digital CH. This binary attitude interestingly echoes the two-fold line of intervention by the EU. On the one hand, in the field of CH as such, it essentially defers to national rules, although still within the broader framework of international law that largely sets the stage for the protection and development of CH. On the other hand, on the grounds of copyright and data protection, whose protection is also articulated at national and supranational levels, it plausibly intervenes with stronger emphasis and regulative actions.

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[12] Lowenthal 2005, pp. 81–92.

[13] Praising a holistic approach that implies the necessary immaterial nature of any material heritage, Giannini, I beni culturali, in Riv. Trim. Dir. Pubbl, 1976, 3 ss., also recalled in Morbidelli, Il valore immateriale dei beni culturali. I beni immateriali tra regole privatistiche e pubblicistiche – Atti Convegno Assisi (25–27 ottobre 2012), AEDON, 2014, 1, http://www.aedon.mulino.it/archivio/2014/1/morbidelli.htm.
An encompassing and inclusive approach to the notion of culture, in general, is proposed by the UN. CESCR 2020; *cf*. Yu 2022, 298.

[14] Ahmad 2006, pp. 292–300; Munjeri 2004, pp. 12–20.

[15] For a detailed overview of the concept from the angles of different disciplines, *see* Kremers 2019; Ch'ng et al. 2013; Kalay et al. 2008; Cameron and Kenderdine 2007; Smith 2002, pp. 41–51; Karp 2004, pp. 45–51.

[16] On this *see* Yu 2022, p. 305, who illustrates three main instances in which such conflict arises, one of them being the digitisation, sharing or dissemination of cultural materials by CHIs.

Following these introductory notes, the paper is structured as follows. The next section offers a synthesis of the strategies of the EU, revealed by a growing body of legislative and policy initiatives which in different ways influence the appreciation of digital CH and the prospects of its unconstrained access and reuse. This sets the background for the subsequent analysis in the third section, which explores the EU and national copyright framework for CH, focusing on exceptions and limitations (E&Ls) to enable access to and use of cultural content. It also touches upon the public domain when discussing the reproduction of public domain art and the impact of paying for the public domain on access to and use of CH. A fundamental backdrop for the study relates to the still limited harmonisation of the regulatory framework across the EU.

To this extent, two exemplary issues are chosen to illustrate the two main and somewhat conflicting approaches of the EU towards access to and use of CH. Hence, section four focuses on the optional "freedom of panorama" (FoP) exception provided by Art. 5(3)(h) of Directive 2001/29/EC (InfoSoc), which permits the digital reproduction of works located in public spaces.[17] Section five discusses the more recently introduced Art. 14 of Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (CDSMD) as a mandatory rule on the reproduction of works of visual art in the public domain.[18] This precise choice also responds to the need and opportunity to find a middle analysis ground from the research undertaken in the project from which this paper originates, as the two issues cover the angles of both the end-user and the CHIs or GLAM (Galleries, Libraries, Archives and Museums) perspectives and focus on their impact on public enjoyment of CH.[19]

Similarly, in terms of methodology, the paper builds on the legal mapping undertaken by the reCreating Europe project to provide an overview of selected Member States (MSs): Austria, Germany, Greece,

[17] 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, OJ L 167, 22/06/2001 P. 0010 – 0019.

[18] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.), PE/51/2019/REV/1, OJ L 130, 17.5.2019, 92–125.

[19] The first is investigated under WP2 and the second under WP5 of reCreating Europe. More information on the stakeholder-centric slant of the project can be found at https://www.recreating.eu/stakeholders/.

Hungary, Ireland, Italy and Lithuania. The criteria for the selection include the material scope of E&Ls, the intersection with other copyright norms and cultural heritage laws, and case law on the topics of interest. While highlighting differences and similarities in terms of their material scope, permitted acts, and limitations, the work seeks to outline possible intersections between these provisions. For completeness, other copyright-related issues that impact (digital) CH will be mentioned, namely orphan works, out-of-commerce works, and the digital preservation of CH, although not as extensively as the two aforementioned exemplary issues.

What emerges in the conclusions is the confirmation of the significant impact that cultural heritage-related provisions, within the exemplary context of the copyright rules considered here, can have on the objective of safeguarding and enhancing access to, enjoyment and use of cultural materials by all. Acknowledging the complexity of the regulatory framework, the paper suggests future trajectories for a balanced and meaningful assessment of interests in the context of digital CH, leading to the full realisation of the universal right to participate in cultural life.

2. Digital Cultural Heritage: An Overview of the EU Agenda, Policies and Law

The regulatory framework affecting CH, including and especially its digital form, features the coexistence of heterogeneous norms and standards. At supranational level, numerous instruments are dedicated to safeguarding and promoting CH in all its nuances. The first to come to mind is the far-reaching UNESCO conventions that have, since the 1950s, shaped individual national approaches and policies towards cultural heritage, and that in some cases have also been ratified by the EU.[20]

The EU has indeed maintained a distinctive approach towards the protection and enhancement of CH with its own instruments aimed at supporting the national initiatives of MSs,[21] the latest being the

[20] *See supra* note 7.

[21] Earlier focus on the conservation of the tangible heritage was shown with the Valletta and the Granada Conventions, aimed respectively at promoting the conservation and enhancement of the archaeological heritage within the urban and regional planning policies and at reinforcing the policies for the conservation and enhancement of Europe's heritage. Council of Europe, Convention for the Protection of the Archaeological Heritage of Europe (revised), signed in Valletta on 16 January 1992 and

aforesaid Faro Convention.[22] Most interestingly for this paper, the Convention considers the interaction between access to (broadly meant as including engagement with) CH and economic progress, against the backdrop of rapid digital developments. Acknowledging the problem of finding a fair balance of interests, which arguably goes beyond the CH sector, it advocates seeking a fair accommodation of the need to grant the greatest possible free access to cultural materials with the need to provide creators or owners with fair rewards.[23] However, it provides no further guidance on achieving this difficult but essential compromise.

Indeed, any consideration regarding the regulatory framework and, overall, the EU's strategic plans for the protection and promotion of CH, necessarily implies adopting some premises regarding the EU system of competencies in the matter, which are strictly limited to supporting MSs and their cooperation in pursuing the goal of safeguarding and enhancing CH. This peculiar setting largely depends on the traditional conception of CH as belonging to the national political sphere. Therefore, no specific competencies support the EU agenda, although this does not exclude a solid commitment to oversee and guide MSs in the process. In this sense, the EU can use Art. 6c of the Treaty on the Functioning of the European Union (TFEU) to take actions to support, coordinate and supplement the activities of MSs. Article 167 TFEU also encourages cooperation between MSs and with third countries. Such a pledge is also in line with Art. 3 of the Treaty on European Union (TEU), according to which the EU contributes to the development of the cultures of MSs, and supports the development of a common European CH. Given this limited scope of intervention, the EU measures are mainly limited to soft law instruments such as communications, recommendations and resolutions, all contributing to the European agenda for culture.[24] Alongside the aforesaid initiatives

entered into force on 25 May 1995, CETS No. 143; Council of Europe, Convention for the Protection of the Architectural Heritage of Europe, (Granada, 1985), signed on 3 October 1985 in Granada (Spain) and entered into force on 1 December 1987, CETS No. 121.

[22] Council of Europe, Framework convention on the value of cultural heritage for society, cit.

[23] Explanatory Report to the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, cit., 12.

[24] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalising world, SEC (2007) 570, COM/2007/0242 final; Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the regions. A New European Agenda for Culture, COM/2018/267 final.

that signalled the interest of the Commission and the Committee in influencing and coordinating the national laws on the matter, the EU has shown, over the years, an increased interest in promoting actions that provide concrete support to the safeguarding and valorisation of CH in Europe, mostly through transnational cooperation and research activities.

Despite the aforesaid uncertainties, in theory, the direction delineated by the EU appears established and well-defined. The idea that CH deserves careful attention is also reinforced by the need to ensure that it is given special consideration in the digital framework. To this extent, the EU has been quite proactive in addressing the specific subject of digital CH, especially encouraging MSs to adopt measures to promote digitisation and ensure access to and use of digital cultural material. This was pursued through the adoption of the Recommendations on the digitisation and online accessibility of cultural material and digital preservation of 2006 and 2011.[25] At the same time, the EU goes beyond digitised cultural material and reinforces its proactiveness with the Recommendation on Common Data Space for the cultural sector of 2021,[26] which fits its wider data strategy,[27] and it has recently set up the common European data space for CH, aimed at expediting digital cultural transformation and promoting the creation and reuse of content in the cultural and creative sectors and which is being deployed by a consortium led by Europeana.[28]

The EU agenda for creating a digital cultural space can be read in tandem with the reforms in the EU copyright *acquis*. Indeed, it paved the way for the modernisation of EU copyright law, also in parallel with the WIPO-administered internet treaties,[29] through the formulation of specific provisions targeting the digitisation and online accessibility of

[25] Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation (2006/585/EC), OJ L 236, 31.8.2006, 28–30; Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation (2011/711/EU), OJ L 283, 29.10.2011, 39–45.

[26] Commission Recommendation (EU) 2021/1970 of 10 November 2021 on a common European data space for cultural heritage, C/2021/7953, OJ L 401, 12.11.2021, 5–16, http://data.europa.eu/eli/reco/2021/1970/oj.

[27] https://digital-strategy.ec.europa.eu.

[28] The initiative, commenced in September 2022, builds on the Europeana Digital Service Infrastructure (Europeana DSI) and the Europeana Strategy 2020–2025. For updated information on the current status and strands of work, visit: https://pro.europeana.eu/page/common-european-data-space-for-cultural-heritage.

[29] Commission Communication [COM(2015) 626 final] Towards a modern, more European copyright framework.

CH.[30] Launched in 2000 with the Lisbon strategy and the *e*Europe 2002 action plan,[31] the socio-political discourse concerning the EU's transition to a knowledge-based economy model has ultimately emphasised "digitisation, online accessibility and digital preservation of Europe's collective memory,"[32] comprising in-print materials (books, journals, newspapers), photographs, museum objects, archival documents and audio-visual materials.

Considering all this, the EU has been relatively active in the harmonisation of copyright and the regulation of data with a direct or indirect impact on (digital) CH. By exercising its specific competence to boost the EU single market, the Union has adopted several directives aimed at harmonising copyright at both vertical and horizontal levels. On the one hand, these initiatives have, to varying degrees, reinforced the exclusive rights of the copyright holders, and on the other, cautiously expanded the more limited E&Ls to copyright that benefit specific categories of users or the wider public. As far as concerns the latter, the main points of reference are the InfoSoc Directive, which introduced mainly non-mandatory exceptions to the rights of reproduction and communication and making available to the public,[33] and the CDSMD, which extended the list of E&Ls by adding a number of mandatory ones expressly aimed at making copyright fit for the new digital challenges.[34] Both instruments contain provisions relevant to (digital) CH, with a specific impact on its access and use practices.

Directive 2012/28/EU (Orphan Works Directive, OWD) is also worth noting, for it facilitates the digitisation, preservation, digital availability and accessibility of works and other subject matter contained in the collection of CHIs and GLAM which are essential to the European cultural space yet whose authors cannot be identified or located through a diligent search. Above all, the OWD remains to date the most criticised EU directive for its exceedingly complicated

[30] Commission Communication [COM(2008) 513 final] Europe's cultural heritage at the click of a mouse: Progress on the digitisation and online accessibility of cultural material and digital preservation across the EU; Commission Recommendation of 27 October 2011 (2011/711/EU) on the digitisation and online accessibility of cultural material and digital preservation.

[31] Council Resolution of 25 June 2002 on preserving tomorrow's memory – preserving digital content for future generations [2002] C 162/02.

[32] Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation, cit., Recital 1.

[33] Directive 2001/29/EC, cit.

[34] Directive (EU) 2019/790, cit.

operation resulting in a minimal application,[35] which, instead of clarifying the regulatory framework, adds further legal uncertainty.[36]

In addition to copyright, the EU exercises specific competence in public sector information, such as with Directive 2003/98/EC (Public Sector Information, PSI) and its subsequent reform. Particularly after 2013, when some cultural entities were included in its material scope, PSI has played a relevant role in mandating that documents within the scope of the Directive, now including cultural data, shall be re-usable with no constraints other than those expressly contemplated. This has been confirmed by the latest Directive 2019/1024, (Open Data Directive, OPD), the recitals of which deliberately address digital CH to reaffirm the principle that public domain material, once digitised, should stay in the public domain, and to emphasise the noteworthy value of digital cultural resources held by CHIs, which, together with their metadata, have a massive potential for innovative re-use.[37]

Within such an articulated framework, the intersection of different rules from CH law, copyright law and data regulation, where the role of each normative element or its primacy over another in the event of conflict, remains unclear. For instance, in some cases, the opportunity afforded by copyright E&Ls may be relatively constrained if not nullified by national rules dedicated to CH. As will be illustrated, this is particularly true regarding the implementation of Art. 14 CDSMD by some Member States, and is also the case with other provisions comprising the broader EU copyright framework.

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[35] A criticism that also comes from the same EU Commission that very recently confirmed the major non-application of the OWD and acknowledged the stakeholder's disagreement on whether there have been any improvements facilitating and promoting the digitisation and dissemination of orphan works. However, for now, it concludes that there is no need for a review of the Directive or to propose other measures, while the monitoring of its application will continue. European Commission, EC Staff Working Document, Report on the application of the "Orphan Works Directive" 2012/28/EU, 6 December 2022, SWD (2022) 412 final, 8–9, https://data.consilium.europa.eu/doc/document/ST-15742-2022-INIT/en/pdf.
The ECSWD relies on different sources, especially the independent study: European Commission, Directorate-General for Communications Networks, Content and Technology, McGuinn, et al. 2012, Study on the application of the Orphan Works Directive (2012/28/EU): final report, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2759/32123.

[36] *See*, *inter alia*, Schroff et al. 2017, pp. 286–304.

[37] *Cf*. Recital 49, which nevertheless acknowledges the opportunity of an otherwise undefined limited period of exclusivity to recoup the investment for digitisation purposes, and recital 65, which highlights how the deployment of such valuable public sector information resources may have a considerable impact, especially on specific sectors such as education and tourism.

3. A Narrow Overview of the EU Copyright Rules Relevant to Digital Cultural Heritage

With the initiatives commenced in 2005 for the launch of digital libraries,[38] a significant portion of the EU's attempts to adjust the existing copyright rules was aimed at eliminating the complications imposed by the so-called "20th century black hole."[39] Given that only part of the materials in the collections of CHIs and GLAM was in the public domain,[40] the majority of E&Ls deliberately addressed these institutions, emphasising the central role of CHIs in preserving and maintaining CH for future generations and facilitating the public's engagement with and enjoyment of culture. In such a legal landscape, some copyright provisions, e.g. FoP and the reproduction of public domain artworks, stand out for their focus on end-users by directly concentrating on public access to and use of CH. For this reason, this section spotlights the broader copyright context in which the two said provisions function for both CHIs and end-users, ultimately supporting the idea that their proper implementation may provide a primer for the EU public's right to access culture and participate in cultural life.[41]

The InfoSoc Directive plays a pivotal role in the provision of direct public access to CH as such, as it constitutes a cornerstone of the EU copyright *acquis* and contains the most extensive set of copyright E&Ls. Despite primarily being optional, the bundle of E&Ls encompassed by the Directive either directly or indirectly empowers members of the public by giving them access to and use of in-copyright and digital elements of CH. For instance, Art. 5(2)(a) of the Directive allows the making of reproductions of works, except for sheet music, on paper or any other similar material through reprographic reproduction techniques, such as photography or photocopying. Similarly, Art. 5(2)(b) permits the reproduction of works on any medium, if it is for private use and does not serve any direct or indirect commercial purpose.[42]

In addition, there are E&Ls dedicated to enabling the participation

[38] Commission Communication [COM(2005) 465 final] 2010: Digital Libraries.
[39] Boyle 2009.
[40] Commission Recommendation [2006] 236/28, Recital 10.
[41] For a comprehensive analysis of the E&Ls *see* Sganga et al. 2023; Priorat et al. 2021. D.L Report on the existing legal framework for Libraries and Archives (LA) industries in the EU. Zenodo.
[42] It is worth noting uses that are subject to fair compensation for the author of the work in question. *See* Directive 2001/29/EC, Art. 5(2)(a); *ibid*, Art. 5(2)(b).

of members of the public in cultural life by creatively engaging with CH. Besides FoP, which is analysed in detail in section three below, Art. 5(3)(d) InfoSoc allows the quotation of excerpts from a work that has been lawfully made available to the public, provided the quotation is for the purpose of criticism or review.[43] Along the same line, Art. 5(3)(k) helps foster creativity by allowing the public to use an in-copyright work to produce a parody, pastiche, or caricature. Lastly, Art. 5(3)(i) provides for the inclusion by anyone of a work or object of related rights in other material, if this use is not intended for the faithful reproduction of such works or other subject-matter but constitutes an "incidental" use of such.

To reinforce the public's access to CH, InfoSoc also pays special attention to the role of CHIs and includes several E&Ls addressed to these institutions that are indirectly but indeed crucial to making CH more accessible to members of society. For instance, Art. 5(2)(c) InfoSoc contains a broadly worded provision allowing CHIs to reproduce works, unless for direct or indirect economic or commercial purposes. While this provision applies mainly to the preservation and indexing practices of CHIs, as they do not have an external aspect (e.g. making available to the public), Art. 5(3)(n) InfoSoc provides the legal basis for public access to works and other subject-matter not subject to purchase or licensing terms, for research and private study purposes; however, this use must be at the dedicated terminals on the premises of such publicly accessible institutions.[44]

This latter group of E&Ls seems to have informed the EU's approach in setting up new categories of copyright rules, given that the Directives that followed InfoSoc (with the sole exception of the Marrakesh Directive) focus on CHIs or other public entities that play an intermediary role in the public's engagement with CH. Following this trend, Directive 2006/115/EC[45] (Rental Directive) contains a provision that does not explicitly mention CHIs but encourages MSs to provide for a legal regulation enabling the public lending of works and other subject

[43] End-users are expected to comply with fair practices and quote the original only to the extent necessary for the intended use, while also attributing the author of the work in use. *See* Directive 2001/29/EC, Art. 5(3)(d).

[44] Attempts to clarify the scope of dedicated terminals have been made by the Court of Justice, as in CJEU, 11 September 2014, case C-117/13 11 September 2014, *TU Darmstadt v. Eugen Ulmer*, ECLI:EU:C:2014:2196.

[45] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right, lending right and certain rights related to copyright on intellectual property [2006] OJ L 376/28.

matter, along with corresponding remuneration for the authors and rightsholders.[46] The OWD[47] introduces copyright rules primarily addressed to CHIs, given their ability to reproduce and disseminate cultural content. Dedicated to promoting access to works and other subject matter whose authors cannot be identified or located,[48] it enables CHIs to open their permanent collections to the public simply by enabling them to reproduce and make available to the public certain types of works, such as books, journals, newspapers, magazines and other similar writings, cinematographic works and phonograms, as well as works and other subject-matter embedded or incorporated in any of these works or phonograms.[49] However, the OWD was doomed *ab initio* and, having become the object of widespread criticism, remains largely unapplied.[50]

Enhancing access to works no longer in commercial circulation has also been on the EU's cultural and copyright agenda. Initially consolidated in a non-binding resolution agreed upon with CHIs,[51] the pressing issue of out-of-commerce works is encompassed by CDSMD.[52] Article 8(1) CDSMD is dedicated to the extended collective licensing mechanism. It envisions a non-exhaustive licence to be concluded between collective management organisations (CMOs) and CHIs to allow the latter to reproduce, distribute, communicate or make available to the public out-of-commerce works and other subject matter permanently in their collections, though only for non-commercial purposes. Art. 8(2) CDSMD then introduces a mandatory exception to help CHIs achieve the same end without a licence agreement. The same provision requires the attribution of the author or any other identifiable rightsholders while permitting the disclosure of out-of-commerce works on non-commercial websites.

The regulations on out-of-commerce works are not the only E&Ls included in the CDSMD that target the accessibility of CH under copyright protection. In particular, Art. 6 CDSMD, once again addressed

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[46] *See* Art. 6(1).
[47] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2021 on certain permitted uses of orphan works [2012] OJ L 299/5.
[48] *See* Art. 2(1).
[49] *See* Arts. 1(2), 1(4), 6.
[50] *See supra*, Sec. 2, p. 7.
[51] "Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works" (European Commission, 20 September 2011). https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_619.
[52] Directive (EU) 2019/790, cit.

to CHIs, provides for a mandatory exception permitting the reproduction, including digitisation, of works and other subject matter contained in these institutions' permanent collections. While remaining within the boundaries previously set by Art. 5(2)(c) InfoSoc, this provision at least no longer requires a non-commercial intent. Neither does it adopt a technologically neutral language, but opens up the possibility of digital reproduction and preservation, although only for the internal use of the institutions concerned.

Compared to the EU copyright rules concerning the in-copyright elements of CH, those dealing with the CH in the public domain constitute a more limited legislative attempt, which enhances the discretion of MSs to build a legal framework shaped according to national cultural policies and priorities.

Directive 2006/116/EC[53] (Term Directive) constitutes the main legal instrument in this context; even though it does not necessarily "regulate", it contours certain aspects of the limits of the public domain. Given its overarching aims and objectives, it clearly expresses an interest in longer terms of copyright protection and related rights compared to those set by the WIPO-administered treaties.[54] Thus, it contributes to achieving a smoothly functioning single market[55] by harmonising the term of protection for copyright and related rights to performances, phonograms, first fixations of film and broadcasts, while also standardising the calculation of the term of protection as such.[56] However, it must also be acknowledged that the Directive introduces certain regulations that risk shrinking the public domain, as it enables the revival of copyright in previously unpublished works that are in the public domain as well as critical and scientific publications of works in the public domain, for 25 and 30 years respectively from the time the work was first lawfully published or lawfully communicated to the public.[57]

Further, Directive 2009/24/EC[58] (Software Directive) implicitly adds to the public domain, as Art. 1(2) of the Directive excludes from

[53] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ L 372/12.

[54] *See* Recitals 6, 10.

[55] *See* Recital 3.

[56] *See* Recital 4.

[57] *See* Arts. 4, 5.

[58] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the protection of computer programs [2009] OJ L 111/16.

copyright protection the ideas and principles that underlie the elements of a computer program, including those that underlie the interfaces of the software. Most recently, Art. 14 CDSMD, which will be critically assessed under section four of this paper, introduces another EU provision that expressly addresses the public domain. However, it only relates to a minimal aspect of it.

As a final remark on the assessment of the public domain in the EU legal context, it is also worth noting that for the time being the national laws of five MSs provide for a paying public domain scheme.[59] The features of these schemes vary from country to country, thus imposing certain further complications on end-users' unrestricted reuse of cultural content already allocated to the public domain.[60]

In the absence of any concrete supranational intervention to contour the regulations on the intersecting borders of the public space and public domain, Art. 5(3)(h) InfoSoc and Art. 14 CDSMD constitute the *key* legislative tools to improve public engagement with CH, particularly through digital platforms, because not only are both provisions products of the EU's digital agenda, they are also addressed to the end-users of cultural content. For this reason, the remainder of this paper investigates the interplay of, first, the in-copyright elements of CH and FoP, and then, the out-of-copyright features of CH and Art. 14 CDSMD, critically analysing their potential to facilitate public access to CH in public spaces and the public domain.

Both provisions reveal the potential for an increasing right to culture in the context of digital CH. However, to attain this goal, they should be construed and applied with the broadmindedness that has been praised here, which also implies taking account of their systematic application in the broader legal framework. First, to the extent they target cultural heritage, both dispositions can be impacted by CH laws that may frustrate the objective of enhancing access and use, which would suggest specific normative interventions to overcome potential conflicts. Second, the interplay of these provisions with other legal domains, such as data regulation, must be taken into consideration, especially for drawing the limits of the publicly accessible space as well as the public domain. Third, FoP and the reproduction of public domain art should be interpreted in the broadest way possible to guarantee that the objectives they pursue are satisfied.

[59] These Member States are Bulgaria, Croatia, France, Hungary and Slovakia.
[60] *Cf*. Sganga et al. 110–441.

4. Freedom of Panorama

FoP is a long-standing element in the European copyright tradition. FoP, or *Panoramafreiheit,* was articulated and first used as a legal concept in the 1990s in the Swiss legal context, but the origins of FoP as a legal reality can be traced back to the early roots of German copyright discourse.[61] It was first introduced into German copyright law in 1840 by the proclamation issued by the Kingdom of Bavaria,[62] and ratified by the *Kunsturhebergesetz* of 1876 (KUG 1876).[63] Against this backdrop, FoP can be acknowledged as an archetype of the legislative instrument intended to strike a balance between the authors' copyright and the freedom of expression of the public at large, given its response to the advances in mechanical reproduction enabled by technology such as industrial printing presses, photography and lithography.[64] Indeed, according to Sec. 6(2) KUG 1876, FoP constitutes an exception to the copyright of authors whose works of fine art are permanently located in public places.[65] This provision enabled the reproduction of works as such, without the authorisation and remuneration of the author, except for the cases in which the reproduced work is in the same form as the original.[66]

FoP as a copyright exception spread beyond the borders of the German Empire and was transplanted into the laws of several other European countries.[67] Regardless of this recognition, it was not included in the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Berne).[68] Nor was Art. 9(2) Berne sufficient for the signatory States to adopt new laws providing for copyright E&Ls corresponding to that of *Panoramafreiheit*.[69] In fact, the gradual advance of digital

[61] T. Nobre 2016; Rosnay and Langlais 2017

[62] *Cf*. Rosnay and Langlais 2017, pp. 4–5.

[63] Gesetz, betreffend das Urheberrecht an Werken der bildenden Künste (Law on Copyright in Works of Fine Arts), vern 9.1.1876, in *Deutsches Reichsgesetzblatt Band* (RGBI) 1876, Nr. 2, Seiten 4–8.

[64] Rosnay and Langlais 2017, pp. 4–5.

[65] KUB 1876, Sec. 6(2).

[66] *Ibid*.

[67] Barrett 2017, pp. 261, 265; LaFrance 2020 pp. 597, 627.

[68] Berne Convention for the Protection of Literary and Artistic Works 1967.

[69] Article 9(2) leaves the discretion of introducing any exceptions or limitations to this right to the national laws of the signatory parties, while also requiring them to comply with the three-step test.

technologies and the widespread sharing of cultural content through the internet have led to the national courts employing the so-called three-step test to *limit* FoP and thus end-users' participation in digital culture by generating and sharing digital content. Indeed, in the notorious *Wikimedia* case,[70] the Swedish Supreme Court applied the three-step test to rule that the exploitation of images of visual works in outdoor public spaces through online content-sharing platforms does not fall under FoP – even if the act does not have an economic return.[71] These circumstances show that end-users, as succinctly explained by Felix Reda, seem to have no option but to determine whether a publicly located work is copyright protected and to have sound knowledge of licensing systems, especially if they want to enjoy their fundamental cultural rights and freedoms.[72] As is evident from the *Wikimedia* case, the lack of a uniform approach in recognising and adopting an FoP exception, which would also take account of the particularities of the digital era, fails to prevent the legal liability of these stakeholders as well as online sharing platforms for copyright infringement, and even less does it secure for end-users freedom of expression and participation in cultural life, especially in the digitised world.[73]

Despite the prevailing silence of the primary IP treaties on FoP, as of today most of the EU MSs provide for an E&L to copyright to guarantee FoP. This pan-European recognition of FoP has been achieved mainly by the EU harmonisation endeavours, which paved the way for the consolidation of FoP in the InfoSoc Directive. FoP was encapsulated

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[70] The Swedish Supreme Court, *Bildupphovsra¨tt i Sverige (BUS) ek. fo¨r. v Wikimedia Sverige*, Ö 849-15, 4 April 2016. One of the main questions addressed by the Court was whether the FoP exception designed for the offline world could be applied to the online realm. The Supreme Court held that the FoP exception was aimed at permitting the reproduction of works of visual art in a two-dimensional form, rather than digitisation. Further, applying the three-step test to this legal dispute, the Court ruled that the FoP exception should be interpreted narrowly, and therefore the availability of a work on a digital platform such as Wikipedia without the authorisation or remuneration of its author would neither comply with a "normal exploitation" nor would it be without prejudice to the economic rights of the author. *Cf*. Malovic 2016; Paulson 2016.

[71] Malovic 2016; Paulson 2016.

[72] Reda 2015.

[73] A curious case relates to the Eiffel Tower in Paris, which became part of the public domain in 2003, but its enhancement with decorative lights remained under copyright protection. This dispute spawned a peculiar outcome: While the reproduction of the Eiffel Tower was legal and free by day, the same building cannot be reproduced by any means during the night while illuminated by the copyright-protected lights design, as this also requires compliance with the licensing terms and conditions. For more information on this dispute, *see* Newell 2010, pp. 405, 411–412.

in Art. 5(3)(h) Infosoc, which is formulated as one of the *optional* E&Ls to the copyright it encompasses. This provision encourages the MSs to adopt legal regulations facilitating the "use of works, such as works of architecture or sculpture, made to be located permanently in public spaces,"[74] by introducing exceptions to the author's exclusive right to reproduction and right of communication to the public.[75] For this provision, an exception to the author's right to reproduction is to be understood as any act of reproduction that would lead to "direct or indirect, temporary or permanent reproduction by any means and in any form"[76] and which would copy the work in whole or part.[77] Similarly, the exception to the right of communication to the public shall be perceived in its broadest sense, including communication by "wire or wireless means, including those that may allow the members of the public to access the work from a place and at a time individually chosen by them."[78]

Although Art. 5(3)(h) InfoSoc comprises a broadly formulated legal provision, this exception is subject to the general restrictions imposed on all of the E&Ls provided by the Directive. Indeed, Art. 5(5) InfoSoc, by codifying the three-step test of the Berne Convention,[79] requires that all E&Ls to copyright (and to related rights) encapsulated within the Directive comply with this test. Aimed at balancing the private interests of the author against the public's interest in using the copyrighted work (or other subject matter), Art. 5(5) requires MSs to apply the E&Ls, including FoP, "only in certain special cases which do not conflict with a normal exploitation of the work (…) and [which] do not unreasonably prejudice the legitimate interests of the rightsholder."[80] Except for the three-step test, Art. 5(3)(h) InfoSoc does not impose any additional restrictions on the scope of FoP. Instead, it leaves a margin of discretion to the MSs, which allows account to be taken of their unique national cultural priorities. Nevertheless, it can be argued that such a wide margin of discretion constitutes the major strength and weakness of this legal regulation, mainly for two reasons.

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[74] Directive 2001/29/EC, cit, Art. 5(3)(h).
[75] *See* Art. 5(3).
[76] *See* Art. 2.
[77] *Ibidem*.
[78] *See* Art. 3(1).
[79] *See* Berne Convention for the Protection of Literary and Artistic Works, Art. 9(2); WIPO Copyright Treaty (adopted 20 December 2996, entered into force 6 March 2002) UNTS 121 (WTC), Art. 9(2).
[80] Directive 2001/29/EC, cit., Art. 5(5).

First, the *optional* character of the vast majority of the E&Ls, including that of FoP, casts a shadow on the overarching harmonisation goal of the InfoSoc as well as the integration of FoP into the pan-European copyright tradition, given the dissonant reactions it triggered among MSs.[81] When the InfoSoc Directive was adopted by the EU in 2001, many Member States had no legal regulations corresponding to that of FoP.[82] Nevertheless, it would be delusional to think that these States transposed the FoP exception within a short period. On the contrary, FoP is a relatively new legal trend, as exemplified by Belgium and France which adopted this exception in 2016, while Luxembourg waited until 2021 to do so.[83] As of today, Italy is the sole country whose legislature has refrained from adopting any legal regulation to transpose FoP into its national legal landscape.[84] That said, the Italian Copyright Act lacks any explicit provision enabling end users to enjoy FoP and freely reproduce works and share such copies of works installed in publicly accessible spaces in Italy.[85]

Second, the space left to the national legislatures for setting the scope of FoP may have facilitated the adaptation of Art. 5(3)(h) InfoSoc to national cultural policies.[86] However, it also paved the way for a distorted "panorama" of EU-wide regulations. Whereas a cohort of MSs adopted the EU rule *verbatim*,[87] others expanded or restricted the scope of the original rule. In fact, a comparative analysis of the national copyright laws of the MSs reveals that *each element* of the EU rule has been a matter of fragmentation across the EU.[88]

Beneficiaries. Article 5(3)(h) InfoSoc adopts a neutral language in setting the scope of the FoP exception and does not specify its

[81] *See* Rosati 2017. For information on the level of harmonisation achieved by the InfoSoc Directive, *see* https://www.copyrightexceptions.eu/.
[82] *Cf*. Sganga et al. 2023.
[83] *Ibidem*.
[84] *Cf*. Sganga et al. 2023. *See* also Meurens et al. 2015.
[85] *Cf*. Sganga et al. 2023. Still, it is worth noting that the *Codice dei beni culturali e del paesaggio* (Cultural and Landscape Heritage Act) includes a provision allowing the reproduction of works related to cultural heritage without the consent and remuneration of the author of the work. Nevertheless, this provision significantly diverges from the FoP exception, given that it concerns the elements of cultural heritage no longer protected by copyright (or related rights) but that have fallen into the public domain. Therefore, it is possible to interpret this rule as an "exception" to the paying public domain scheme rather than acknowledging it as an exception corresponding to FoP. *See* Legislativo 2004. *See* also Romano 2018.
[86] Directive 2001/29/EC, cit., Recital 31.
[87] *Cf*. Sganga et al. 2023.
[88] *Cf*. Rosati 2017, p. 312.

beneficiaries. Neither does it deprive potential beneficiaries of the enjoyment of this exception. While the majority of the MSs have embraced the same approach,[89] Greece stands out, with Art. 26 of Law 2121/1993 (Greek law) providing this exception only for the "mass media".[90] Thus, the Greek reading of the FoP exception appears to be more of a *right* to which *media outlets* are entitled, rather than constituting a *copyright exception* that benefits the public.

Subject-matter. The EU rule draws the limits of the FoP exception simply by referring to works, without an exhaustive list or the exclusion of specific categories of works. Although the provision explicitly refers to creations of architecture and sculpture, this reference is exemplary; thus, it by no means limits the scope of the subject matter of the FoP exception. While Germany follows this approach, with Sec. 59 of *Gesetz über Urheberrecht und verwandte Schutzrechte* (UrhG-G) referring to "works" without any further specifications,[91] other MSs, including Lithuania,[92] have opted to narrow down the scope of this exception by adopting the examples in the EU provision as a benchmark for setting the subject matter of the aforesaid provision. Austria and Ireland slightly expanded their scope. The Austrian exception encompasses works of architecture and fine art.[93] In contrast, the Irish exception in Sec. 93 of the Copyright and Related Rights Act (CRRA) covers works of architecture, artistic works, and sculptures, including models thereof. Compared to these, the Greek law and the Hungarian[94] exception provide a broader yet still predetermined scope, for they both extend their scope to works of architecture, artistic works, and works of applied art, while the CRRA includes photographs and images in addition.

We should also consider the role the national courts play in interpreting FoP since, regardless of the Greek legislature's approach in

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[89] None of the other jurisdictions covered herein (Austria, Germany, Hungary, Ireland and Lithuania) specify or restrict the beneficiaries of this exception.

[90] *Νόμος 2121/1993, Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα και Πολιτιστικά Θέματα (Εισηγητική έκθεση για το ν. 2121/1993). ΦΕΚ Α 25 1993 – Θέση σε ισχύ: 04.03.1993 (Greek law).*

[91] Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes, 7. Juni 2021, BGBl. 2021 I S. 1204 (German law).

[92] As evident in Art. 28(1) of Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas, Nr. VIII-1185 May 18, 1999, 2022 m. kovo 24 d. Nr. XIV-970 (Lithuanian law).

[93] Enshrined in Section 54(1)5 of Bundesgesetz, mit dem das Urheberrechtsgesetz, das Verwertungsgesellschaftengesetz 2016 und das KommAustria-Gesetz geändert werden (Urheberrechts-Novelle 2021), BGBl. I Nr. 244/2021, 31/12/2021 (Austrian law).

[94] Inherent in Art. 68(1) of 1999. évi LXXVI. Törvény a szerzői jogról, SZJT (Hungarian law).

setting the scope of the subject matter as such, the Athens Court of First Instance has ruled that FoP does not apply to works that are not visible unless special equipment (e.g. special lenses, drones, etc.) is used or unless an extra effort (e.g. jumping over a fence, etc.) is required to capture the work.[95]

Permitted acts. The InfoSoc Directive identifies and allows two specific acts: reproduction and communication to the public. While embracing the broadest definitions of these acts, it does not provide any further guidelines for implementing this exception. Nevertheless, the margin of discretion left to the MSs is revealed in two opposing ways.

Most MSs have tended to extend the permitted acts beyond these two rights. Hungarian law has the broadest formulation in this sense, for it allows reproduction and *other uses,* while Austrian law permits a wide spectrum of acts: reproduction, distribution and broadcasting, as well as the public display of works by optical means. Relatively narrower in scope, the Irish law facilitates the reproduction, distribution and broadcasting of works; German law enables reproduction, making available to the public and distribution. Nevertheless, some Member States have the same set of permitted acts or exempt certain ways of conducting the permitted acts. Regarding the first group, Lithuanian law, with an originalist reading of the EU provision, allows only reproduction and communication to the public. Despite preceding the EU legislation, the Greek law can also be mentioned here, for it allows reproduction and dissemination. Regarding the second group, the Austrian and Lithuanian laws strictly prohibit the reproduction of works of architecture and sculptures in the same form as the original work. Germany is also a special case, as it prohibits the reproduction of a work on a building.

Public space. The unclarity of the term "public space" for the overarching goal of the FoP exception constitutes another reason for the divergent interpretation and implementation of Art. 5(3)(h) InfoSoc. The national implementation strategies of the MSs can be clustered under three groups: First, the Austrian, Greek, and Lithuanian laws have adopted the same terminology and integrated "public spaces" as a general concept into their national laws. Second, the German law provides a non-exhaustive and exemplary list of "public spaces", including but not limited to "public paths, roads." Third, the German and Hungarian laws differentiate works located in *outdoor* spaces from

[95] Athens Court of First Instance, Case No. 3141/2015.

those located *indoors* and allow only the former to be subject to FoP, while others, also as in German law, draw a line between exterior and interior spaces of the same work of architecture and permit FoP to apply merely to external spaces. Amongst the laws of this latter group, Ireland has the most flexible formulation, referring to "public spaces and other premises open to the public,"[96] without adopting any other paradigm. Finally, Lithuanian law notably excludes museums and exhibitions from the public spaces intended for this exception.

As a last remark on the disparate approaches to defining "public spaces", it is essential once more to acknowledge the role national courts play in interpreting legal concepts and rules. Indeed, the Austrian Supreme Court has issued a ruling that applies FoP to the reproduction not only of a building's exterior but also of its interior – along with elements therein, such as the staircase, courtyard, halls and rooms, doors and furniture.[97] The Court requires, however, that these internal elements of the work of architecture be reproduced and communicated to the public by clarifying their connection to the building itself, to highlight that such elements are integral parts of the architectural work.[98] In contrast to the positive approach of the Austrian judiciary, the German courts have held that FoP does not apply to works situated in public parks, given that these publicly accessible open spaces are owned by specific national foundations, which takes them out of the "public space" indicated in the German law.[99]

Intended use or other conditions of applicability. There are other distinct features in the national implementation strategies of MSs, which not only significantly depart from the EU provision but also lead to further inconsistency across the national copyright laws. For instance, Austria mainly indicates that the reproduction of a painting or a work of graphic art permanently located in a public space does not fall under FoP. With an alternate approach, Lithuanian law has adopted several additional criteria for the applicability of FoP. It requires the permitted acts to be conducted for non-commercial purposes, the source of the work and the name of the author to be indicated unless this proves impossible, and, most significantly, it stipulates that the act of reproduction shall not lead to the slavish copying of the work – in other words, the reproduced work shall not be the main element of the

[96] Copyright and Related Rights Act No. 28 of 2000, Sec. 93. [Ireland].
[97] OGH 4 Ob 80/94.
[98] *Ibidem*.
[99] LaFrance 2022, p. 626.

reproduction, as was the case in the "original" FOP rule enshrined in Sec. 6(2) of KUG 1876.

Compliance with the three-step test. Notably, MSs, in line with their general attitude towards the three-step test, have embraced disparate methods in subjecting their FoP to this test. For instance, Greek and Lithuanian laws require compliance with the three-step test, whereas Austria, Germany, Hungary and Ireland do not. Besides the discrepancies amongst the national copyright laws of MSs regarding the three-step test requirement, it is also debatable whether the FoP use of works for commercial purposes without the consent of or the payment of a fair remuneration to the author is consistent with the spirit of the three-step test.[100] On that note, and recalling the decision of the Swedish Supreme Court in the Wikimedia case, it should be emphasised that, unfortunately, unclarity persists regarding the applicability of the technology-neutral yet originally offline FoP to the reproduction and communication to the public of copyright content in the online realm.

The comparative assessment of the national implementation of Art. 5(3)(h) InfoSoc exposes three major and intertwined outcomes. First, the optional character of the exception for FoP, combined with the broad formulation of Art. 5(3)(h), opens the gates to competing interpretations of the EU rule, which has created disparate legal regulations at national level. Second, the language of the national FoP provisions which stem from or predate the InfoSoc not only results in disparate treatment of the same end-users or uses in different jurisdictions but also blurs the cross-border and online applicability and hence the efficacy of the FoP exception, especially in the absence of a pan-European recognition and enforceability of this specific legal regulation. Third, the absence of a uniform legal position across Europe leaves end-users with a high level of legal uncertainty regarding the reuse of cultural content.[101]

While such a legal setting justifies the calls for legal reform, or at least the EU's immediate legislative intervention, which would clear these obstacles and equip the EU copyright *acquis* with tools to respond to the needs of the digital era, it also evokes the Reda report[102] and the promotion of a *mandatory* exception for FoP it contains.[103] Further, the

[100] For a similar argument, *see* Shtefan 2019, pp. 14, 17.
[101] *Cf*. Rosati 2017, pp 327–328; *cf*. Shtefan 2019, p. 16.
[102] Felix Reda, "Reda Report Draft – Explained" (*Felix Reda*) Sec. 16 https://felixreda.eu/copyright-evaluation-report-explained/.
[103] *Ibid*.

attitudes of Lithuanian law and the German court in interpreting "publicly accessible places" highlight the need for legal certainty in drawing the borders of spaces as such, which are subject to overlapping yet clashing legal frameworks. These approaches indeed have the potential to further complicate the end-users' perception of where the public space, in which the in-copyright elements of CH are available, ends and where the public domain starts. This issue is becoming essential, especially after the adoption of Art. 14 CDSMD, which deals with the out-of-copyright elements of CH allocated to the public domain.

5. Use of Works of Visual Art in the Public Domain

In the process of the copyright reform of 2019, Art. 14 CDSMD was deemed to play a central role in the enrichment of digital CH. By excluding from copyright or related rights any material stemming from the reproduction of works of visual art in the public domain unless it was original, it was acclaimed as a pioneering norm that explicitly mentioned the public domain and the long-awaited tool to facilitate and empower access to CH, freeing it from copyright constraints. Its scope increased notably in the context of digitisation, the most common means of reproduction today in the long-term strategy for digital transformation in CH; however, it should not be read as limited to digital reproduction.

Overall, a broader reading of Art. 14 CDSMD is advocated with respect to several elements of the provision, entailing a careful consideration of what underpins it. In its literal interpretation, the provision clarifies the copyright status of non-original reproductions of public domain works by delimiting the areas of copyright and related rights to visual artworks no longer subject to protection.[104] However, the scope of the provision can be appreciated only under the guidance of Recital 53, which accentuates the contribution to "the access to and

[104] It is worth recalling that Art. 14 shares its origins with Art. 6 CDSMD, which allows CHIs to make copies of any work (or other subject matter) that is permanently held in their collections, in any format or medium, for purposes of preservation and to the extent necessary for such preservation. The two provisions were initially merged with no apparent indication of copyright or related rights. However, when Art. 14 pursued a separate path with a more encompassing scope, its compromised formulation led to the inclusion of the specifications provided. *See Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*, Working Paper, 16 February 2019.

promotion of culture, and the access to cultural heritage" by faithful reproductions of public domain works of visual arts. Recital 53 should constantly guide the interpretation of Art. 14 and its national implementation. It sheds light on the clear exclusion of copyright and related rights in the case of a faithful reproduction, and yet warns against legal uncertainty, especially in the instances of cross-border activities, while not preventing CHIs from marketing the reproduction.

The consensus it received, especially from CH stakeholders and public domain ambassadors,[105] was also accompanied by some reservations[106] primarily related to the legal text of the EU provision and its national implementation. Since the earliest discussion preceding the formal enactment of the final version of the CDSMD, most concerns focused on its ambiguous language, the complex link with the originality threshold, the difficulty of determining a public domain status and the concurrence of additional regulatory tools such as other legal domains, technology or CH practices that circumvent the copyright ban.

The opacity of its semantics is especially to be found in the reference to the concepts of reproduction and visual arts without any further elucidation on their meaning. On the one hand, it must be clear (as logical and desirable) that reproduction can be both digital and analogous. On the other hand, the lack of an explanation of the latter carries the risk of intensifying the current fragmentation of copyright subject matters.[107] It seems wise and in line with the underlying goal of the provision to interpret the category of visual arts in the broadest sense.

The trouble with originality lies in ascertaining the minimum standard that should in any case exclude copyright protection in the plain act of reproduction. Nevertheless, it could also easily lead to alter or modify the work in a way that the resulting material is claimed to be an "author's own intellectual creation". By providing that the non-

[105] *E.g.* Keller 2019.

[106] *Inter alia, European Copyright Society (ESC) 2020 in JIPITEC 11/2 2020, which described it as "a remarkable provision [granting] a positive status to works belonging to the public domain" (at para. 8); Giannopoulou 2019; Kluwer Copyright Blog 2019, which not only depicts it as "the first step towards the creation of a normative regime that will effectively ensure the preservation of the European public domain", but also pinpoints the limits of its rather descriptive context.*

[107] The only explicit reference to works of visual arts is provided by the Annex to the OWD, which, referring to the sources indicated in Art. 3(2) for visual works, includes "fine art, photography, illustration, design, architecture, sketches of the latter works and other such works that are contained in books, journals, newspapers and magazines or other works".

original reproduction of works of visual art in the public domain is not subject to copyright or related rights,[108] Art. 14 excludes copyright protection and an unfortunate application of neighbouring or copyright-related rights to public domain works of visual arts.[109] However, the relationship with Art. 6 Term Directive remains to be expressly determined.

With respect to the difficulties in determining whether a work falls in the public domain, Art. 14 CDSMD sketches an explicit mention of the public domain for the very first time. Traditionally, the concept of the public domain has been construed to identify contents not subject to copyright in the first place, either because they exceed the material scope of copyright or because the legitimate rightsholders have waived their rights, but it also covers contents no longer copyright protected following expiry of their copyright term. In principle, no copyright applies to the public domain, although this is only partially accurate. First, moral rights may still apply to public domain works. Second, copyright boundaries may be superseded by neighbouring rights or *sui generis* rights. Third, copyright may wrongly apply to public domain works, resulting in the disdained practices of "private encroachment" and "copyright fraud",[110] which clash with the ideal recommendation that what is in the public domain remains there and is not to be subject to other exclusive rights, e.g. due to their analogue-digital conversion.[111]

Lastly, other rules may supersede copyright prescription, eroding the impact of Art. 14 CDSMD. This could be the case of CH laws (as will be seen, the Italian transposition is exemplary in this regard), or the use of technology, as with machine learning and non-fungible tokens (NFTs) that intermingle with both in-copyright and out-of-copyright content, or the pursuit of stakeholders' practices, which the provision does not address or inhibit.

Many of these considerations had already been discussed in case law preceding Art. 14 CDSMD, from the notorious US controversy of

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[108] Exemplary in this sense are non-original (simple) photographs, which MSs may protect according to Art. 6 Term Directive. On this, *see* Margoni 2018, pp. 157–180. Protection of simple (non-original photographs) is indeed not a mere sign of the past. For an overview of the recent Swiss choice to introduce the right, *see* Rigamonti 2020, pp. 987–988.

[109] These two last examples are especially discussed by ESC, para. 18.

[110] Practices that are tenaciously contested by activists and public domain ambassadors like *Communia* (*see* its Policy recommendations 2022. https://communia-association.org/policy-recommendations/).

[111] Europeana Public Domain Charter, Principle 2, https://www.europeana.eu/en/rights/public-domain-charter.

Bridgeman Art (1998) to the more recent German *Museumsfotos* (2018).[112] The former, introducing the principle that an exact photographic reproduction of public domain images does not attract copyright protection, is considered a milestone decision for its influence on developing open cultural strategies including those pursued by the "Open GLAM movement".[113] The latter decision, while rejecting copyright protection for photographic reproduction of works of visual art for not meeting the originality standard, conceded that they might attract copyright-related protection as non-original photographs,[114] was one of the motivations for enacting Art. 14.[115] In between, the EU Court of Justice has not ruled out the possibility that a portrait photograph could meet the threshold of revealing the author's own intellectual creation and thus enjoy copyright protection.[116] Indeed, it can be expected that the provision will be tested and challenged in court due to the uncertainty of the abovementioned elements, as its diversified national implementation seems to suggest.[117] Overall, considering the already completed or in-progress implementation process, national courts should interpret the provision so as to favour the widest dissemination and even re-use of CH.[118]

Transposition in national law reveals at least four main approaches, as follows. A first group of MSs, such as Hungary, did not explicitly enact a new provision or amendments to copyright law but rather relied on the interpretation of existing rules on the term of protection and originality, the combined reading of which safeguards

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[112] For a detailed analysis of the Bridgeman cases (*Bridgeman Art Library Ltd v. Corel Corp* (*Bridgeman I*), 25 F. Supp. 2d 421 (S.D.N.Y. 1998); *Bridgeman Art Library, Ltd v. Corel Corp* (*Bridgeman II*), 36 F. Supp. 2d 191 (S.D.N.Y. 1999), *see* Cameron 2006 pp. 59–60; Allan 2007: Wojcik 2007–2008; Crews and Brown 2011, pp. 269, 272–276.
On the German Federal Supreme Court's *Museumsfotos* decision (*Bundesgerichtshof*, 20 December 2018, Case No. I ZR 104/17, *Reiss-Engelhorn Museum v. Wikimedia et al*) and its progeny, *see* the detailed analysis by Wallace and Euler 2020, pp. 823, 829–834.

[113] OpenGlam comprises a network of institutions and individuals committed to developing policies and practices on open access to cultural heritage. Notable among its initiatives is the draft of a Declaration on Open Access for Cultural Heritage: https://openglam.pubpub.org.

[114] Given that German law protected such photographs under Sec. 72 of the UrhG.

[115] *See* ESC 2019 defining Art. 14 as a "direct reaction to that case", which afforded copyright-related protection to non-original photographs under Art. 72 of the German Copyright Act, irrespective of its in-copyright or public domain status (at para. 10).

[116] Reference is to CJEU, 1 December 2012, C-145/10 *Eva-Maria Painer v. Standard Verlags GmbH and Others*, 93–98. On this, *see* Wallace and Euler 2020, pp. 827–828.

[117] *See infra*, concerning the Italian implementation.

[118] This has been explicitly advised by Sappa 2022, pp. 924–939.

works in the public domain unless what is created through their reproduction is original.[119] A second cluster of countries such as Austria amended their copyright provisions on photographs to deny protection through related rights to the reproduction of works of visual art in the public domain.[120] A third group of MSs, comprising Germany, Greece[121] and Italy,[122] followed the letter of Art. 14 CDSMD and introduced a specific norm but did not change the existing provisions on non-original photographs. A fourth approach, such as that of Lithuania,[123] featured an amendment of the general provisions regarding the subsistence of copyright, adding further elements limiting copyright. Each country here shows some peculiarities, which can be discussed by considering the following aspects.

Beneficiaries. Article 14 CDSMD does not specify who is the target of the provision. Unlike the sibling Art. 6, which is only applicable to CHIs, the right can be exercised by anyone if the other conditions apply. None of the countries considered specifies a beneficiary of the provision (thus the flexibility that Art. 14 provides would allow anyone to use non-original reproductions of works of visual art in the public domain).

Subject-matter. The provision applies only to visual artworks in the public domain. This flexibility applies only to non-original reproductions of the works of visual art allocated to the public domain. In this regard, it may defer to the specific characterisation of visual art in the specific MS. However, while Germany, Italy and Lithuania essentially replicate the notion of works of visual art, the Hungarian approach enables a broader interpretation of "work". Of particular interest is Austria, which, in contrast, specifies that the work is of fine art.

Act of reproduction and purposes. Article 14 CDSMD can ultimately be seen as safeguarding acts of reproduction of works of visual art in the public domain but without specifying further whether such reproduction should be digital or analogue. This appears to be resolved after the implementation of national legislation. Interestingly, what is additionally provided is the restriction to specific purposes that

[119] Sections 31 and 1(3) of the Hungarian law (LXXVI/1999) respectively. It is worth mentioning that Hungary, since 1999 when the current copyright law was enacted, no longer offers protection even as a related right for unoriginal photographs.
[120] Section 68 of the Austrian law (UrhG).
[121] Article 31 of the Greek law (No. 2121/1993).
[122] L. 22 aprile 1941, No. 633, *Protezione del diritto d'autore e di altri diritti connessi al suo esercizi*o, G.U. 16 luglio 1941, No. 166.
[123] Article 5(7) of the Lithuanian law (No. VIII-1185/1999).

the reproduction should address. This is precisely the case with the Greek provision (Art. 31A), which, at paragraph 2, provides a specific safeguard of the limitations on the access, reproduction and dissemination of cultural heritage images imposed under the Greek Code for the protection of cultural heritage (Law 4858/2021).[124] The same consequences arise from the Italian provision (Art. 32^{quater} of Law 633/1941), which essentially limits the scope of the provision by upholding the potential application of the Italian law on the protection of cultural goods that restricts the reproduction of cultural property.[125] Indeed, the inadequacy of the Italian implementation has already been tested. Without explicitly mentioning the link with copyright law, recent case law has shown the fragile nature of the transposed provision,[126] which is likely to be overwhelmed by the CH regulation's strict approach.[127]

Originality. The reproduction of such public domain works that meet the originality requirement threshold for copyright protection is excluded from the scope of the provision; thus no doubts arise as to the non-application of the provision if the material resulting from the act of reproduction is not original, but only Lithuania specifies, repeating the diction of the CJEU, that original means an intellectual work of the author (who reproduced the work). Beyond the EU definition of originality as elucidated by the CJEU, resorting to national norms is, however, unavoidable when ascertaining the originality standard; and this is where any controversy will essentially arise.

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[124] Very critical in this regard is Markellou 2023, p. 12, who remarks how, with this restrictive approach, Greece "missed the opportunity to maximize cultural heritage accessibility".

[125] For a detailed illustration of the legislative process that led to the Italian implementation of the provision, *see* Arisi 2021, pp. 1127–1345.

[126] Dore 2023 notes how, since the recent decision of the Court of Venice (precautionary order of October 24, 2022), the public domain not only suffers an inevitable compression by the Code of Italian Cultural Heritage and Landscape but is also now under threat from an unreasonable extension of the scope of personality rights claimed to be vested in the institution holding the cultural good.

[127] This is likely to require an amendment of Arts. 107–107 of the Italian Code of Cultural Heritage and Landscape, currently imposing broader restrictions on certain uses of cultural goods. On this, *see* Modolo 2021, pp. 151–166, who advocates a liberalisation of the reuse, for any purpose including commercial, of faithful reproductions of public cultural heritage in the public domain.

Caso 2023 is very critical of the highly conservative approach of Italian courts and, commenting on another recent decision by the Court of Florence, concludes that Italian courts are in practice creating "a new form of pseudo-intellectual property (in this case, a pseudo-copyright) that would attribute to the Italian State the power to exclusively control the commercial use of cultural heritage images".

Overall, determining the conditions of the applicability of Art. 14 is crucial. A common issue to all national implementations is the possibility of the reproduction having to satisfy the threshold of originality to claim copyright protection. However, although this applies to only two of the countries considered here, i.e. Greece and Italy, any additional limitations, even if provided under other legal domains, will possibly disrupt the difficult road towards enacting this important EU provision. The circumstance that, implementing Art. 14, the two MSs have expressly safeguarded the application of their national cultural heritage norms wilfully knowing that it may prevent the application of the EU rule, leads to a dangerous conflict. Passed as a protective measure for the potentially endangered cultural property of the nation, it may achieve the boomerang effect of overriding and nullifying the attempt to boost access to culture, thus critically undermining the right to culture.

6. Conclusions and Future Trajectories

Despite the range of conventional notions of CH and the prolificacy of EU cultural policies, defining CH is challenging, given its variability across contexts, communities and countries. The complex relationship between CH and copyright does not help; nor does it liaise with other pieces of regulation, such as data protection. This is further exacerbated by the typical two-fold line of EU intervention in the field of CH as such, where it lets international conventions and national rules set the stage for its protection and development. In contrast, the basis of copyright and data protection also affects CH and intervenes more powerfully with specific regulatory actions.

However, it is plausibly evident that CH has attracted increased interest in its digital frame over the years. The promises of the digital and post-digital era are the new chimaera for both CHIs and end-users. A domain full of opportunities and challenges prompts us to reflect on fundamental rights, and here the first thought is of the right to culture.

For several reasons, there is scope within the current EU copyright system to optimise the conditions for the public's enjoyment of digital culture.

First, the E&Ls designed to facilitate access to and use of cultural content are addressed to CHIs or end-users, but rarely simultaneously to both. Consequently, end-users wishing, for example, to use orphan works and out-of-commerce works, have no option but to trust the

digitisation and dissemination plans and efforts of CHIs. Besides, the Study on the Application of the Orphan Works Directive published by the Commission, elaborating on the OWD's actual impact and efficacy, should not be disregarded, for it consolidates the quite limited catalysis of the OWD in enhancing access to orphan works.[128]

Second, although accepting the hardship in, if not impossibility of, having a holistic approach to the interplay of copyright with CH, the current EU copyright regime focuses on disparate fragments of CH; thus, it offers piecemeal regulations rather than an all-encompassing regulation on at least the in-copyright elements therein.

Third, the uses permitted by these EU rules are inconsistent, as they change in parallel to the overarching policy goals of a specific exception or limitation. On the same lines, not all the E&Ls provided for CHIs enable the dissemination of reproduced content, as with the preservation of CH in Art. 6 CDSMD. Besides, the language of the pre-CDSMD E&Ls does not clarify compliance with such uses on digital platforms. Fourth, the variety and quantity of subject matters allocated to the public domain by MSs, especially in the absence of a supranational norm, create several national public domains containing different elements, rather than feeding into a *global* public domain. Finally, while the existence of a paying public domain scheme is already sufficient to impede the free use of out-of-copyright works,[129] the discrepancies amongst the national laws of MSs on the public domain, combined with their differential regulation within the national copyright laws of MSs, may cause complications for end-users.

This paper is intended to connect the points of the two chosen copyright rules: FoP, as the non-mandatory exception under Art. 5(3)(h) InfoSoc for the reproduction of cultural goods visible from public places; and the reproduction of public domain visual art according to Art. 14 CDSMD. The former can also be understood as a more general concept, suggesting a right to enjoy access to intellectual creations in the public space. The latter, representing the first provision to address the public domain, guarantees a right to enjoy such works free from copyright barriers. The two provisions, despite their different purposes and scope, bridge the first and the last EU copyright directives, with the overall aim of partially overcoming various copyright barriers that impede access to works that present a public dimension, and promoting the

[128] Content and Technology (European Commission) Directorate-General for Communications Networks and others 2021, pp. 174–175.
[129] For a similar argumentation, *see* Dusollier 2011, p. 42.

enhancement of CH despite the inevitable fragmentation that still characterises their national implementation. Since copyright law does not operate in a vacuum, it is strongly recommended that special attention be paid to the synergies of copyright law with CH laws as well as other laws that articulate, concern or regulate "publicly accessible places", mainly to prevent national legal regulations or interpretations of CHIs which would clash with the most recent definition of the concept in Art. 2(3) CDSMD, or of public spaces, which would lead to the restriction of the actual space where the members of society may enjoy their aforementioned fundamental rights.

Similarly, vis-à-vis the reproduction of public domain visual art, it is advisable to prefer the broadest (and most logical) construction both of the act of reproduction to include any analogue or digital form, and of visual artworks so as to have as many works as possible defined as public domain works, including those no longer copyright-protected and those never subject to copyright. When assessing the putative originality of the reproduction, it also becomes essential to constantly keep in mind that according to the basic principles of copyright, a plain and straightforward reproduction cannot be the author's own intellectual creation in the light of the hints in Recital 53, which expressly aims at securing the entire access to and promotion of culture and CH.

The implementation of the two EU provisions by MSs has yielded a highly fragmented pan-European approach rather than safeguarding legal clarity and certainty in the public's right to culture and freedom of expression. Considering that the comparative analysis herein reveals only a glimpse of the broader (and more fractured) context, the national implementation strategies of MSs in transposing them deserve a closer look and, especially for the FoP exception, a supranational legislative intervention to make it *mandatory* is highly advisable. Regarding Art. 14 CDSM, national courts should be vigilant to ensure that the scope of the provision is not ~~crushed~~ diminished or nullified, particularly when the application of the rule is concretely pre-empted by other regulations, e.g. cultural heritage laws. To this end, they might refer to the EU Court of Justice.

As far as concerns the outcome of the analysis, it is precisely by focusing on what underpins the two provisions and by searching for a well-reflected reading that it is possible to foresee the shared subsistence of an essential piece of the EU right to culture, at least in its application in the context of (digital) CH. It is true and wise to remember

that even in this constellation, it should not be limited to the digital environment. Nevertheless, overall, the current focus on the digitisation and digital transformation of CHIs may even benefit such conclusions. Either way, what is imperative is to remember that the right to culture still has a long way to go. Safeguarding and enhancing the access to, enjoyment and use of cultural materials by all, using a sound FoP and the uncompromising reproduction of public domain visual art, is just the beginning.

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